DECISION AND FINDINGS IN THE CONSISTENCY APPEAL OF JESSIE W. TAYLOR FROM AN OBJECTION BY THE STATE OF SOUTH CAROLINA

(Taylor Decision)

December 28, 1998

SYNOPSIS

Jessie W. Taylor (Appellant) appealed to the Secretary of Commerce (Secretary) to override the State of South Carolina's (State) objection to his proposal to fill 0.60 acres of wetlands for the purpose of commercial development, and to mitigate the adverse wetland impacts through his purchase of mitigation credits in a wetland mitigation bank. This appeal arises under the Coastal Zone Management Act (CZMA), an act administered by the National Oceanic and Atmospheric Administration (NOAA), an agency within the Department of Commerce. Section 307 of the CZMA provides that any applicant for a required Federal license to conduct an activity affecting any land or water use or natural resource of the coastal zone shall provide to the permitting agency a certification that the proposed activity complies with the enforceable policies of a state's coastal management program, including the State of South Carolina's coastal management program. This requirement furthers state coastal management efforts by fostering coordination and cooperation among coastal states, Federal agencies, and Federal license or permit applicants.

The Appellant has requested approval from the U.S. Army Corps of Engineers (Corps) for the activity, which includes the Appellant's offer of mitigation. Because South Carolina has objected to the activity, the Corps may not grant a license or permit, unless the Secretary finds that the activity is consistent with the objectives of the CZMA or is otherwise necessary in the interest of national security.

I. Background

In 1982, the Appellant purchased 0.62 acres of commercial property, part of a larger block of commercial property, for the purpose of building a commercial storage facility on the site. The site is situated in a developed commercial area. Subsequently, the owners of adjacent property elevated their lots above the natural grade through the placement of fill material. The natural water drainage has continued to change since the placement of fill material on the adjacent property, and has interfered with water drainage from the Appellant's property.

The Appellant applied to the Corps for a permit for the proposed activity, and certified that his activity is consistent with South Carolina's coastal management program. The Appellant proposed to compensate for wetland impacts by purchasing mitigation credits in a wetland mitigation bank. The amount of mitigation credits was determined using a worksheet provided by the Corps. The credits, according to the Appellant, represent approximately 2.85 acres of high quality wetlands. On March 11, 1996, the South Carolina Bureau of Ocean and Coastal Resource Management (OCRM), the State of South

Carolina's coastal management agency, objected to the Appellant's activity on the ground that it is not consistent with the enforceable policies contained in South Carolina's coastal management program. State policies prevented OCRM from considering the Appellant's offer of mitigation in evaluating his activity.

II. Request for a Secretarial Override

Under the CZMA, OCRM's consistency objection precludes the Corps from issuing a license or permit necessary for the proposed activity, unless the Secretary finds that the activity is either consistent with the objectives or purposes of the CZMA (Ground I) or is necessary in the interest of national security (Ground II). The Appellant filed with the Department of Commerce a notice of appeal from OCRM's objection to his proposed activity. The Appellant argued that the activity satisfies Ground I. Upon consideration of the entire record, including submittals by the Appellant and OCRM, and written information from Federal agencies, the Secretary made the findings discussed below.

III. Compliance with the CZMA and its Implementing Regulations

The scope of the Secretary's review of the State's objection is limited to determining whether the State complied with the requirements of the CZMA and implementing regulations in filing its objection. OCRM's objection must describe, among other things, "how the proposed activity is inconsistent with specific elements of the management program." 15 C.F.R. § 930.64(b)(1). The Secretary found that the State's objection letter adequately describes how the proposed activity is inconsistent with specific elements of the management program, and concluded that the State complied with the requirements of the CZMA and its implementing regulations in lodging its objection to the activity.

IV. Grounds for Overriding a State Objection

Having found that the State's objection was properly lodged, the Secretary examined the grounds provided in the CZMA for overriding the State's objection. The CZMA requires the Secretary to override the State's objection if he finds that the Appellant's proposed activity is consistent with the objectives of the CZMA (Ground I), or otherwise necessary in the interest of national security (Ground II). See CZMA § 307(c)(3)(A); 15 C.F.R. § 930.130(a).

The Appellant based his appeal solely on Ground I. To find that the proposed activity satisfies Ground I, the Secretary must determine that the activity satisfies all four of the elements specified in the regulations implementing the CZMA (15 C.F.R. § 930.121). If the

activity fails to satisfy any one of the four elements, it is not consistent with the objectives or purposes of the CZMA. The four elements of Ground I are:

> 1. The proposed activity furthers one or more of the competing national objectives or purposes contained in CZMA §§ 302 or 303. See 15 C.F.R. § 930.121(a).
>
> 2. The proposed activity's individual and cumulative adverse coastal effects are not substantial enough to outweigh its contribution to the national interest. See 15 C.F.R. § 930.121(b).
>
> 3. The proposed activity will not violate the Federal Water Pollution Control Act (Clean Water Act) or the Clean Air Act. See 15 C.F.R. § 930.121(c).
>
> 4. There is no reasonable alternative available that would permit the proposed activity to be conducted in a manner consistent with the State's coastal management program. See 15 C.F.R. § 930.121(d).

The Secretary made the following findings with respect to the four elements of Ground I. First, the Appellant's proposed activity furthers one or more of the competing national objectives or purposes of the CZMA by minimally contributing to the national interest in economic development of the coastal zone. Second, the proposed activity, including the Appellant's mitigation measure, will have minimal individual and cumulative adverse effects on coastal wetlands. These minimal adverse coastal effects based on this record are not substantial enough to outweigh the activity's minimal contribution to the national interest in economic development of the coastal zone. Third, the proposed activity will not violate the requirements of the Clean Water Act or the Clean Air Act. Fourth, there is no reasonable alternative available to the Appellant that would permit the activity to be conducted in a manner consistent with South Carolina's coastal management program.

V Conclusion

Because the Appellant satisfied Ground I of the statutory and regulatory requirements for an override of the State of South Carolina's consistency objection, the Secretary overrode that objection. Accordingly, the U.S. Army Corps of Engineers may issue the necessary permit for the activity, provided the mitigation measures offered by Appellant are included as permit conditions. Of course, the Corps may impose more restrictive or protective conditions on the activity. This decision does not enable the Corps to license or permit any other activity.

DECISION

Jessie W. Taylor (Appellant) requested that the Secretary of Commerce (Secretary) override the State of South Carolina's (State) objection to his proposal to fill wetlands on his property for commercial development, and to mitigate the adverse wetland impacts through his purchase of mitigation credits in a wetland mitigation bank. This appeal arises under the consistency provisions of the Coastal Zone Management Act (CZMA), as amended, 16 U.S.C. § 1451 et seq. The CZMA is administered by the National Oceanic and Atmospheric Administration (NOAA), an agency within the Department of Commerce. Section 307 of the CZMA, 16 U.S.C. § 1456, provides that any applicant for a required Federal license to conduct an activity affecting any land or water use or natural resource of the approved state's coastal zone shall provide to the permitting agency a certification that the proposed activity complies with the enforceable policies of a state s coastal management program. This requirement furthers state coastal management efforts by fostering coordination and cooperation among coastal states, Federal agencies, and Federal license or permit applicants.

The Appellant has requested approval from the U.S Army Corps of Engineers (Corps) for the activity, which includes the Appellant's offer of mitigation. Because South Carolina has objected to the activity, the Corps may not grant a license or permit unless the Secretary finds that the activity is consistent with the objectives of the CZMA or is otherwise necessary in the interest of national security. 16 U.S.C. § 1456(c)(3)(A).

Background

In 1982, the Appellant purchased 0.62 acres of commercial property, part of a larger block of commercial property, for the purpose of building a commercial storage facility on the site.[1] The site is situated in a developed commercial area. Appellant's Initial Brief at 8. Attachments A, B and C identify the Appellant's property (lots 22 and 23) in relation to local commercial development. Subsequently, the owners of adjacent property (lots 21, 24 and 25) elevated their lots above the natural grade through the placement of fill material, and one owner built a commercial structure to house a business known as Lube City next to the Appellant's property. Id. at 1.

Notwithstanding the placement of fill on lots 21, 24 and 25, the collection of lots 21-25, together, contain 2.2 acres of

---

1 Appellant's Initial Brief at 1. See letter from Beverly C. Blanchard (for the Appellant), to Roger B. Eckert, NOAA (September 16, 1996).

wetlands.[2] Thus, the Appellant owns 0.60 acres of a larger 2.2 acre wetland area. In 1987, the Appellant was permitted to cut, clear, and clean underbrush from his property. Appellant's Initial Brief at 1. The natural water drainage has continued to change since the placement of fill material on the adjacent property, and has interfered with water drainage from the Appellant's property. See Id. at 1-2. The Appellant states: "Because of activities of adjacent property owners in the past, the [Appellant's] property, through no fault of his own, has developed wetland characteristics."[3] Robert Mikell, OCRM Director of Planning and Federal Certification, states: "These wetlands are valuable habitat, provide stormwater functions, serve as hydrologic buffers, and possibly aquifer recharge." State's Initial Brief, Exhibit 6.

In 1995, the Appellant applied to the Corps for a permit for the placement of fill material on his property under section 404 of the Clean Water Act. The Corps concluded that the activity was a candidate for authorization if an acceptable mitigation proposal was submitted by the Appellant and certified by the South Carolina Bureau of Ocean and Coastal Resource Management (OCRM).[4] The South Carolina Department of Health and Environment Control - Environmental Quality Control, waived water quality certification and review of the activity. No objections to the activity were received from the commenting public. The Appellant proposed to compensate for wetland impacts by purchasing mitigation credits in a wetland mitigation bank known as Vandross Bay Mitigation Bank. Attachment D is the Appellant's completed mitigation worksheet. This worksheet was provided by the Corps. In conjunction with that Federal permit application, and pursuant to CZMA § 307(c)(3)(A), the Appellant certified that the activity is consistent with South Carolina's coastal management program.

OCRM reviewed the Appellant's proposed activity and informed the Corps of its intent to find the activity inconsistent with South Carolina's coastal management program. Letter from Robert D. Mikell, OCRM, to LTC Thomas F. Julich, Corps (September 12, 1995). See discussion below. OCRM also identified the coastal management program policies at issue. Id. The State indicated that it did not consider the Appellant's offer

---

2 State's Initial Brief, Exhibit 5 (Thompson Affidavit). See letter from Mary D. Shahid, OCRM, to Roger B. Eckert, NOAA (November 15, 1996). See also Attachment C.

3 OCRM Appeal at 4. See letter from C.C. Harness, III, (for the Appellant), to Roger B. Eckert, NOAA (April 10, 1996). The appeal to the Secretary (Notice of Appeal) enclosed documentation of the Appellant's appeal at the state level.

4 Id. OCRM is part of the South Carolina Department of Health and Environment Control and is South Carolina's designated coastal management agency under the CZMA.

of mitigation. See State's Initial Brief at 6. Specifically, Robert Mikell, Director of Planning and Federal Certification, OCRM, stated:

> Because the project was not eligible for wetland master planning we are forced to use the policies of the Management Program. These policies do not allow for an alteration of this type of wetland. Consequently, the offsite mitigation proposal made by the applicant is irrelevant in this case and cannot be considered until the project can be made consistent.

State's Initial Brief, Exhibit 6.

The Appellant filed an unsuccessful administrative appeal at the state level. See Notice of Appeal at 3. After reviewing the Appellant's appeal, OCRM formally objected to the Appellant's activity on the grounds that it is inconsistent with the South Carolina coastal management program. Letter from Robert D. Mikell, OCRM, to LTC Thomas F. Julich, Corps (March 11, 1996) (State Objection Letter). OCRM identified the same policies it had identified in its September 12, 1995, letter to the Corps. OCRM stated that the activity would result in the permanent alteration of 0.60 acres of productive freshwater wetlands through the placement of fill material for the purpose of commercial development. State Objection Letter. OCRM also stated that it had not been able to identify any alternatives to the activity. Id.

Under section 307(c)(3)(A) of the CZMA and 15 C.F.R. § 930.131, OCRM's consistency objection precludes the Corps from issuing a permit for the activity unless the Secretary of Commerce finds that the activity is either consistent with the objectives or purposes of the CZMA (Ground I), or necessary in the interest of national security (Ground II).

In accordance with CZMA § 307(c)(3)(A) and 15 C.F.R. Part 930, Subpart H, the Appellant filed with the Department of Commerce an appeal from OCRM's objection to his proposed activity. The Appellant requested that the Secretary override the State's objection, asserting that the activity is consistent with the objectives or purposes of the CZMA. Both the Appellant and the State provided an initial set of comments on the merits of the appeal. See footnotes 1 and 2, above.

The sole effect of overriding a state's objection is to authorize the Federal agency from whom the license or permit in question is sought to issue the license or permit notwithstanding the State's consistency objection. See Decision and Findings in the Consistency Appeal of Korea Drilling Company, Ltd. 4-5 (January 19, 1989) (Korea Drilling Decision). This decision describes the activity that the Corps may license or permit. In particular, the activity at issue includes the Appellant's offer of mitigation. The Corps is not authorized to license or permit

any other activity. See Korea Drilling Decision 5. Of course, the Corps may impose more restrictive or protective conditions as it sees fit.

NOAA requested comments on the merits of the appeal from interested Federal agencies[5] and the public.[6] The Corps and EPA responded, whereas the FWS and NMFS did not respond. No comments were received from the general public.

After the public and Federal agency comment periods closed, NOAA provided the Appellant and OCRM with an opportunity to file final responses to any submission filed in the appeal. Both the Appellant and OCRM submitted final briefs.[7]

Finally, in its review of the administrative record for this appeal, NOAA determined that additional information on the Appellant's mitigation proposal would assist the Secretary in deciding whether to override the State's objection. Accordingly, NOAA reopened the record and allowed the Appellant, OCRM, and the Corps an opportunity to file additional comments on the Appellant's mitigation proposal. The Appellant, OCRM, and the Corps each responded to NOAA's request for additional comments.

All documents and information received during the course of this appeal have been included in the administrative record upon which I will base my decision.[8] However, I have only considered those documents and information relevant to the statutory and the regulatory grounds for deciding an appeal. See Decision and Findings in the Consistency Appeal of Vieques Marine Laboratories 6-7 (May 28, 1996) (Vieques Decision).

On December 30, 1997, I issued a decision in this matter that allowed the Corps of Engineers to grant the Appellant a permit to make the

---

5 NOAA requested comments from the Fish and Wildlife Service (FWS), the Corps, the Environmental Protection Agency (EPA) and the National Marine Fisheries Service (NMFS).

6 Public comments on issues germane to the decision in the appeal were also solicited by public notices published in the Federal Register, 61 Fed. Reg. 53719 (October 15, 1996), and the Sun News (October 9, 10, and 11, 1996).

7 See letter from Mary D. Shahid, OCRM, to Roger B. Eckert, NOAA (February 6, 1997), enclosing the state's final brief; letter from C.C. Harness, III, (for the Appellant), to Roger B. Eckert, NOAA (February 18, 1997), enclosing the Appellant's final brief.

8 These documents and information were submitted in accordance with NOAA's requests for comments.

requested fill. The State was extremely concerned with that decision, particularly with the language regarding the "quality" of wetlands. On July 31, 1998, the Appellant and the State jointly requested the decision be reissued, using agreed-upon substitute language, but keeping the same result. I have accepted their motion and hereby void my December 30, 1997 decision in this matter and issue this modified decision.[9]

III. Compliance with the CZMA and its Implementing Regulations

The scope of my review of the State's objection is limited to determining whether the objection was properly lodged, i.e., whether the State complied with the requirements of the CZMA and implementing regulations in filing its objection.[10] I have not considered whether the State was correct in its determination that the proposed activity was inconsistent with its coastal management program.[11] Similarly, resolution of whether OCRM's denial of certification of the Corps permit is unconstitutional is also beyond the scope of this appeal.[12]

The Appellant alleges that OCRM failed to lodge its consistency objection properly. Appellant's Initial Brief at 4-5. The CZMA

---

9 This decision, like all consistency appeal decisions, is based exclusively on the record. After issuance of the first Secretarial decision in this matter, the State more thoroughly articulated information regarding the value of the wetland to be filled and other factors which might have strengthened its case. Some of the additional, post-decisional information provided by the State is contained in footnotes in this revised decision. However, because I have not reopened the record. I have not considered this new information in revising my decision.

10 See Decision and Findings in the Consistency Appeal of the Virginia Electric and Power Company 7 (May 19, 1994) (Lake Gaston Decision); Decision and Findings in the Consistency Appeal of Claire Pappas 3 (October 26, 1992), citing Decision and Findings in the Consistency Appeal of José Pérez-Villamil 3 (November 20, 1991) (Villamil Decision).

11 See Decision and Findings in the Consistency Appeal of Roger W. Fuller 5 (October 2, 1992) (Fuller Decision), citing Decision and Findings in the Consistency Appeal of Korea Drilling Company, Ltd. 3-4 (January 19, 1989) (Korea Drilling Decision).

12 See Decision and Findings in the Consistency Appeal of Davis Heniford 15 (May 21, 1992) (Heniford Decision). The Appellant argues that the State's action is an unconstitutional taking of his property without just compensation, and a violation of his due process and equal protection rights. See Appellant's Initial Brief at 10-11.

regulations provide two alternative bases upon which a state may base its objection to a proposed activity. See 15 C.F.R. § 930.64(b) and (d). In this case, OCRM determined that the activity is inconsistent with its coastal management program. OCRM's objection must describe, among other things, "how the proposed activity is inconsistent with specific elements of the management program." 15 C.F.R. § 930.64(b)(1). The State of South Carolina cites the following two elements of its coastal management program:

> (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) (Emphasis added.)
>
> (Chapter III, Policy Section XII. E. (1)).
> Project proposals which require fill or other significant permanent alteration of a productive freshwater marsh will not be approved unless no feasible alternative exists or an overriding public interest can be demonstrated, and any substantial environmental impact can be minimized. (p. III-73).

See State Objection Letter. The first sentence of Chapter III, Policy Section IV. (1)(b) is key to my analysis of the State's objection. This policy provides, in part, that commercial proposals that require the fill of wetlands are inconsistent with the State's coastal management program unless no feasible alternatives exist and the proposal is water dependent. With regard to these elements, OCRM stated:

> The project is inconsistent because it would result in the permanent alteration of 0.60 acres of productive freshwater wetlands through the placement of fill material for the purpose of commercial development. The Office of OCRM has not been able to identify any alternatives to the proposed project.

Id. Given the September 12, 1995, OCRM letter, the Appellant's state-level appeal, and the nature of the policy, I find that the State Objection Letter adequately describes how the activity is inconsistent with the first sentence of Chapter III, Policy Section IV. (1)(b). The policy is clear. With one exception, commercial proposals that require fill or other permanent alteration of salt, brackish or freshwater

wetlands are inconsistent with the state's coastal management program. The exception has two prongs: there must be no feasible alternatives and the facility must be water-dependent. The administrative record reflects that the activity is clearly not water-dependent; moreover, the Appellant argued prior to the date of the State Objection Letter that water-dependency should be an irrelevant consideration.[13]

Accordingly, I find that the State Objection Letter adequately describes how the proposed activity is inconsistent with specific elements of the management program, in compliance with 15 C.F.R. §930.64(b)(1), and conclude that the State complied with the requirements of the CZMA and its implementing regulations in lodging its objection to the activity.

IV Grounds for Overriding a State Objection

I now examine the grounds provided in the CZMA for overriding OCRM's objection. I will override OCRM's objection only if I find that the Appellant's proposed activity is consistent with the objectives of the CZMA (Ground I), or otherwise necessary in the interest of national security (Ground II). See also 15 C.F.R. § 930.130(a). The Appellant asserts that the activity satisfies the requirements of Ground I. The four elements of Ground I are:

> 1. The proposed activity furthers one or more of the competing national objectives or purposes contained in CZMA §§ 302 or 303. See 15 C.F.R. § 930.121(a).
>
> 2. The proposed activity's individual and cumulative adverse coastal effects are not substantial enough to outweigh its contribution to the national interest. See 15 C.F.R. § 930.121(b).
>
> 3. The proposed activity will not violate the Federal Water Pollution Control Act (Clean Water Act) or the Clean Air Act. See 15 C.F.R. § 930.121(c).

---

13 OCRM informed the Appellant of its intent to find the activity inconsistent with South Carolina's coastal management program prior to the March 11, 1996, objection letter. See Letter from Robert D. Mikell, OCRM, to LTC Thomas F. Julich, Corps (September 12, 1995). OCRM's September 12, 1995, letter contained the same analysis as its March 11, 1996, objection letter. After receiving the September 12th OCRM letter, the Appellant filed an administrative appeal at the state level, questioning how his activity was inconsistent with South Carolina's coastal management program. Among other things, the Appellant stated in his OCRM appeal: "Given that wetland master planning regulations allow for the fill of one acre, water dependency should be considered irrelevant." OCRM Appeal at 5. Following this state-level appeal, OCRM issued its March 11, 1996, objection letter.

4. There is no reasonable alternative available that would permit the proposed activity to be conducted in a manner consistent with the State's coastal management program. See 15 C.F.R. § 930.121(d).

To find that the proposed activity satisfies Ground I, I must determine that the activity satisfies all four of the elements specified above. If the activity fails to satisfy any one of the four elements, I must find that the activity is not consistent with the objectives or purposes of the CZMA.

Element 1: Activity Furthers One or More Objectives of the CZMA

To satisfy Element 1, I must find that the proposed activity furthers one or more of the competing national objectives or purposes contained in CZMA §§ 302 or 303. See 15 C.F.R. § 930.121(a). Congress has broadly defined the national interest in coastal zone management to include both the protection and the development of the coastal zone. See CZMA §§ 302 and 303. In past consistency appeal decisions, the Secretary has found a wide range of activities that satisfy these competing goals.[14]

The Appellant argues that Element 1 is satisfied because the proposed activity meets the CZMA goals of effective management and development of the coastal zone. See Appellant's Initial Brief at 6-8; CZMA § 303(2). Among other things, the Appellant cites the CZMA policy that new commercial development should be located in or adjacent to areas where such development already exists. CZMA § 303(2)(D).

The State, on the other hand, argues that the project does not further one or more of the competing national objectives or purposes of the CZMA. State's Initial Brief at 3-4. The State points out that the activity is not water dependent, and indicates that it could not identify any overriding public benefits that would be gained from the activity. See Id. The State also highlights the need to conserve urban wetlands. See Id.

I agree with the State that the proposed activity is not coastal-dependent. Previous consistency appeal decisions have held that certain non-coastal-dependent activities at issue in those cases do not promote the national interest and objectives of the CZMA. See Decision and

---

14 Previous consistency appeal decisions have found that activities satisfying Element 1 include, in part, oil and gas exploration, the siting of railway transportation facilities, the construction of a commercial marina, and the construction of a food market.

Findings in the Consistency Appeal of the Asociación de Propietarios de Los Indios (February 19, 1992) (Los Indios Decision); Decision and Findings in the Consistency Appeal of John K. DeLyser (February 26, 1988) (DeLyser Decision).[15] However, those previous decisions involved limited residential projects, which are distinguishable from the activity under consideration in this case. Id. This appeal involves a proposal for commercial development. See also Decision and Findings in the Consistency Appeal of Shickrey Anton 9-10 (May 21, 1991) (Anton Decision).

I also agree with the State that the activity will not further the national interest in preserving and protecting natural resources of the coastal zone. My consideration of the activity's adverse coastal effects under Element 2 of Ground I elaborates on this point. However, the CZMA reflects a competing national interest in encouraging development of coastal resources.

I am persuaded by the evidence in the record that the Appellant's activity will foster development of the coastal zone, albeit non-coastal-dependent development. The CZMA recognizes development as one of the competing uses of the coastal zone and its resources. See CZMA § 303(2). In addition, the proposed commercial activity would be located in areas where development already exists. See CZMA § 303(2)(D). See also Anton Decision at 9-10. Any negative impacts or reasonably foreseeable future harm from that development are more properly considered under Element 2 of Ground I, rather than under this element.[16] Accordingly, I find that the proposed activity satisfies Element 1 of Ground I because it furthers one or more of the CZMA's objectives or purposes.

2. Element 2: The Activity Will Not Cause Individual and Cumulative Adverse Coastal Effects Substantial Enough to Outweigh Its Contribution to the National Interest

To satisfy Element 2, I must find that the proposed activity's adverse effects on the natural resources or land and water uses of the coastal zone are not substantial enough to outweigh its contribution to the national interest. 15 C.F.R. § 930.121(b). To do so, I must first determine what adverse effects the activity will have on the coastal zone and what the activity will contribute to the national interest. I then must determine whether the activity's adverse effects, if any,

---

15 See also Lake Gaston Decision at 20.

16 See Decision and Findings in the Consistency Appeal of Chevron U.S.A., Inc. 7 (January 8, 1993) (Chevron Destin Dome Decision).

outweigh the national interest contribution, if any. As indicated in section II, above, I base my decision on the information contained in the administrative record of this appeal.

A. Adverse Coastal Effects

The adverse effects of the proposed activity must be analyzed both in terms of the activity itself, and in terms of its cumulative effects. That is, I must look at the activity in combination with other past, present, and reasonably foreseeable future activities affecting the coastal zone. See Lake Gaston Decision at 21-22.

In this case, the coastal resource at issue is the wetland area on the Appellant's property. In evaluating the adverse effects of the activity, relevant factors include the quantity of wetland loss, the nature of the wetland loss, and the effects of the wetland loss on the remaining ecosystem. See Fuller Decision at 10; Anton Decision at 6. Similarly, the mitigation worksheet provided by the Corps identified the following factors for consideration: the dominant effect of the activity,[17] the lost wetland values, the duration of effects, the location of the activity, and the area of impact. See Attachment D.

The Appellant's proposal to fill wetlands appears to follow similar actions taken by his neighbors and others in the surrounding area. As Robert Mikell, OCRM Director of Planning and Federal Certification, stated: "At one time the wetland was probably much larger in size, but urban development has resulted in the area being reduced to this area of approximately 2.2 acres in size."[18] State's Initial Brief, Exhibit 6. Attachments A and B identify the Appellant's property (lots 22 and 23) in relation to Surfside Beach. Attachment B indicates that the Appellant's property is part of a larger series of lots one-half block from business Highway 17. A structure is located on adjacent lot 21 to house a business known as Lube City. Id. at 1. While the collection of lots 21-25, together, apparently contain 2.2 acres of isolated

---

17 The Corps' wetlands mitigation worksheet (Attachment D) identifies the following activities and grades their adverse effects on wetlands in order of greatest to mildest: fill, drain, dredge, flood, clear, or shade wetlands. The Appellant's proposal to fill wetlands would result in their loss rather than their partial impairment.

18 Since the issuance of the initial decision, South Carolina has stated its belief that this filling may have occurred prior to the enforcement of wetland regulations and South Carolina's consistency review of Clean Water Act section 404 permits.

wetlands,[19] the record also indicates that the owners of neighboring property (lots 21, 24, and 25) elevated their lots[20] above the natural grade through the placement of fill. See Appellant's Initial Brief at 1-2. While there is a catch basin at Highway 17 that is supposed to drain the area, the natural water drainage has continued to change since the placement of fill material on the adjacent property, and has interfered with water drainage from the Appellant's property. See Id. Finally, in 1987, the Appellant was permitted to cut, clear, and clean underbrush from his property. Notice of Appeal at 2.

Nevertheless, the Appellant's activity would remove the wetlands on his property. Among other things, these wetlands collect and assimilate stormwater from adjacent property. The State asserts that "[t]hese wetlands are valuable habitat, provide stormwater functions, serve as hydrologic buffers, and possible aquifer recharge." State's Initial Brief, Exhibit 6.

The Federal agency comments on this appeal were minimal. The FWS and NMFS did not respond to the agency's request for comments. EPA responded that it had no comments regarding the appeal. See Letter from Robert Perciasepe, EPA, to Roger Eckert, NOAA, December 4, 1996. However, the Corps stated: "We are not aware of any basis for recommending that the Commerce Department override the determination made by the South Carolina Department of Health and Environmental Control's Office of Ocean and Coastal Resource Management." Letter from Lance D. Wood, Corps, to Roger B. Eckert, NOAA (December 2, 1996). The Corps provided no further explanation.

To analyze the cumulative adverse effects, I must look at the activity in combination with other past, present, and reasonably foreseeable future activities affecting the coastal zone. Lake Gaston Decision at 21-22. The Appellant asserts that the cumulative impacts of his activity are non-existent. OCRM Appeal at 5. He asserts that allowing economic use of wetlands in a developed area is sound policy. Id.

I agree with the State that the project will cause adverse cumulative impacts.[21] As indicated above, the commercial development of the area

---

19 State's Initial Brief, Exhibit 5 (Thompson Affidavit); Attachment C.

20 Subsequent to the issuance of the initial Secretarial decision in this matter, South Carolina stated its belief that only lots 21 and 25 were elevated, and that only a portion of those lots was elevated.

21 Since the issuance of the initial Secretarial decision in this matter, the State has stated its belief that one probable impact is that the owners of additional lots remaining in the wetland may request

has reduced the larger wetlands to an isolated 2.2 acre area. It is reasonable to conclude that past activities in the coastal zone at Surfside Beach have resulted in wetland loss that increases the need to preserve remaining wetlands. The value of preserving these wetlands, however, is a factor of, in part, their size, nature, and location.

The Appellant has proposed to compensate for the loss of the 0.6 acres of wetlands that would be filled by purchasing mitigation credits in a wetland mitigation bank known as Vandross Bay Mitigation Bank.[22] While the State has determined that its coastal management policies prevent it from considering the Appellant's offer of mitigation,[23] I am able to consider this aspect of the Appellant's proposal. The Vandross Bay Mitigation Bank provides an established mechanism for mitigating wetland losses. The amount of mitigation was determined using a worksheet provided by the Corps that considered the dominant effect of the activity (fill), the lost wetland values, the duration of effects, the location of the activity, and the area of impact. See Attachment D; Brief of Appellant in Response to Inquiry of Secretary of Commerce, at 2-3. The Appellant asserts that his proposed mitigation measure will preserve approximately 2.85 acres of wetlands, which will have a higher value for wildlife habitat and environmental protection than the 0.6 acres proposed to be filled. Brief of Appellant in Response to Inquiry of Secretary of Commerce, at 2-3. The Appellant argues that his mitigation proposal will minimize any adverse environmental impacts of his activity. OCRM Appeal at 5. The State offered no argument or facts contrary to the Appellant's assertion. In fact, the State noted that for activities where its coastal management program allowed the consideration of wetlands offsets, credits from the Vandross Bay Mitigation Bank have been allowed for approved projects. Letter from Mary D. Shahid, OCRM, to Roger Eckert, NOAA (July 22, 1997).

Based on all of the materials in the record, those submitted by the Appellant, OCRM, and the Federal agencies, I find that the Appellant's proposed activity, including the Appellant's proposed mitigation measure, will cause minimal individual and cumulative adverse effects on

---

permits to fill the remaining wetlands.

22 The Appellant states that the Vandross Bay Mitigation Bank is a restoration and enhancement mitigation bank project that sells credits that are treated by the Corps as non-preservation. See Brief of Appellant in Response to Inquiry of Secretary of Commerce, at 2.

23 See State's Initial Brief, Exhibit 6. OCRM stated, however, that the purchase of credits from the Vandross Bay Mitigation Bank is one of the available mitigation options approved in other projects. See letter from Mary D. Shahid, OCRM, to Roger B. Eckert, NOAA, July 22, 1997.

the natural resources of South Carolina's coastal zone as a result of the filling of wetlands. Among other things, these wetlands collect and assimilate stormwater from adjacent property. I also find that the Appellant has offered to mitigate these impacts of the fill of these wetlands through an established procedure that considers factors established by the Corps. The Corps worksheet demonstrates that some measure of mitigation will occur.[24] I believe that, as mitigated, the activity will have minimal individual and cumulative adverse effects on coastal wetlands.

B. Contribution to the National Interest

The national interests to be balanced in Element 2 are limited to those recognized in or defined by the objectives or purposes of the CZMA. See Lake Gaston Decision at 34. The CZMA identifies two broad categories of national interest to be served by proposed activities. The first is the national interest in preserving and protecting natural resources of the coastal zone. The second is encouraging development of coastal resources. See CZMA §§ 302 and 303.

Again, there were few Federal agency comments to consider. The FWS, NMFS, and EPA had no comments regarding the appeal.[25] Only the Corps stated that it was not aware of any basis for recommending a Secretarial override. None of the Federal agencies commented specifically on whether the activity contributed to the national interest for purposes of Element 2.

As indicated in the discussion of Element 1, above, OCRM's position is that the activity contravenes the objectives and policies of the CZMA. While I agree that the activity will not further the national interest

---

24 Since the issuance of the initial Secretarial decision, OCRM has stated that this mitigation is much smaller than that which has been required for similar projects that impact isolated wetlands of greater than one acre in size.

25 After issuance of the initial Secretarial decision, South Carolina provided its explanation for the lack of response by the Federal agencies. According to South Carolina, the lack of response is based on the good working relationship between State and Federal agencies in the coastal zone. According to South Carolina, FWS and NMFS as a matter of practice do not provide comments on small wetland fill projects. Instead, South Carolina states that the Federal agencies trust the State will properly administer the wetland alteration policies of the Coastal Zone Management Act. However, as noted in footnote 9, the record in the instant case is closed, and I, therefore, have not considered this argument.

in preserving and protecting natural resources of the coastal zone, I also note that the CZMA reflects a competing national interest in encouraging development of coastal resources.

In Element 1, I found that the Appellant's activity furthers one or more objectives of the CZMA. Specifically, I found that the activity will promote economic development and will be located in an area of other economic development. See CZMA § 303(2) and § 303(2)(D). After considering the scope and nature of the Appellant's activity, I conclude that the Appellant's activity will make a minimal contribution to the national interests identified in the CZMA. See also Anton Decision at 9-10.

C Balancing

In Element 2, an activity's adverse coastal effects are weighed against its contribution to the national interest. In this case, I found that the Appellant's proposed activity, including his mitigation offset, will cause minimal adverse effects on the natural resources of the coastal zone. I also found the proposed activity will have a minimal contribution to the national interest.

The Appellant asserts:

> [T]he balance favors the development of areas in the coastal zone of questionable or limited ecological value so that ecologically productive areas may be preserved. Moreover, in this case the cumulative impacts will be non-existent; not only is the area to be filled a wetland of marginal utility located in an already heavily-developed area, but it will be counterbalanced by mitigation.

Appellant's Initial Brief at 9. The Appellant states that the activity will allow for development in an urban area through alteration of marginal wetlands, offset by mitigation for the wetland loss. Notice of Appeal at 4. The Appellant points to similar, prior instances in which OCRM allowed the balance to tip in favor of development. Appellant's Initial Brief at 9. The Appellant asserts that these other cases involved the filling of isolated wetlands of one acre or less in total size, or the filling of larger tracts of land in situations where the wetland master planning policies have been applied. Notice of Appeal at 5. As stated above, however, it is not my role to review OCRM's judgment on this point.

While the balancing in Element 2 is necessarily a case-specific inquiry and bound by the administrative record for an appeal, the five prior consistency appeal decisions that addressed Element 2 and involved

impacts to wetlands provide precendents.[26] In each of these prior cases, Element 2 was not satisfied, based on their facts and administrative records. When considering the Appellant's offer of mitigation, his activity will have relatively fewer adverse coastal effects vis-a-vis the Element 2 balancing than the activities in these five prior cases.

Of the prior cases that addressed Element 2 and involved impacts to wetlands, the facts in the Anton Decision are most similar to the pending matter. In the Anton case, Mr. Anton, the Appellant, proposed to fill 0.76 of an acre of wetlands for the purpose of commercial development, and to create 0.56 of an acre of wetlands elsewhere on the property. Anton Decision at 1. The activity in the Anton case would adversely affect water quality in a nearby, highly productive estuary. Mr. Anton presented no evidence on the effectiveness of the mitigation, Id. at 6, whereas in the pending matter, the Vandross Bay Mitigation Bank provides an established mechanism for mitigating wetland losses based on a worksheet provided by the Corps.[27] In addition, the record of the Anton appeal reflected concerns about Mr. Anton's project by the FWS and NMFS, see Id. at 7-8, whereas in the pending matter, the record does not contain any comments of the FWS and NMFS relevant to the Appellant's activity.

In balancing the activity's individual and cumulative coastal effects against its contribution to the national interest, and in accordance with the foregoing analysis, I find that the minimal adverse coastal effects of the proposed activity are not substantial enough to outweigh the activity's minimal contribution to the national interest. See 15 C.F.R. § 930.121(b). This finding is based on the administrative record, which includes the factual circumstances presented in this case and the offer of mitigation. Accordingly, the Appellant has satisfied Element 2.

3 Element 3: Activity Will Not Violate the Clean Water Act or the Clean Air Act

The CZMA incorporates the requirements of the Federal Water Pollution

---

26 See Decision and Findings in the Consistency appeal of Henry Crosby, (Crosby Decision), December 29, 1992; Fuller Decision; Heniford Decision; Anton Decision; Decision and Findings in the Consistency Appeal of Michael P. Galgano, (Galgano Decision), October 29, 1990.

27 As noted above, OCRM did not consider the Appellant's offer of mitigation in evaluating his activity.

Control Act (Clean Water Act or CWA) and the Clean Air Act (CAA)[28] into all state coastal management programs. See CZMA § 307(f). To satisfy Element 3 of Ground I, the activity must not violate either of these Federal statutes. Previous consistency appeal decisions have concluded that the existence of necessary permits is sufficient to meet the requirements of Element 3.[29]

I am persuaded that the Appellant will not violate the Clean Water Act or the Clean Air Act because he cannot proceed with his activity except in compliance with the CWA and CAA. The South Carolina Department of Health and Environmental Control - Environmental Quality Control, waived water quality certification and review of the project. Appellant's Initial Brief at 10. In its comments on this appeal, OCRM stated that the construction of a mini-storage facility on the Appellant's property will not violate either the CWA or the CAA. State's Initial Brief at 5. The EPA provided no comments on the appeal. The proposed activity, therefore, satisfies Element 3 of Ground I.

4. Element 4: No Reasonable, Consistent Alternatives Available

To satisfy Element 4, I must find 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 [South Carolina's] management program." 15 C.F.R. § 930.121(d). When a state is objecting to an activity as being inconsistent with the State's coastal management program, the state is required to propose alternative measures (if they exist) which would permit the activity to be conducted in a manner consistent with its coastal management program. 15 C.F.R. § 930.64(b). In this case, the State Objection Letter states simply that OCRM has not been able to identify any alternatives to the proposed activity.[30] In addition, the Appellant stated that the environmental review made by OCRM staff indicated that there were no feasible

---

28 See 15 C.F.R. § 930.121(c). See also the Federal Water Pollution Control Act, as amended (Clean Water Act or CWA), 32 U.S.C. §§ 1341 & 1344 and the Clean Air Act, as amended, 42 U.S.C. §§ 7401 et seq.

29 See Decision and Findings in the Consistency Appeal of Union Exploration Partners, Ltd. 31-33 (January 7, 1993) (Unocal Pulley Ridge Decision), citing Decision and Findings in the Consistency Appeal of Chevron U.S.A., Inc. 57 (October 29, 1990) (Chevron Decision).

30 Subsequent to the issuance of the initial Secretarial decision, South Carolina has stated its belief that its Objection Letter contained an implied, "no action" alternative.

alternatives to the activity.[31] In its comments on the appeal, OCRM stated that there is no reasonable alternative to make this project consistent with the State's coastal management program. State's Initial Brief at 6. Accordingly, I find that there are no reasonable, available alternatives which would permit the Appellant's proposed activity to be conducted in a manner consistent with the State's coastal management program, and that the Appellant has satisfied Element 4 of Ground I.

V. Conclusion

In summation, I made the following findings on Ground I. First, the Appellant's proposed activity furthers one or more of the competing national objectives or purposes of the CZMA by minimally contributing to the national interest in economic development of the coastal zone. Second, the proposed activity including the Appellant's mitigation measure will have minimal individual and cumulative adverse effects on coastal wetlands. These minimal adverse coastal effects based on this record are not substantial enough to outweigh the activity's minimal contribution to the national interest in economic development of the coastal zone. Third, the proposed activity will not violate the requirements of the CWA or the CAA. Fourth, there is no reasonable alternative available to the Appellant that would permit the activity to be conducted in a manner consistent with South Carolina's coastal management program.

I hereby find, for the reasons stated above, that the proposed activity is consistent with the objectives and purposes of the CZMA. Accordingly, the Corps may issue the permit for the activity, provided the mitigation measures offered by Appellant are included as permit conditions. Of course, the Corps may impose more restrictive or protective conditions on the activity. This decision does not enable the Corps to license or permit any other activity.

Secretary of Commerce

---

31 OCRM Appeal at 5. The Appellant further stated that he has no other land available and that if the state's certification is denied, he will lose his entire investment and any practical use of the property. Id.