DECISIONS AND FINDINGS

IN THE

CONSISTENCY APPEAL OF

DAVIS HENIFORD FROM

AN OBJECTION BY THE

SOUTH CAROLINA COASTAL COUNCIL

MAY 21, 1992

SYNOPSIS OF DECISION

The Appellant applied to the Army Corps of Engineers, Charleston District, for a permit to place approximately 7,000 cubic yards of fill material into a 2.5 acre area of freshwater wetland as part of a project to construct a Food Lion grocery store, strip mall, and adjacent parking lot. Such a permit is required under Section 404 of the Federal Water Pollution Control Act, as amended, 33 U.S.C. § 1344 (Clean Water Act). The parcel for which the fill permit was sought is located in the town of Loris, Horry County, South Carolina. The site is rectangular in shape and is bordered by Highway 701 along its southeast side and the Seaboard Coast Line Railroad along its northwest side. According to an evaluation conducted by the U.S. Fish and Wildlife Service, the on-site wetlands are hydrologically connected to a much larger freshwater swamp system, and it is located within the South Carolina Coastal Zone. Accordingly, the Appellant prepared and submitted, as part of its Section 404 application, a statement certifying the project's consistency with the South Carolina Coastal Zone Management Plan.

On August 21, 1990, the South Carolina Coastal Council objected to the Appellant's project on grounds that the proposed filling of freshwater wetlands for construction of a parking lot and other commercial development, when reasonable alternative uses of the property are available, was inconsistent with the policies of the South Carolina Coastal Zone Management Plan. Under CZMA Section 307(c)(3)(A), as amended, and 15 C.F.R. § 930.121, the State's consistency objection precludes the Corps from issuing any permit or license unless the Secretary of Commerce finds that the activity, notwithstanding the State's objection, is either consistent with the objectives or purposes of the CZMA (Ground I), or otherwise necessary in the interest of national security (Ground II). If the Secretary finds that requirements of either Ground I or Ground II are met, the State's objection is overridden and the Corps may approve the activity.

On September 24, 1990, in accordance with CZMA § 307(c)(3)(A), as amended, and 15 C.F.R. Part 930, Subpart H, the Appellant filed with this Department a notice of appeal from the State's objection, including a request for extension of time to file supporting information. The Appellant has only argued the first ground for Secretarial override of the State's objection. Upon consideration of the information submitted by the Appellant, the State, and four Federal agencies, the Secretary made the following findings pursuant to the applicable provisions of 15 C.F.R. § 930.121:

Ground I

The Appellant's proposed project which would involve the filling of wetlands for construction of a shopping center and parking lot is not consistent with the objectives or purposes of the CZMA.

Conclusion

The Secretary will not override the State's objection to the Appellant's consistency certification.

DECISION

I. Background

Davis Heniford (the Appellant) applied to the U.S. Army Corps of Engineers, Charleston District, for a permit under section 404 of the Clean Water Act[1] to place approximately 7,000 cubic yards of dredged or fill material in a 2.5 acre area of freshwater wetlands located within the South Carolina coastal zone, in the town of Loris, Horry County, South Carolina. The proposed fill operation would be part of a project to construct a Food Lion grocery store, strip mall and adjacent parking lot. The total site contains 6.42 acres, of which 4.04 acres are wetlands.[2] According to the Site Inventory, the property is rectangular in shape with Highway 701 running along its southeast side and the Seaboard Coast Line Railroad right-of-way bordering on the northwest side.

The Site History indicates that the tract was cleared of vegetation in 1983 as part of initial site work for an automobile dealership, but that the owners decided to relocate the dealership to the North Myrtle Beach area. From about 1983 until 1986, the site was leased to a mobile home sales company. During that period, and until recently, there was some regrowth of vegetation on the site. However, at the time of the permit application, all vegetation was cleared.[3] Based on a U.S. Fish and Wildlife Service Inventory Map of the Loris, South Carolina Quadrangle, surveyor Jon Guerry Taylor, P.E., Inc. determined that a wetland community had existed on the western, southwestern and eastern portions of the site, which the Fish and Wildlife Service defined as a Temporarily Flooded Palustrine Broad-Leaved Deciduous Shrub Swamp.

The surveyor conducted an on-site delineation of wetlands on February 9, 1990.[4] Due to the clearing, the delineation evaluated hydrology and soil characteristics to determine the wetland boundary line.[5] Based on that delineation, wetlands were found to exist on the southern, southwestern and western portions

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33 U.S.C. § 1344.

Army Corps of Engineers 404 Application No. SAC 26-90-230, Site Inventory, March 26, 1990.

Surveyor's Report, see Exhibit "A" to State's Brief.

[4] Wetland Delineation and Characterization Report for the Davis Heniford Property (Wetland Delineation Report), February 15, 1990, attached to State's Brief as "Exhibit D".

[5] In addition to soil type and hydrology, standard wetland delineation uses vegetation as a third parameter. However, in this case, all vegetation had been cleared from the site, some soils had been reworked and drainage ditches had been dug, apparently in an effort to drain the site. Accordingly, vegetation was not used in the wetland delineation. See Pullano letter of February 15, 1990, attached to State's initial brief as exhibit "D".

of the site.[6] These wetlands encompass approximately 3/4 of the site and consist of a single system. The elevation of the site ranges from 109.9 feet MSL to 103.8 feet MSL and consists of a gentle downward slope to the southwest.[7]

Under the proposed development plan, the Food Lion store would be constructed on the 2.38 acre upland portion of the site.[8] In addition, 2.5 acres of the wetland portion of the site would be filled for the construction of an adjoining parking lot and additional shops. Of the remaining wetland portion of the site, approximately half would be converted into a "new detention pond" (0.75 acres) and the remainder (0.79 acres) would be replanted in wetland vegetation. The detention pond, in combination with grassed swales and oil and water separator catch basins, is proposed in order to provide storm water management for the Food Lion, mall and adjoining parking lot.

The Appellant submitted his section 404 permit application to the Corps of Engineers on March 14, 1990. As part of that application, the Appellant included a statement, as provided for under 15 C.F.R. § 930.57, certifying that to the best of his knowledge the work subject to the jurisdiction of the Corps of Engineers is consistent with the South Carolina Coastal Management Program. On March 29, 1990, the Corps of Engineers contacted the Director of Planning and Certification for the South Carolina Coastal Council (SCCC) requesting a determination under 15 C.F.R. § 930.63 as to whether the SCCC concurs that the project is consistent with the South Carolina Coastal Zone Management Plan.

Soon after the permit application was filed, a site inspection by the Corps of Engineers disclosed that there had been some placement of fill and excavation of ditches on the wetlands portion of the site. These activities were reported to the Environmental Protection Agency (EPA) as apparent violations of Section 301(A) of the Clean Water Act.[9] The permit application and consistency review process were held in abeyance pending resolution of the EPA enforcement actions. On June 28, 1990, the wetland regulatory unit of the EPA issued a letter to the Appellant indicating that the enforcement actions would be concluded based on an agreement under which the Appellant voluntarily made an effort to restore the wetland area damaged by

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[6] Wetland Delineation Report, at 2.

Wetland Delineation Report, at 1.

[8] Boundary and topographic survey, revised December 7, 1889, attached to Appellant's Notice of Appeal and initial Brief.

[9] EPA letter to Grey Castle, Deputy Under Secretary for Oceans and Atmosphere, dated January 15, 1991, at 2.

the ditching and filling activity.

Subsequently, the State proceeded with the consideration of the Appellant's section 404 application. The SCCC requested comments on the proposed fill operation from interested state and Federal agencies. By letter to the SCCC dated April 27, 1990, the South Carolina Wildlife and Marine Resources Department expressed its opposition to the issuance of a permit on grounds that the site contained a forested, palustrine wetland which is hydrologically connected to, and is part of, a larger wetland system which provides productive habitat for a diversity of wetland dependant wildlife species, including small fur-bearing mammals, numerous amphibians and reptiles, and resident and migratory birds.[10] The Department stated that the proposed operation for filling the wetlands would result in a permanent loss of these ecological functions, along with other important functions, including water quality enhancement, filtering of upland runoff, and flood water retention.[11]

The SCCC received similar comments from the U.S. Fish and Wildlife Service (FWS), U.S. Department of the Interior,[12] which further noted that although the site's wetlands had been seriously degraded, the hydrology remained essentially intact. In its comments to the SCCC, the FWS concluded that given time and protection, wetland vegetation will become re-established and the area would once again provide an array of environmental benefits. FWS also stated that the proposed development project would not constitute a water-dependent activity, that alternate upland sites were available and that there was an absence of mitigative measures. As a result of these consideration, the FWS recommended denial of the permit.[13]

On August 16, 1990, the Management Committee of the SCCC met to review the proposed project under the Federally-approved South Carolina Coastal Management Program (SCCMP). By letter dated August 21, 1990, the Management Committee transmitted to the Corps of Engineers its objection to the consistency certification based on its determination that the proposed project was

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[10] South Carolina Wildlife & Marine Resources Department letter to Stephen Snyder, Director, Planning and Certification, SCCC, dated April 27, 1990, attached to State's brief as Exhibit "B".

[11] Id.

[12] Specifically, the U.S. Fish and Wildlife Service stated that, in add tion to its ecological values, the subject wetlands helped to maintain water quality through trapping and assimilating excess nutrients and contaminants, storing and absorbing storm and flood waters, and aiding in aquifer recharge. See Banks letter of May 7, 1990, attached to State's brief as exhibit "C".

[13] Id.

inconsistent with the applicable policies of the SCCMP.[14] The letter stated that the project was found inconsistent because it would involve the filling of 2.5 acres of freshwater wetlands for the purpose of commercial development, that letters of objection had been received from the above-mentioned agencies, and that an alternative to the project would be to use the available uplands on site.[15] As provided for under section 307(c)(3)(A) of the Coastal Zone Management Act, the Corps of Engineers suspended further consideration of the permit application pending appeal of the SCCC objection to the Secretary of Commerce.

II. Appeal to the Secretary of Commerce

On September 24, 1990, in accordance with CZMA section 307(c)(3)(A), as amended, 16 U.S.C. §§ 1451 et seq., and the Department of Commerce's implementing regulations, 15 C.F.R. Part 930, Subpart H, the Appellant filed a Notice of Appeal of the State's objection with the Secretary of Commerce, including a request for extension of time to file additional supporting information. The Appellant perfected its appeal on November 5, 1990 and the State timely filed its response to the appeal on December 10, 1990. Public comments on the appeal were solicited by notice published in the Federal Register, 55 Fed. Reg. 49,326 (November 27, 1990) and the Loris Sentinel (December 12, 19, 26, 1990). The deadline for public comments was set at January 26, 1991. No comments were received from the general public.

On the same day as the Federal Register notice, a letter soliciting comments was sent to interested Federal agencies. Comments were received from four Federal agencies; namely, 1) the U.S. Army Corps of Engineers, 2) the National Marine Fisheries Service of the National Oceanic and Atmospheric Administration, U.S. Department of Commerce, 3) the United States Fish and Wildlife Service of the Department of the Interior, and 4) the United States Environmental Protection Agency.

At the conclusion of the period for public and agency comments,

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[14] The SCCC decision cited two policies relevant to the Davis Heniford application as follows:

> (Chapter III, Policy Section II. E. (1)(a)). The filling or other permanent alteration of productive salt, brackish or freshwater wetlands will be prohibited for purposes of parking unless no feasible alternatives exist, the facility is directly associated with a water-dependent activity, any substantial environmental impacts can be minimized, and an overriding public interest can be demonstrated. (p. III-27).
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> (Chapter III, Policy Section IV. (1)(b)). Commercial proposals which require fill or other permanent alteration of salt, brackish or freshwater wetlands will be denied unless no feasible alternatives exist and the facility is water-dependent. Since these wetlands are valuable habitat for wildlife and plant species and serve as hydrologic buffers, providing for storm water runoff and aquifer recharge, commercial development is discouraged in these areas. The cumulative impacts of the commercial activity which exists or is likely to exist in the area will be considered. (p. III-40).

[15] See Exhibit "E" to State's Brief.

the parties were given an additional 30 days to file final briefs addressing any matters on the record. This period expired on or about March 5, 1991. Prior to this deadline, the State submitted a final supplemental brief. No supplemental brief was received from the Appellant.

III. Grounds for Sustaining an Appeal

Section 307(c)(3)(A) of the CZMA, as amended, provides that no license or permit shall be granted by any Federal agency until the state or its designated agency has concurred with the applicant's certification that the proposed activity is consistent with the State's coastal zone management plan, or unless the Secretary, on appeal and after reasonable opportunity for detailed comments from the Federal agency involved and the State, finds that the activity is either 1) consistent with the objectives or purposes of the CZMA, or 2) otherwise necessary in the interest of national security. See also 15 C.F.R. § 930.120 et seq.

A Secretarial override is not a review of whether the SCCC properly interpreted the South Carolina Coastal Management Plan.[16] Specifically, consistent with prior consistency appeals, I have not considered whether the SCCC was correct in its determination that the proposed activity was inconsistent with South Carolina's Coastal Management Program. Rather, section 307 review is limited to the question of whether, despite the State's determination of inconsistency with its Federally-approved coastal zone management plan, the proposed activity meets the statutory and regulatory criteria for an override established in the CZMA.[17] A decision to override may be predicated on either of the two Secretarial findings mentioned above. In this case, the Appellant has raised only the first ground for Secretarial review, i.e. consistency with the objectives or purposes of the CZMA.

To make a finding of consistency with the objectives of the CZMA, the Secretary must determine that the proposed activity satisfies all four of the elements specified in 15 C.F.R. § 930.121. These requirements are:

> 1. The activity furthers one or more of the competing national objectives or purposes contained in section 302 or 303 of the Act;
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> 2. When performed separately or when its cumulative

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[16] Decision and Findings in the Consistency Appeal of Chevron U.S.A. Inc. From the Objection by the California Coastal Commission, October 29, 1990, at 6.

[17] Id.

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;

3. The activity will not violate any requirements of the Clean Air Act, as amended, or the Federal Water Pollution Control Act, as amended; and

4. 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.

IV. Element One - Furtherance of National Objectives of Purposes Under Section 302 or 303 of the Act

The Appellant argues that the proposal furthers one or more of the competing national objectives or purposes contained in sections 302 or 303 of the CZMA. In support of this contention, the Appellant refers to the Congressional findings contained in Section 302(a)[18] which states that "[t]here is a national interest in the effective management, beneficial use, protection, and development of the coastal zone." [emphasis added]

Section 302(c) expresses Congress' objective to balance and better manage the "increasing and competing demands upon the lands and waters of our coastal zone occasioned by population growth and economic development" which have resulted in the "loss of living marine resources, wildlife, nutrient-rich areas, permanent and adverse changes to ecological systems, decreasing open space for public use, and shoreline erosion."

Although the principal focus of the CZMA is improvement of coastal resource management through coordinated policies, it is clear that commercial development is one of the recognized competing uses of the coastal zone. The language of section 302 expresses a national interest in sustained economic development, while recognizing the need to better manage the "increasing and competing demands" upon the nation's finite coastal resources. Undoubtedly, there is a need for establishments such as the proposed "Food Lion" to serve the needs of the coastal population. However, there is no evidence in the record to indicate that the present or future needs of the local community require that this project be constructed as it is currently proposed. No public comments were received either for or against this proposal from the standpoint of local needs.

However, for purposes of the first element of the analysis, I

16 U.S.C. 1451 (a).

conclude that the construction of a Food Lion would further the national interest in economic development and it would, therefore, serve one of the competing interests expressed in the CZMA.

V. Element Two - Weighing Adverse Effects Against Contribution to the National Interest

This element requires consideration of any separate or cumulative adverse effects of the proposed project on the natural resources of the coastal zone and a determination as to whether those effects are substantial enough to outweigh the project's contribution to the national interest.[19] In evaluating the adverse effects of the project on the natural resources of the coastal zone, I must consider the adverse effects of the project by itself and in combination with other past, present, or reasonably foreseeable activities affecting the coastal zone. Id.

A. Adverse Effects

The Appellant argues that the adverse effects of filling 2.50 acres out of a total of 4.04 acres of on-site wetlands will be minimal because the remaining 1.54 acres will be "improved wetland areas". Specifically, the Appellant proposes that 0.79 acres of the unfilled portion will be "protected and enhanced wetlands" and 0.75 acres will constitute a new detention pond.[20] In addition, the Appellant refers to conversations he had with the South Carolina Heritage Trust Fund and an agreement to donate a "larger acreage of wetlands" to the Trust Fund, presumably as a means of offsetting or mitigating the impacts of the proposed fill operation.[21] The Appellant suggests that such a trade-off "is more effective protection than attempting to rehabilitate this site which has been subject to commercial development for ten years and which is devoid of vegetation."

The Appellant's proposal to restore or "enhance" approximately one-fifth of the on-site wetlands to "improve the natural resource" so as to minimize the effects of dredging and filling the other four-fifths must be considered in the context of the site history contained in the administrative record. The Appellant fails to provide any specific plan for such enhancement, or to provide any analysis of how such restoration will minimize the effects of destroying approximately four-fifths of the remaining wetland area (including the conversion of about a fifth (0.75 acres) into a detention pond for controlling the

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[19] Decision and Findings of the Secretary of Commerce in the Consistency Appeal of Michael P. Galgano From and Objection by the New York Department of State, October 29, 1990, at 5.

Appellant's brief, at 5-6.

[21] Appellant's brief, at 4.

increased stormwater run-off from the newly-created parking lot). The Appellant's statements imply that mitigation in this context may involve some replanting of wetland vegetation on the unfilled area. However, based on the EPA comments, it is clear that the present lack of vegetation on the site is a direct result of Appellant's most recent clearing and unauthorized filling and ditching activities related to the "Food Lion" project which is the subject of this appeal.

In addition, the Appellant fails to provide any documentation in support of the alleged conversations and agreements with the Heritage Trust Fund. In its brief, the State argues that the any such deal to "buy the public good" with the South Carolina Heritage Trust Fund in exchange for the destruction of on-site wetlands is "illusory" in that the State already controls the use of the wetlands proper.[22] Although the State is not entirely clear on this point, the Appellant's argument fails in any event for lack of a showing that the Appellant has voluntarily and successfully restored or enhanced the wetlands to be transferred to the Heritage Trust Fund such as would be required under any such mitigation scheme. Accordingly, the Appellant has failed to show how such an exchange would serve to minimize or offset the adverse affects of the proposed filling operation.[23]

The Appellant discounts the value of the on-site wetlands by emphasizing the current absence of vegetation and accordingly characterizing the area as "non-productive".[24] However, the site survey and numerous agency comments indicate that these wetlands, although previously cleared of vegetation, would return to substantially their original condition if only given a chance to regenerate. Also, while the Appellant refers to the location of the site between a railroad spur and U.S. Highway 701 in arguing that the cumulative impacts of the project will be minimal, comments indicate that the site remains hydrologically connected by culverts.[25]

Based on the foregoing considerations, it may be concluded that the effect of the proposed fill operation would be the permanent

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[22] State's brief, at 9-10. Obviously, if wetlands are already protected by law and their uses subject to the requirements of the State's coastal management program, a private sale of wetlands, even if for protective purposes, would not per se result in any new public benefit.

[23] There is no merit to Appellant's contention that a mere transfer of ownership of existing, non-degraded wetlands would serve as the equivalent of restoration of the on-site wetlands that Appellant himself has degraded.

[24] Appellant's brief, at 2. This is a curious argument, in light of the documentation in the record that Appellant agreed to restore the on-site wetlands as a resolution to the EPA's enforcement action for the previous unauthorized filling. See Welborn letter of June 28, 1990, attached to EPA comments of January 15, 1991.

[25] Comments of South Carolina Wildlife & Marine Resources Department, attached as "Exhibit B" to State's brief.

destruction of a wetland area that, despite past temporary disturbance, remains a coastal resource of substantial value both separately and through its physical connections with a larger wetland system, of which it is an integral part.

B. Contribution to the National Interest

The national interests to be considered under this element are those recognized or defined by the objectives or purposes of the CZMA.[26]

The Appellant contends that the filling of 2.5 acres would be "effective development" of the coastal zone because it would benefit the residents of a rural South Carolina community by making available a needed and "additional" food store.[27] However, as stated above, these assertions are not supported by the record, and no public comments have been received relating to the needs of the local population.

While "development of the coastal zone" is clearly in the national interest as defined by the competing objectives and purposes of the CZMA, such development must be considered in the context of the Congressional findings regarding the "need for resolution of serious conflicts among important and competing uses and values in coastal and ocean waters" and the need to address damage to "[s]pecial natural and scenic characteristics" which are caused by "ill-planned development."[28]

Given this context, the national interest relevant to coastal "development" under the CZMA has its basis in concepts of integrated planning and resource management which are at the heart of each state's Federally-approved coastal zone management plan. Thus, it is in the national interest to "preserve, protect [and] develop ... the resources of the Nation's coastal zone" through responsible planning which takes into account the long-

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[26] Decision and Findings of the Secretary of Commerce in the Consistency Appeal of the Korea Drilling Company from an Objection by the California Coastal Council, January 19, 1989 at 16.

Appellant's brief, at 5.

CZMA, Section 302(f) and (g); 16 U.S.C. § 1451(f) and (g).

term potential of limited coastal resources and serves the needs of "this and succeeding generations."[29]

The site was used previously for commercial purposes in the form of a mobil home dealership. This commercial use, by the previous owner, was conducted in a manner that did not require destruction of the site's wetland areas.[30] The Appellant refers to previous commercial uses of the land in support of his argument that "effective protection" would better be served by protecting some other wetland site than by "attempting to rehabilitate this site which has been subject to commercial development for ten years and which is devoid of vegetation." In essence, the Appellant appears to argue that the current lack of vegetation supports his position that filling the wetlands to create a parking lot is the best use for this coastal resource.

However, the record does not support a finding of any direct relationship between the current lack of vegetation on the wetlands portion of the site and the past commercial uses of the site. To the contrary, the evidence supports a finding that some regeneration of wetland vegetation occurred during the previous period of commercial use.[31] The Appellant places substantial reliance on the recent degradation of the wetlands to support both his characterization of minimal adverse affects, as well as his characterization of the national interest in developing (otherwise "unproductive") land. This reliance is clearly misplaced under the circumstances presented by the record. Indeed, any attempt to estimate the resource value of the on-site wetlands for purposes of analysis must consider such value as if these recent alterations had not occurred.[32]

The Appellant additionally argues that the objectives and purposes stated under Section 302(b), 16 U.S.C. § 1451(b), would be met by granting the permit. This section states that:

> [t]he coastal zone is rich in a variety of natural, commercial, recreational, ecological, industrial, and esthetic resources of immediate and potential value to the present and future well-being of the Nation.

See CZMA, Section 303(1); 16 U.S.C. § 1452(1).

[30] As mentioned supra, these previous commercial uses consisted of initial site work for an automobile dealership, and use by a mobile home sales company. See Site H story attached to Appellant's application under section 404 of the Clean Water Act.

See Site History, Exhibit "A" to State's brief.

[32] Taylor, "Wetland Delineation and Characterization Report for the Davis Heniford Property," at 1, Exhibit "D" to State's brief.

Again, the Appellant narrowly focuses on certain words in this passage in an effort to derive a meaning that is inconsistent with the objectives and purposes conveyed by this language when taken in the context of the resource management orientation of the CZMA. The CZMA recognizes that coastal areas contain certain "commercial" and "industrial" resources which are of "immediate and potential value to the present and future well-being of the Nation."[33] However, the Appellant's generic characterization of the site as a "commercial" or "industrial" resource does not automatically render his project one that is in the national interest. Such a characterization ignores the express policy of the CZMA to give priority to "coastal dependent uses" of the coastal zone.[34]

The CZMA's preference for coastal-dependent land uses within the coastal zone is reflected in the policy of the SCCC which prohibits the filling of freshwater wetlands for purposes of parking "unless, [inter alia], the facility is directly associated with a water-dependent activity."[35] The Appellant has not contended that the Food Lion constitutes a water-dependent activity.

Coastal land areas constitute rich commercial and industrial resources precisely because they are located in proximity to other resources such as offshore mineral deposits, shellfish beds and fisheries, attractive shorelines and international transportation routes that are unique to the nation's coastal regions. The increasing demand for such limited resources prompted Congress to seek a legislative means to ensure the sound management of the coastal zones. Congress recognized in section 302(g) the need to give "high priority to natural systems in the coastal zone."[36]

Therefore, although the construction of a Food Lion shopping center and parking lot may be properly characterized as use of land (or wetlands) as a commercial resource, it is quite inaccurate to infer from such a generic characterization of the land's resource potential that such use, in this case, furthers the objectives and purposes of the CZMA. I therefore find that the contribution of such use to the national interest in coastal development is minimal.

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[33] Appellant's brief, at 5.

See CZMA, Section 303(2)(D); 16 U.S.C. § 1452(2)(D).

See Snyder letter of August 21, 1990, attached to State's brief as exhibit "E".

[36] CZMA Section 302(g); 16 U.S.C. § 1451(g).

C. Balancing

Section 302(c) expresses Congress' objective to balance and better manage the "increasing and competing demands upon the lands and waters of our coastal zone occasioned by population growth and economic development" which have resulted in the "loss of living marine resources, wildlife, nutrient-rich areas, permanent and adverse changes to ecological systems, decreasing open space for public use, and shoreline erosion." Thus, in determining the objectives and purposes of the CZMA relating to uses of the coastal zone, considerable weight should be given to any adverse impacts of such development on natural systems such as the wetlands in question.

In this case, I have held that the project would result in the destruction of a coastal wetland resource resulting in substantial adverse impacts on important resource values. I have also determined that the project to develop a shopping center and parking lot on the wetland area would contribute minimally to the national interest in developing the resource potential of the coastal zone. I therefore conclude that the proposed project would provide a minimal contribution to the national interest and that such contribution is insufficient to outweigh the certainty that this project would cause substantial adverse effects on the natural resources of the coastal zone.

VI. Element Three - Compliance with the Clean Air and Clean Water Act

The third element of Ground I requires that, in order to override the State's determination of inconsistency, the Secretary must find that "[t]he activity will not violate any requirements of the Clean Air Act, as amended, or the Federal Water Pollution Control Act (Clean Water Act), as amended." 15 C.F.R. § 930.121(c). The requirements of the Clean Air Act and the Clean Water Act are incorporated in all State coastal programs approved under the CZMA.[37] It is unlikely that the proposed project would involve any violation of the Clean Air Act. However, certain provisions of the Clean Water Act are clearly applicable.

The EPA commented on the requirements of the Clean Water Act as they relate to the Appellant's proposed project. In its comments, the EPA stated that:

> [w]here a proposed project would involve the discharge of dredged or fill material into waters of the United States, the proposal is reviewed by the U.S. Army Corps of Engineers under the Clean Water Act Section 404(b)(1)

[37] CZMA § 307(f).

> Guidelines. In order to comply with the Guidelines, a proposed discharge must represent the least environmentally damaging practicable alternative. Given that alternative means of achieving the basic purpose of this project have been identified which do not involve impacts to wetlands, we do not believe it is likely that the proposed discharge complies with the Guidelines.[38]

While asserting that the proposed project would not violate the requirements of the Clean Air or Clean Water Acts, the Appellant fails to address the concerns raised by EPA under the Section 404 (b)(1) Guidelines. Moreover, the Army Corps of Engineers, the agency charged with the implementation of the 404 Guidelines, concluded on the basis of the available information that the decision of the Coastal Council should be upheld in this case.[39] In light of comments by EPA and the Corps of Engineers, there is reason to doubt whether the project, as currently proposed, would be in compliance with the requirements of the Clean Water Act.

However, because the Appellant has filed an application for a permit under section 404 of the Clean Water Act, I will assume, for purposes of this element, that the proposed project is conditioned on the Appellant's obtaining a valid permit under section 404. Because the Appellant cannot conduct his proposed activity without first obtaining a section 404 permit, and even then only in conformity with any terms and conditions that it may contain, I find that the Appellant's proposed project will not violate the requirements of the Clean Water Act.

VII. Element Four - The Availability of a Reasonable Alternative

Even if the Appellant had succeeded in demonstrating that each of the preceding three elements for Secretarial review had been met, a decision to override the State would require an affirmative finding under Section 930.121(d) that:

> [t]here 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.[40]

In its letter to the Appellant denying the consistency certification, the Management Committee of the SCCC concluded that an alternative to the project would be to use the available uplands on site. This conclusion is reiterated in the agency

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EPA comments contained in Sanderson letter of January 15, 1991.

Comments by the Army Corps of Engineers, Edelman letter of December 17, 1990, at 1.

[40] 15 C.F.R. § 930.121(d).

comments,[41] and further elaborated in the State's brief.[42] Specifically, the Management Committee reviewed the project design to determine, in accordance with the express policies of the Coastal Zone Program,[43] whether "no feasible alternatives exist." According to the State:

> The Council determined that a commercial project could be built at the site without impacting the wetlands. This decision was based upon the best available information and considering the factors of environmental, economic, social, legal and technological suitability of the proposed activity and the alternatives. Thus, using the available uplands on the site is a [sic] alternative to destroying 2.5 acres of wetlands.[44]

In arguing that no reasonable alternative exists, the Appellant refers to the requirements of "local zoning" and "commercial planning" in an effort to controvert the conclusions of the Management Committee. However, as the above-quoted passage indicates, the Committee considered the "legal and technological suitability of the proposed activity and the alternatives" in arriving at its conclusion. For purposes of this review, it is clear that the Appellant has failed to provide any basis that would support a finding contrary to the State's determination under its own coastal management and planning laws that an alternative is available that is both legally and technologically feasible, and that would accomplish the purposes of the proposed project.

I find, therefore, that the Appellant has failed to controvert the State's determination of the existence of a reasonable alternative to the proposed activity. It is unnecessary for the State to provide specific alternative designs or uses for the upland portion of the site. It is clear that such alternatives may include a less ambitious project, or a version of the project that more effectively utilizes the upland portion of the site so as to avoid impacts on the wetlands, or one that uses the upland portion in combination with adjoining or nearby sites. Based on the administrative record, I am unable to conclude that no

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[41] See Comments of U.S. Fish and Wildlife Service, Banks letter of May 7, 1990, at 2; see also EPA comments, Sanderson letter of January 15, 1991, at 3.

State's brief, at 5-6.

[43] Chapter III, Policy Section II. E. (1)(a)) of the SCCMP provides that: "The filling or other permanent alteration of productive salt, brackish or freshwater wetlands will be prohibited for purposes of parking unless no feasible alternatives exist, the facility is directly associated with a water-dependent activity, any substantial environmental impacts can be minimized, and an overriding public interest can be demonstrated." (p. III-27)>

Id.

reasonable alternatives exist such as would justify overriding the State's consistency determination.

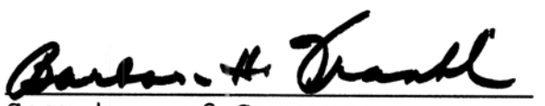
VIII. Jurisdictional and Constitutional Issues

The Appellant additionally argues that the Corps of Engineers lacks jurisdiction over the site because the property is not adjacent to any body of water and the permit application should not have been accepted. Finally, the Appellant contends that failure to grant the permit amounts to denial of economic use of the applicant's property and thus constitutes a taking of private property for public use requiring just compensation.[45] The State asserts that neither of these issues are properly considered within the scope of Secretarial consistency review under Section 307 of the CZMA.

The position of the State is the correct one. These issues are beyond the scope of consistency review under the CZMA.[46] Specifically, such jurisdictional and constitutional issues are irrelevant to the statutorily limited purposes of this review, i.e., to determine whether the Appellant's project is consistent with the objectives of the CZMA. Such concerns are properly addressed in other fora.

VIII. Conclusion

In order for me to find that the proposed project is consistent with the objectives of the CZMA, the Appellant must satisfy all four elements of 15 C.F.R. § 930.121. The project's failure to satisfy all four elements precludes me from making that finding. Based on the foregoing analysis, I having found that Appellant has satisfied elements one and three, but has failed to satisfy elements two or four of the regulation. Consequently, I will not override the State's objection to the Appellant's consistency certification.



Secretary of Commerce

[45] The Appellant further argues that Executive Order 12630 requires a "Takings Impact Assessment" (TIA) to be completed and that such an assessment would point out such economic and environmental benefits to the State as would favor of a finding of consistency with the Coastal Zone Management Program. Appellant is correct that a TIA must be done and the Secretary has complied with Executive Order 12630. However, the TIA is prepared solely to inform the Secretary whether denial of the appeal may involve a taking. Under the applicable law and regulations, the substance of the present appeal is limited to the issue of whether Appellant's project is consistent with the objectives of the Coastal Zone Management Act. Thus, substantive consideration of the takings issue is beyond the scope of this appeal.

[46] See Decision and Findings in the Consistency Appeal of Michael P. Galgano from the Objection by the New York Department of State, n. 16 (Oct. 29, 1990).