DECISION AND FINDINGS

OF THE SECRETARY OF COMMERCE

IN THE

CONSISTENCY APPEAL OF

LONG ISLAND LIGHTING COMPANY

FROM AN

OBJECTION BY THE NEW YORK DEPARTMENT OF STATE

February 26, 1988

SYNOPSIS OF DECISION

Long Island Lighting Company (LILCO) owns and operates the Shoreham Nuclear Power Station (SNPS) located at Shoreham, Long Island, New York. In conjunction with the construction of SNPS, and pursuant to a series of permits issued by the U.S. Army Corps of Engineers (Corps), LILCO performed periodic maintenance dredging of Wading River Creek and the power plant's intake canal, and maintenance of the intake canal's two stone jetties between 1968 and 1985. The last Corps permit for these activities expired in June, 1985. On March 20, 1986, LILCO applied to the Corps for a permit to perform the same dredging and jetty maintenance activities that had been carried out since 1968.

On April 16, 1986, LILCO submitted to the New York Department of State (New York or State) a consistency certification for the proposed dredging and jetty maintenance project for the State's review under section 307(c)(3)(A) of the Coastal Zone Management Act of 1972, as amended (CZMA), 16 U.S.C. § 1456(c)(3)(A). On October 20, 1986, New York objected to LILCO's consistency certification for its proposed dredging and jetty maintenance project on the ground that LILCO had supplied the State with insufficient information upon which a consistency determination could be made. Under CZMA section 307(c)(3)(A) and 15 C.F.R. section 930.131 (1987), the State's consistency objection precludes Federal agencies from issuing any permit or license necessary for LILCO's proposed activity to proceed, unless the Secretary of Commerce finds that the objected-to activity may be Federally approved because it is consistent with the objectives of the CZMA (Ground I) or is otherwise necessary in the interest of national security (Ground II). If the requirements of either Ground I or Ground II are met, the Secretary must sustain the appeal.

On November 19, 1986, in accordance with CZMA section 307(c)(3)(A) and 15 C.F.R. Part 930, Subpart H (1987), LILCO filed with the Secretary of Commerce a notice of appeal from New York's objection to LILCO's consistency determination for the proposed dredging and jetty maintenance project. The Secretary, upon consideration of the information submitted by LILCO, the State, and Federal agencies, as well as other information in the administrative record of the appeal, made the following findings pursuant to 15 C.F.R. section 930.121 (1987):

I. Factual Background

Long Island Lighting Company (LILCO) owns and operates the Shoreham Nuclear Power Station (SNPS) located at Shoreham, Long Island, New York. In conjunction with the construction of SNPS, and pursuant to a series of permits issued by the U.S. Army Corps of Engineers (Corps), LILCO performed periodic maintenance dredging of Wading River Creek and the power plant's intake canal, and maintenance of the intake canal's two stone jetties between 1968 and 1985. The last Corps permit for these activities expired in June, 1985. On March 20, 1986, LILCO applied to the Corps for a permit[1] to perform the same dredging and jetty maintenance activities that had been carried out since 1968.

LILCO describes the proposed project for which it now seeks the Corps permit as follows:

> The proposed maintenance work is to be performed at Shoreham, Long Island, in the waters of Long Island Sound. The sand to be taken from both the Wading River Creek area and the Intake Canal results from littoral transport after storm activity. The areas in the vicinity of the project suffer an average of one to two feet of erosion per year; more during years with severe storm activity.
>
> As part of the application process, LILCO performed a grain size analysis of the material to be dredged, in order to assure that this material, used for beach replenishment would be compatible with the existing beach, and not wash away. Results were favorable.
>
> The part of the dredging project performed in Wading River Creek is to involve a minimum of 4,500 cubic yards of material and possibly as much as two or three times that amount. This part of the project is to be accomplished with a bulldozer or a frontloader and spread on the beach with a frontloader. The sediment within the Intake Canal is to be removed with either a hydraulic or clamshell dredge and placed on the beach to the east of Wading River Creek. It is estimated that this part of the dredging project

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[1] The Corps permit is required by § 10 of the River and Harbor Act of 1899, 33 U.S.C. § 403; § 404 of the Clean Water Act, 33 U.S.C. § 1344; and § 103 of the Marine Protection, Research, and Sanctuaries Act, 33 U.S.C. § 1413.

Ground I

(a) LILCO's proposed project promotes (1) development and protection of coastal resources and (2) coastal access for recreational purposes, and thereby furthers one or more of the competing national objectives or purposes contained in sections 302 or 303 of the CZMA. (Pp. 10-12)

(b) The proposed project will not cause adverse effects on the resources of the coastal zone substantial enough to outweigh its contribution to the national interest. (Pp. 12-14

(c) The proposed project will not violate the Clean Air Act or the Clean Water Act. (Pp. 14-15)

(d) There is no reasonable alternative available to LILCO that would permit the proposed project to be carried out in a manner consistent with the New York Coastal Management Program. (Pp. 15-18)

Ground II

Because the Secretary has found that LILCO has satisfied the first of the two alternative grounds set forth in the CZMA for allowing the objected-to activity to proceed notwithstanding an objection by the State, it is not necessary to address Ground II. (P. 18)

Conclusion

The Secretary has found that LILCO's proposed dredging and jetty maintenance project may be permitted by Federal agencies. (P. 18)

involves 2,500 cubic yards of sand, although this amount is also dependent on annual wave energy in the Shoreham area.

Appellant's Opening Brief at 11-12 (citations omitted).

On April 16, 1986, LILCO submitted to the New York Department of State (State or New York) a consistency certification for the proposed activity for the State's review under section 307(c)(3)(A) of the Coastal Zone Management Act of 1972, as amended (CZMA), 16 U.S.C. § 1456(c)(3)(A). The certification states that "[t]he proposed activity complies with New York State's approved Coastal Management Program [CMP], or with the applicable approved local waterfront revitalization program, and will be conducted in a manner consistent with such program." Appellant's Opening Brief at Exhibit B.

The State received LILCO's certification on April 21, 1986, and began its consistency review. On several occasions thereafter, the State requested from LILCO additional information which it considered necessary for completion of its consistency review. Appellant's Opening Brief at 3; Letter from Thomas F. Hart, Coastal Resources Specialist, New York Department of State, to Maurice P. Fitzgerald LILCO, Aug. 7, 1986, in Appellant's Opening Brief at Exhibit C; Letter from Robert C. Batson, Associate Counsel, New York Department of State to, Debra Winthrop Pollack, Senior Attorney, LILCO, Sept. 3, 1986, in Appellant's Opening Brief at Exhibit E.

These information requests pertained to: (1) the licensing of SNPS by the Nuclear Regulatory Commission (NRC); (2) detailed descriptions of the proposed dredging and jetty maintenance project, and SNPS; (3) assessments of the effects on the coastal zone resulting from the proposed dredging and maintenance project, and SNPS; (4) a set of findings stating that the proposed dredging and jetty maintenance project, SNPS, and their impacts are consistent with the State's CMP; (5) the need for power from SNPS; (6) public safety reports for SNPS; (7) environmental impact statements and plans for SNPS; (8) water quality findings for SNPS; and (9) the construction permit for SNPS. The State justified its request for information about SNPS by arguing that, pursuant to the CZMA's implementing regulations, the plant is an "associated facility for the proposed jetty maintenance and dredging project, and therefore, subject to review for consistency with the State's CMP. Letter from Robert C. Batson, Associate Counsel, New York Department of State, to Debra Winthrop Pollack, Senior Attorney, LILCO, Sept. 3, 1986, in Appellant's Opening Brief at Exhibit E.

LILCO provided information (1) assessing the effects on the coastal zone of the proposed dredging and jetty maintenance project

and (2) stating that the proposed dredging and jetty maintenance activities are consistent with New York's CMP. LILCO declined to provide any information about SNPS (except for the dates of its application to and license issuance from the NRC) because it disagreed with the State's conclusion that SNPS is an associated facility, and therefore, considered the State's request for information regarding SNPS beyond the permissible scope of a consistency review. Letter from Debra Winthrop Pollack, Senior Attorney, LILCO, to Thomas F. Hart, Coastal Resources Specialist, New York Department of State, Aug. 21, 1986 in Appellant's Opening Brief at Exhibit D.

On October 20, 1986, New York objected to LILCO's consistency certification for its proposed project on the ground that LILCO had supplied the State with insufficient information upon which a consistency determination could be made. In support of its objection, New York reiterated its contention that information on SNPS, as a facility associated with the proposed dredging and jetty maintenance project, is necessary for the State's consistency review. Letter from Hon. Gail S. Shaffer, Secretary of State of New York, to John A Weismantle, LILCO, Oct. 20, 1986.

Under CZMA section 307(c)(3)(A) and 15 C.F.R. section 930.131 (1987), the State's consistency objection precludes Federal agencies from issuing any permit or license necessary for LILCO's proposed activity to proceed, unless I determine that the activity may be Federally approved notwithstanding the objection because the activity is consistent with the objectives or purposes of the CZMA, or is necessary in the interest of national security.

II. Appeal to the Secretary of Commerce

On November 19, 1986, in accordance with CZMA section 307(c)(3)(A and 15 C.F.R. Part 930, Subpart H (1987), LILCO filed with this Department a notice of appeal from New York's objection to LILCO's consistency certification for the proposed dredging and jetty maintenance project. Letter from Anthony F. Earley, General Counsel, LILCO, to Hon. Malcolm Baldrige, Secretary of Commerce, Nov. 19, 1986. The parties to the appeal are LILCO and the New York Department of State. I have retained the authority to decide this appeal under Department Organization Order 25-5A, section 3.01(w).

Public notices of receipt of the appeal were published in the Federal Register, 51 Fed. Reg. 44,507 (Dec. 10, 1986). When LILCO perfected the appeal by filing supporting data and information pursuant to 15 C.F.R. section 930.125 (1987),

public comments on the issues germane to my decision in the appeal were solicited by way of notices in the Federal Register, 52 Fed. Reg. 2,142 (Jan. 20, 1987), and The New York Times (Feb. 11, 1987). On February 20, 1987, the State filed a response to LILCO's appeal. On February 27, 1987, the Department solicited the views of fourteen Federal agencies[2] regarding the contribution to the national interest by LILCO's proposed dredging and jetty maintenance project.[3] All agencies, except the Departments of Defense and Interior, the Fish and Wildlife Service and the National Security Council, responded.

During the course of the appeal, LILCO and the State filed additional materials, including a request for a public hearing filed by the State on March 16, 1987. Letter from Hon. Gail S. Shaffer, Secretary of State of New York, to Hon. Malcolm Baldrige, Secretary of Commerce, Mar. 10, 1987. The Department denied this request on April 22, 1987, because no comments had been received during the prescribed public comment periods and no member of the public had requested, pursuant to 15 C.F.R. section 930.127(c)(1987), an extension of time for submittal of comments. These facts demonstrated to the Department that the public was manifesting no pressing interest in the appeal which would merit providing a public comment forum beyond those already given. Further, there was no reason to believe that a public hearing would elicit information which was not already part of the record. All comments and information received by the Department during the course of the appeal have been included in the administrative record.[4]

The Army Corps of Engineers; the Coast Guard; the Departments of Defense, Energy, Interior, State, Transportation and Treasury; the Environmental Protection Agency; the Federal Energy Regulatory Commission; the Fish and Wildlife Service; the National Marine Fisheries Service; the National Security Council and the Nuclear Regulatory Commission.

3 The letters to the Departments of Defense and Energy, the National Security Council and the Nuclear Regulatory Commission also requested comments regarding the national security merits of LILCO's proposed project.

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

In materials filed in the administrative record, the parties have raised two issues that I must resolve before addressing the substantive issues in the appeal. These issues are the ripeness and scope of LILCO's appeal.

Regarding ripeness, the State contends that, because its objection was based upon insufficient information, LILCO's appeal is not ripe for review. According to New York:

> Upon information and belief, this [CZMA appeal] procedure has only been used in cases where the state agency has objected to a consistency certification on its merits. In this case [New York] ... has been precluded from undertaking a substantive consistency review because of LILCO's failure to provide necessary information and data. Under the regulations, [the State] ... had no alternative but to object to the consistency certification. Since [the State] ... has not determined whether or not the proposed activity is consistent with New York's coastal management program, this matter is not ripe for Secretarial review pursuant to [15 C.F.R. Part 930] Subpart H.

State's Response to Appeal at 5 (citation omitted). To support this proposition, the State cites one of the CZMA's implementing regulations, which provides:

> The provisions of this subpart provide procedures by which the Secretary may find that a Federal license or permit activity, ... which is inconsistent with a [state] management program, may be federally approved because the activity is consistent with the objectives or purposes of the Act, or is necessary in the interest of national security.

15 C.F.R. § 930.120 (1987). In the State's view, this regulation dictates that the appeal process applies only to projects which have been found inconsistent with a state's CMP. Therefore, "[s]ince there has been no finding that the proposed activity is inconsistent with New York's Coastal Management Program, there can be no Secretarial review pursuant to Subpart H." State's Response to Appeal at 6.

New York's argument is without merit. Although New York correctly quotes 15 C.F.R. section 930.120, it incorrectly interprets the provision. By its very title ("Objectives"), as well as its content, the regulation provides an introduction

to the provisions governing consistency appeals. The statement that review applies to projects "inconsistent with a [state] management program" is merely one part of a statement which provides a brief, general overview of the entire appeal process. This brief overview is not intended to be a definitive statement of the detailed procedures which precede or occur during an appeal. For example, this provision does not describe the process by which a state arrives at its concurrence with or objection to a proposed project's consistency, nor does it discuss the requirement of communicating to a permit applicant the right to appeal a state's objection. New York's argument is flawed because it attempts to isolate one general statement from the broad set of detailed regulations which prescribe procedures for all phases of consistency certification, review and appeal. Reading this statement in isolation is erroneous.

A proper reading of section 930.120 in the context of related regulations demonstrates that appeals to this Department are triggered by a state's "objection" to an applicant's consistency certification for a proposed project. 15 C.F.R. § 930.125(a)(1987)("An appellant may file a notice of appeal with the Secretary with[in] 30 days of the appellant's receipt of a State agency objection.")(emphasis added).

State agency objections are discussed more fully at 15 C.F.R. section 930.64 (1987), which provides:

> A State agency objection may be based upon a determination that the applicant has failed, following a written State agency request, to supply the information required pursuant to § 9[30].58. If the State agency objects on the grounds of insufficient information, the objection must describe the nature of the information requested and the necessity of having such information to determine the consistency of the activity with the management program.

15 C.F.R. § 930.64(d). If a state determines that information not required in section 930.58 is necessary to assess the consistency of Federal license and permit activities, it may amend its management program, pursuant to section 930.56(b), to require submittal of such information. I do not address here whether the information requested by New York was required under 930.58.

If a state objects to a project, it must notify the applicant of its objection within six months of beginning its consistency review. 15 C.F.R. § 930.64(a). Further, this notification must include a statement of the applicant's rights of appeal to this

Department.[5] Id. at (e). Nothing in the regulations exempts from appeal any category of state objection.

In sum, the regulations clearly provide for appeals to this Department only after a state objection, and clearly indicate that an objection based upon insufficient information is a valid objection from which an applicant may appeal. Even assuming that the State's reading is correct, the more detailed regulations regarding objection and appeal procedures supersede section 930.120 to the extent that they conflict. Based upon the foregoing analysis, I find that this appeal is ripe for consideration and that the parties have complied with Commerce's regulations governing the conduct of this appeal, 15 C.F.R. Part 930, Subparts D, H (1987).[6]

The second preliminary matter to be resolved is the scope of the appeal. Through their filings, the parties have argued the issue of the scope of LILCO's proposed project subject to consistency review. This, in turn, dictates the scope of the appeal. LILCO contends that only the proposed dredging and jetty maintenance project is under review. New York, on the other hand, maintains that its consistency review and this appeal must consider the ramifications of both the proposed dredging and jetty maintenance project and SNPS, which the State considers to be an "associated facility" as defined at 15 C.F.R. section 930.21 (1987).[7] Both the plain meaning of that regulation and its regulatory history belie the State's interpretation of this phrase.

It should be noted that, contrary to the State's position regarding ripeness, it followed these procedures in LILCO's case. Its objection to LILCO's proposed project was based upon insufficient information, and it notified LILCO of its rights of appeal to this Department.

6 Whereas I have found that the appeal is ripe for review, I have not considered or determined whether the State's consistency review and ultimate objection were valid. It is current procedure in CZMA appeals for the Secretary to presume the validity of a state's objection and base a decision solely on the prescribed statutory and regulatory criteria. See infra § III at 10-18.

New York seeks to bolster it legal arguments regarding the meaning of the term "associated facility" by noting that many Federal agencies commented on both the proposed dredging and jetty maintenance project and SNPS. State's Final Response to Appeal, May 21, 1987. This fact is not relevant for two reasons. First, the Department solicited agency comments before reaching a decision on the scope of the appeal. In these cases, it is common departmental practice

(continued ...)

15 C.F.R. section 930.58 (1987) requires that both the primary project for which a permit is sought and its "associated facilities" be evaluated by a coastal state in determining consistency with the state's coastal management program. "Associated facilities" are "proposed facilities ... [w]hich are specifically designed ... or ... used ... to meet the needs of a Federal action (e.g., ... permit ...), and [w]ithout which the Federal action, as proposed, could not be conducted." 15 C.F.R. § 930.21 (1987). A common sense reading of this definition compels the conclusion that an associated facility occupies a role subordinate to the Federal action.

To illustrate the application of this conclusion to the case at hand, it is useful to read the associated facilities definition in terms of LILCO's proposed project. The "Federal action" in this case is the proposed dredging and jetty maintenance project for which the U.S. Army Corps of Engineers must issue a permit. If one reads the definition with the words "dredging project" substituted for "Federal action," then an associated facility is one which is "specifically designed ... or ... used ... to meet the needs of [the dredging project] ... and [w]ithout which [the dredging project], as proposed, could not be conducted." According to this definition, then, an associated facility supports a primary facility. Thus, whereas the proposed dredging project

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(... continued)
to request comments on the various legal criteria on which I may base a decision, in order to ensure the compilation of a complete record. After the record closes, I evaluate all materials received and then decide any lingering procedural issues and the merits of the appeal. Therefore, the letters requesting agency comments were intentionally broad to ensure a full record on which to base my decision. They were never intended to imply a decision on the scope of the appeal.

Second, even if a commenting agency considered SNPS an "associated facility" to the dredging and jetty maintenance project, that agency's interpretation of this Department's regulations does not supersede our own. Therefore, the State's position is unpersuasive regarding other agencies' alleged interpretation of Commerce's definition of "associated facilities."

might be considered subordinate to SNPS, the reverse is not true. Because the CZMA consistency review and appeal processes only apply to the proposed Federal action (in this case, the dredging project) and its associated facilities, SNPS is beyond the scope of this appeal.

In addition to the plain meaning of the definition, the regulations provide examples of proposed activities and associated facilities which further support the conclusion that SNPS is not an associated facility and therefore not reviewable in this appeal. "Proposed activities" include project siting and construction; "associated facilities" include access roads and support buildings. 15 C.F.R. § 930.58(a)(4)(1987).

Relevant regulatory history also supports this conclusion. The preamble to the final rulemaking for 15 C.F.R. Part 930 (1987) provides the following guidance for determining whether a facility is "associated":

> Associated facilities are, in reality, an indispensable part of the proposed Federal action. Accordingly, this section requires their concurrent review along with the remainder of the proposal to ensure that the State agency is informed of all the critical elements of the proposal. As a result, the State agency will have complete information to fulfill its coastal planning and management responsibilities, and the proponent of the Federal action will not be faced with the situation where there has been receipt of State agency approval regarding one element of the project with later objection to an associated facility which was not earlier reviewed with the remainder of the proposal. For example, this section requires a Federal agency to make certain that both a proposed Federal waste treatment facility and a proposed pipeline connection which must be constructed to meet the needs of the facility are consistent, to the maximum extent practicable, with an approved management program where these interrelated activities significantly affect the coastal zone.

43 Fed. Reg. 10,510, 10,519 (Mar. 13, 1978)(citation omitted); accord 44 Fed. Reg. 37,142, 37,145 (June 25, 1979). This comment classifies as associated facilities the separate elements of one large project, when those elements are otherwise individually eligible for consistency review. According to the comment, the rationale behind this approach is to avoid piecemeal

review of the project's separate elements when they could be reviewed simultaneously.

The key distinction between the example provided by the comment and LILCO's proposed dredging activity is the fact that while the proposed dredging activity is reviewable for consistency, SNPS is not. Therefore, the goal, as expressed in the comment, of simultaneous review of equally eligible but separate components of one project is unattainable in the case of LILCO's dredging permit. The CZMA consistency review net is simply not broad enough to encompass a related project when that project is not separately subject to consistency review.

Based upon the foregoing analysis of the regulatory language and history, I find that SNPS is not, under the terms of 15 C.F.R. section 930.21 (1987), a facility associated with the proposed dredging and jetty maintenance project. Therefore, SNPS will not be considered in this CZMA consistency appeal.

III. Grounds for Sustaining an Appeal

Section 307(c)(3)(A) of the CZMA provides that Federal licenses or permits required for LILCO's proposed activities may not be granted until either the State concurs in the consistency of such activities with its Federally approved coastal zone management program, or I find that the activities are (1) consistent with the objectives of the CZMA or (2) otherwise necessary in the interest of national security. See also 15 C.F.R. § 930.130(a)(1987). LILCO has pleaded both grounds.

A Ground I: Consistent with the Objectives of the CZMA

The first statutory ground (Ground I) for overriding a state objection to a proposed project is to find that the activity "is consistent with the objectives of [the CZMA]." CZMA § 307(c)(3)(A). To make this finding, I must determine that the activity satisfies all four of the elements specified in 15 C.F.R. section 930.121 (1987).

1. First Element

To satisfy the first of the four elements, I must find that "[t]he activity furthers one or more of the competing national objectives or purposes contained in sections 302 or 303 of the [CZMA]." 15 C.F.R. § 930.121(a)(1987).

The CZMA identifies a number of objectives and purposes which may be stated generally as follows:

> To preserve, protect and where possible to restore or enhance the resources of the coastal zone. § 302(a), (b), (c), (d), (e), (f), (g), (i); § 303(1);
>
> 2. To develop the resources of the coastal zone. § 302(a), (b), (i); §303(1); and
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> 3. To encourage and assist the States to exercise their full authority over the lands and waters in the coastal zone, giving consideration to the need to protect as well as to develop coastal resources, in recognition by the Congress that State action is essential to more effective protection and use of the resources of the coastal zone. § 302(h), (i); § 303(2).

More specifically, in the context of this appeal, the CZMA encourages "effective management [and] protection of the coastal zone," § 302(a); "preserv[ation] ... and restor[ation of] the ... coastal zone," § 303(1); and "minimiz[ation of] the loss of ... property caused by ... destruction of natural protective features such as beaches," § 303(2)(B).

As I have stated in an earlier appeal, because Congress has defined broadly the national interest in coastal zone management to include both protection and development of coastal resources, this element will "normally" be found to be satisfied on appeal. Findings and Decision in the Matter of the Appeal by Exxon Company, U.S.A., to a Consistency Objection by the California Coastal Commission (Feb. 13, 1984)(citing 42 Fed. Reg. 43,594 (1977) (preamble to proposed rule for Federal consistency with approved coastal management programs)).

LILCO's proposal involves maintenance dredging of a creek and a canal, and replenishment of a beach to counteract extreme erosion and improve boating access in the canal. Since the goals of the CZMA include development and protection of coastal resources, and coastal access for recreation purposes, I find that LILCO's project furthers one or more of the broad objectives of the CZMA. The State contends that "LILCO's failure to supply the requested information [regarding SNPS] is tantamount to denying the national objectives or purposes of the Act by ignoring the authority of the State to manage its coast."

State's Response to Appeal at 7. Because I have found that SNPS is beyond the scope of this appeal, I reject the State's argument that LILCO's proposed project does not further the CZMA's objectives. Therefore, the first element of Ground I is fulfilled.

2. Second Element

To satisfy the second element of Ground I, I must find that "[w]hen performed separately or when its cumulative effects are considered, [the activity] will not cause adverse effects on the natural resources of the coastal zone substantial enough to outweigh its contribution to the national interest." 15 C.F.R § 930.121(b)(1987).

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.[8]

(a) Adverse Effects

LILCO contends that, not only are there no adverse effects from the proposed project, "just the opposite is so. The project serves to reverse the adverse impacts which littoral drift has on the area." Appellant's Opening Brief at 24.

Several agencies have commented on the proposed project's effects on the coastal zone, and none has advanced any information which would indicate that the dredging might cause environmental problems. Reflecting this conclusion, the Environmental Protection Agency (EPA) states "in connection with its review of the proposed [Corps of Engineers] permit, EPA has not identified any separate or cumulative impacts on the natural resources of the coastal zone that would weigh against granting the [Corps] permit." Letter from Jennifer Joy Wilson, Assistant Administrator for External Affairs, EPA, to Hon. Anthony J. Calio, Administrator,

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[8] The State has maintained the position throughout the course of the appeal that it does not have sufficient information on which to evaluate LILCO's proposed project. See, e.g., State's Response to Appeal; State's Final Response to Appeal. As a result, it has offered no evidence on the proposed project's adverse effects or contribution to the national interest.

National Ocean and Atmospheric Administration (NOAA), Mar. 30, 1987.

Moreover, far from identifying adverse effects, the National Marine Fisheries Service (NMFS) has discussed environmental benefits to be derived from LILCO's proposed project. NMFS's comments will be discussed below in connection with the proposed project's contribution to the national interest.

Based upon a review of the administrative record, I find that LILCO's proposed project will not cause adverse effects on the natural resources of the coastal zone.

(b Contribution to the National Interest

With respect to proposed project's contribution to the national interest, LILCO argues:

> [T]his [dredging and jetty maintenance] activity is not only permitted, but is in fact mandated by other licenses, permits and easements granted to LILCO, including the conditions enumerated in the [final environmental impact statement] issued by the NRC for the SNPS project in 1977. It can be argued, therefore, that it is in the national interest to fulfill obligations and commitments made to federal and state agencies .... Performance of maintenance dredging in Wading River Creek and the Intake Canal, a mandated activity, is therefore in the national interest.

Appellant's Opening Brief at 25 emphasis added)(citation omitted).

To assess the contribution to the national interest of LILCO's proposed project, I sought the views of fourteen Federal agencies.[9] The National Marine Fisheries Service (NMFS) submitted comments which address directly this point; its views follow:

> We have no objection to the Wading River Creek project, and believe it serves the national interest because it continues to facilitate water movement up river to the Wading River Creek wetlands. This flushing effect is favorable in that it enhances the area's productivity and quality of the habitat which is utilized by living marine resources.

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9 See supra note 2.

Memorandum from William E. Evans, Assistant Administrator for Fisheries, NMFS, NOAA, to Anthony J. Calio Administrator, NOAA, Mar. 31, 1987. Aside from this statement regarding the proposed project's benefits, the record contains no other evidence concerning the national interest of the proposed dredging project.[10] Based upon this record, I find that LILCO's proposed activity will contribute to the national interest by improving the habitat of marine resources.

As mentioned previously, my decision regarding the second element of Ground I requires balancing the adverse effects of the proposed project against the proposed project's contribution to the national interest. If the former do not outweigh the latter, then the element is satisfied. Having found no adverse effects associated with LILCO's proposed project, and having found further that the project will benefit the national interest, I now find that the proposed dredging and jetty maintenance project will not cause adverse effects on the resources of the coastal zone substantial enough to outweigh its contribution to the national interest. LILCO's proposed project has satisfied the second element of Ground I.

hird Element

To satisfy the third element of Ground I, I 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, as amended." 15 C.F.R. § 930.121(c)(1987). The requirements of the Clean Air Act and the Federal Water Pollution Control Act (FWPCA) are incorporated in all State coastal programs approved under the CZMA. CZMA § 307(f).

LILCO contends that its proposed project satisfies full this element:

> LILCO's maintenance dredging project involves the use of a bulldozer or frontloader and either a hydraulic or clamshell dredge to move somewhere between 7,000 and 16,000 cubic yards of sand (the amount varies due to wave action) from the intake canal to the beach. Prior Army Corps of Engineers permits issued for similar maintenance projects certified that it was consistent with the FWPCAA. There is no discharge of pollutants involved in the project, and the grain size analysis results were favorable. The

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The record does contain statements regarding the contribution of SNPS to the national interest. As noted earlier in this decision, SNPS is beyond the scope of this appeal. Therefore, these comments have not contributed to my finding on this point.

project is, therefore, entirely consistent with the FWPCAA.

> LILCO's maintenance dredging project has no effect whatsoever on national ambient air quality standards. There are no emissions involved in the project itself. The operation of construction equipment at the site will produce hardly any emissions. The vehicles will only be operational for a short period of time, and are already subject to any emission controls for vehicles of their type.

Appellant's Opening Brief at 25-26 citation omitted

Consistent with its position throughout the appeal, see supra note 8, New York has offered no evidence on this element. The Federal agencies that commented on the appeal did not address this point either. The EPA did, however, offer the general conclusion that it had not found any negative environmental effects resulting from LILCO's proposed project. See supra p. 12, para. 4. It is reasonable to conclude that if violations of the CAA or the FWPCA were present or possible, the EPA, which administers these Acts, would have discussed them in their comments.

Further, section 202 of the Clean Air Act, 42 U.S.C. § 7521, directs the Administrator of the EPA to establish federal standards to regulate the emissions of carbon monoxide and hydrocarbons from mobile sources. Any emission from LILCO's proposed activities will have to comply with these standards. Therefore, I find that LILCO's proposed dredging and jetty maintenance project will not violate the Clean Air Act.

With respect to the Clean Water Act, LILCO's proposed activity requires a permit issued by the Corps under section 404 of the Clean Water Act. Pending my decision in this appeal, the Corps cannot issue this permit. If I decide the appeal in LILCO's favor, the Corps can continue to process LILCO's application for the permit and decide whether to issue it. If the proposed project will violate the Clean Water Act, the Corps will not issue the permit. Accordingly, I conclude that LILCO's proposed activity will not violate the Clean Water Act. Based upon the foregoing discussion, I find that LILCO's proposed project meets the third element of Ground I.

Fourth Element

To satisfy the fourth element of Ground I, I must find that

"[t]here is no reasonable alternative available (e ... location, design, etc.) which would permit the activity to be conducted in a manner consistent with the [State coastal] management program." 15 C.F.R. § 930.121(d)(1987).

LILCO asserts that "[n]either the Corps nor the [State] has expressed concern over the nature of the maintenance dredging project .... The project cannot be accomplished in any other practical manner, nor can it be performed at any other location. There is, therefore, no reasonable alternative to this action." Appellant's Opening Brief at 27.

In past CZMA appeals, I have decided this element by evaluating an alternative proposed by the objecting state. See, e.g., Decision and Findings in the Consistency Appeal of Gulf Oil Corporation before the Secretary of Commerce (Dec. 23, 1985); Decision and Findings in the Consistency Appeal of Southern Pacific Transportation Company to an Objection from the California Coastal Commission (Sept. 24, 1985). This is the case because the state is normally in the best position to propose an alternative which it considers to be consistent with its CMP. In this case, however, the State has advanced no evidence on this point. See supra note 8. In the absence of an alternative proposed by the State, I have looked to New York's CMP for guidance in evaluating LILCO's proposed project.

Two policies in the CMP, Nos. 15 and 35, relate to dredging:

> Mining, excavation or dredging in coastal waters shall not significantly interfere with the natural coastal processes which supply beach materials to land adjacent to such waters and shall be undertaken in a manner which will not cause an increase in erosion of such land. Policy 15 in New York CMP, Part II, § 6, at 69.
>
> Dredging and dredge spoil disposal in coastal waters will be undertaken in a manner that meets existing State dredging permit requirements, and protects significant fish and wildlife habitats, scenic resources, natural protective features, important agricultural lands, and wetlands. Policy 35 in New York CMP, Part II, § 6 at 169.

Neither policy discusses alternative dredging methods. The explanatory text to Policy 35, however, provides the following guidance:

> Dredging often proves to be essential for ... maintaining navigation channels at sufficient depths, pollutant removal

> and meeting other coastal management needs. Such dredging projects, however, may adversely affect water quality, fish and wildlife habitats, wetlands and other important coastal resources. Often these adverse effects can be minimized through careful design and timing of the dredging and proper siting of the dredge spoil disposal site.

New York CMP, Part II, § 6 at 169 (emphasis added). According to the State CMP, then, a project's design and timing are two components which can be varied to mitigate adverse effects, if any. As noted previously, I have found that LILCO's proposed project will not cause adverse effects on the natural resources of the coastal zone, and will not violate the Clean Air and Clean Water Acts. Arguably, therefore, I need not make a determination regarding an alternative because New York's CMP requires such a determination only when a project will cause adverse effects. Accordingly, I find that for purposes of this regulatory element only, LILCO's proposed project is consistent with New York's CMP, and therefore, a reasonable alternative need not be evaluated.

Even if I were to reach the issue whether a reasonable alternative exists, I would answer in the negative, based upon an analysis of the components which might be varied to mitigate adverse effects. As noted, New York's CMP lists design and timing,[11] and Commerce's regulatory criterion establishing this element lists location and design[12] as potentially variable components for devising an alternative consistent with a state CMP. I will analyze each in turn.

With respect to the design of the proposed dredging and jetty maintenance activities, it is difficult to conceive of an alternative which might be more reasonable than the one proposed; namely, dredging and filling with hydraulic dredges, bulldozers and frontloaders. Although a different and equally reasonable design might be available, it is reasonable to conclude, based upon common knowledge, that the method chosen by LILCO is a widespread approach to dredge and fill operations. I find, therefore, that a more reasonable alternative design is not available.

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11 See New York CMP Part II, § 6 at 169.

12 See 15 C.F.R. § 930.121(d 1987).

As for timing, it is conceivable that a dredging operation might be conducted during one season rather than another to avoid adverse effects upon migratory fish or turtles, or other coastal natural resources. Because none of the commenting Federal agencies, many of which specialize in natural resource management, have identified a potential problem in this regard, I will interpret their silence to mean that timing is not an issue in this case. Therefore, I find that no reasonable alternative timing needs to be considered.

Regarding the location of the proposed project, considering the nature of LILCO's proposed activity, it is obvious that no other location could exist for dredging the SNPS intake canal and Wading River Creek. These two locations receive accumulations of sediment, and only they can be dredged to assure their proper functioning. Based upon this situation, I find that no reasonable alternative location is available for performing LILCO's proposed activity.

In sum, I conclude that no reasonable alternative to LILCO's proposed project exists which would permit the activity to be conducted in a manner consistent with New York's CMP. Therefore, I find that element four of Ground I is satisfied.

Conclusion for Ground I

On the basis of the findings I have made in this decision, I find that LILCO has satisfied the four elements of Ground I. Therefore, LILCO's proposed project is consistent with the objectives of the CZMA.

B Ground II: Necessary in the Interest of National Security

Because I have found that LILCO has satisfied the first of the two alternative grounds set forth in the CZMA for allowing the objected-to activity to proceed notwithstanding an objection by the State, it is not necessary to address the second statutory ground ("necessary in the interest of national security").

Conclusion

Having found that LILCO's proposed project is consistent with the objectives of the CZMA, I now find further that LILCO's proposed project may be permitted by Federal agencies.

William Verity

Secretary of Commerce