DECISION AND FINDINGS

IN THE

CONSISTENCY APPEAL OF

EXXON COMPANY, U.S.A.

FROM AN

OBJECTION BY THE NEW JERSEY

DEPARTMENT OF ENVIRONMENTAL PROTECTION

JUNE 14, 1989

SYNOPSIS OF DECISION

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

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

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

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

Ground I

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

Conclusion

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

DECISION

I. Background

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

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

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

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

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

II. Appeal to the Secretary of Commerce

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

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

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

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

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

III. Jurisdictional and Procedural Issues

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

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

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

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

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3 See infra p. 7.

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

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

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

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

State's Response to Appeal at 24-25.

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

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

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[5] See supra pp. 1-2.

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

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

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

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

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

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

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

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6 See supra pp. 1-2.

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

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

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

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

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

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

IV. Grounds for Sustaining an Appeal

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

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

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

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

V. Element Two

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

A. Adverse Effects

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

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

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

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

The EIR, in describing the location of the proposed project, also acknowledges the presence of forest trees with little shrubbery or undergrowth. Aside from this brief mention of the vegetation on the site, the EIR does not discuss any effects on habitat that might result from filling the wetlands.

In counter-argument, the State maintains that the proposed project would destroy a wetland that provides wildlife habitat and helps to sustain the food chain, improve water quality, and prevent flooding. Citing comments submitted by the U.S. Fish and Wildlife Service (FWS) and the Environmental Protection Agency (EPA) to the Corps, the State offers the following remarks on the environmental effects of the proposed development:

> Here, the filling of the subject wetlands would quite simply destroy that wetland habitat. The Fish and Wildlife Service found this wetland area "provides excellent habitat for wildlife," including birds, reptiles, amphibians and various small mammals. In addition, it found this forest wetlands area benefits the aquatic community by performing various functions "such as food chain support, water quality purification and flood prevention." (Exhibit I, attached hereto). Moreover, it found that these habitats are scarce or becoming scarce and have high value for wildlife. Similarly, the EPA concurred with the Fish and Wildlife Service in objecting to the issuance of an Army Corps permit because the filling of wetlands would be environmentally damaging and alternatives appeared practicable (Exhibit J, attached hereto).

State's Response to Appeal at 15.

In addition to the parties' submittals, the record contains relevant views of three of the four Federal agencies that commented on this appeal.[7] The National Marine Fisheries Service (NMFS) states:

> The applicant proposes to fill approximately 7,592 square feet of palustrine forested wetlands for the purpose of constructing a service station. A staff biologist visited the project site on November 20, 1986. The wetlands are vegetated with white cedar, red maple, black gum, highbush

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[7] See supra note 2 and accompanying text.

> blueberry, sweet pepperbush, as well as other wetland species, and drain directly into the estuarine wetlands of Barnegat Bay. These wetlands help purify water entering Barnegat Bay by retaining excess nutrients and other pollutants from upland sources, and should be protected from destruction if possible.
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> The applicant's plans seem to indicate that the wetlands would be filled to provide a second entrance to the proposed service station from Fis[c]her Boulevard. However, it appears that sufficient uplands are available to construct a service station, including a single entrance on Fis[c]her Boulevard, without impacting the wetlands.
>
> Because the applicant has not demonstrated that it is absolutely necessary to destroy wetlands in order to construct a service station, we recommend that the permit application be denied.

Letter from Stanley W. Gorski, Assistant Branch Chief, Management Division, Habitat Conservation Branch, Northeast Region, NMFS, to Lt. Col. Ralph V. Locurcio, District Engineer, Philadelphia District, U.S. Army Corps of Engineers, November 26, 1986.

EPA echoes the points made by the NMFS about wetlands' beneficial impact on water quality:

> Over half of our nation's wetland[s] have been eliminated during the past 200 years. Cumulative impacts of wetlands' destruction are a major policy concern to EPA and we have focused multi-year research efforts to more clearly delineate cumulative impacts of wetlands losses. In addition, EPA believes a close synergism exists between wetlands in coastal areas and water quality in nearby estuarine waters. Part of EPA's Near-Coastal Waters strategy calls for increased protection of wetlands in these fragile and overstressed coastal areas. Some 70% of our population lives within 100 miles of our coasts and the Great Lakes. The dwindling coastal wetlands are becoming more vulnerable as population pressures increase.
>
> In this case, EPA has identified adverse effects from the filling of the wetlands associated with the Appellant's construction site. In his letter of December 8, 1986 (enclosed), EPA Regional Administrator Christopher Daggett advised the Corps District Engineer that EPA opposed permit issuance based on the availability of less environmentally damaging alternatives, which could involve restricting construction to the upland portion of the site or acquisition of adjacent upland.

Letter from Jennifer Joy Wilson, Assistant Administrator for External Affairs, EPA, to William E. Evans, Under Secretary for Oceans and Atmosphere, Department of Commerce, August 16, 1988.

The FWS, in comments on this appeal, has expressed concerns about the project's destruction of wildlife habitat:

> The Service's field office in Absecon, New Jersey, provided the Department of the Interior's comments on the public notice for the Section 404 permit to the U.S. Army Corps of Engineers (Corps) on December 3, 1986. The Service advised the Corps that the wetlands provided excellent habitat for wildlife and recommended that impacts to the wetlands be avoided by implementing less environmentally damaging alternatives on and off site.

Letter from Frank Dunkle, Director, FWS, to Sydney Anne Minnerly Attorney-Adviser, NOAA, August 5, 1988.

In sum, a review of the submissions to the record by the parties and the Federal agencies commenting on this appeal reveals the identification of two potentially adverse environmental effects that would result from the Appellant's proposed project: (1) decline in water quality and (2) destruction of wildlife habitat. With respect to the decline in water quality, the record contains conflicting evidence.

On the one hand, the Appellant has submitted an EIR that concludes that the wetlands in question are not functioning normally, and, therefore, do not contribute to the improvement of water quality as would normally functioning wetlands. By contrast, three Federal resource management agencies have concluded that the wetlands in question do contribute to improving water quality in the area. On balance, I conclude that the weight of the evidence presented on the question of the impacts of the proposed development on water quality dictates my finding that the project will affect adversely the water quality of the area.

Regarding the effect on wildlife habitat, the evidence is uncontradicted. As discussed above, several commenters have acknowledged the presence of trees and other vegetation, and have stated that the filling of these wetlands would destroy wildlife habitat. Despite an opportunity to respond to this evidence by filing a reply brief, the Appellant has not provided any evidence to contradict the foregoing conclusions. I find, therefore, that the proposed project will affect adversely the environment by destroying habitat.

B. Contribution to the National Interest

With respect to the proposed project's contribution to the national interest, the Appellant argues that the service station meets needs for economic development, Appellant's Brief at Exhibit A, and helps to satisfy transportation needs of New Jersey's and the Nation's citizens, id. at 20. The State, on the other hand, maintains that, while the project may serve some transportation needs, its contribution to the national interest is minimal. State's Response to Appeal at 16.

NMFS has expressed views similar to the State's: "Since wetlands have recognized values to the nation, filling wetlands to construct an extra gas station exit ramp seems to have little overriding national interest." Memorandum from Richard B. Roe, Director, Northeast Region, NMFS, to James W. Brennan, Assistant Administrator for Fisheries, NMFS, July 29, 1988.

Moreover, the comments of EPA discussed above with respect to adverse environmental effects demonstrate EPA's concern for preservation of the Nation's wetlands. I believe it reasonable to infer from those comments that EPA concludes that wetlands contribute positively to the national interest.

The FWS also refers to its concern for protection of the country's wildlife habitat. In its comments to the Corps on the Appellant's permit application, it stated, in relevant part:

> The proposal is inconsistent with maintenance of fish and wildlife resources, as well as Federal agency policies intended to protect those resources. It is Service policy to discourage filling of wetlands, especially where the proposed use is non-water dependent and could be accommodated on an upland site.
>
> Therefore, the Service recommends that a permit for the project, as proposed, be denied as not being in the public interest.

Letter from Charles J. Kulp, Field Supervisor, FWS, to Lt. Colonel Ralph V. Locurcio, District Engineer, Philadelphia District, Corps, Dec. 3, 1986 (included in this appeal record as Exhibit I to State's Response to Appeal).

An examination of the foregoing comments by NMFS, EPA, and FWS reveals that the three agencies are unanimous in their opinion that the proposed filling of wetlands in this case would detract from, rather than contribute to, the national interest by eliminating wetlands that improve water quality and provide wildlife habitat.

As decided in a previous consistency appeal:

> The national interests to be balanced in Element Two are limited to those recognized in or defined by the objectives or purposes of the Act. In other words, while a proposed activity may further (or impede) a national interest beyond the scope of the national interests recognized in or defined by the objectives or purposes of the Act, such a national interest may not be considered in the balancing.

Decision and Findings of the Secretary of Commerce in the Consistency Appeal of the Korea Drilling Company, Ltd. from an Objection by the California Coastal Commission, Jan. 19, 1989, at 16. Among the CZMA's numerous objectives are two that the Appellant's proposed project furthers indisputably: (1) "needs for economic development," § 303(2), and (2) "the location, to the maximum extent practicable, of new commercial ... developments in or adjacent to areas where such development already exists," § 303(2)(C). Nevertheless, I am persuaded by the State's contention that the project would contribute minimally to these national interests. This conclusion is consistent with this Department's finding in an earlier appeal decision. See Decision of the Secretary of Commerce in the Consistency Appeal of Ford S. Worthy to an Objection from the North Carolina Department of Natural Resources and Community Development, May 9, 1984, at 10 (the addition of a single boating marina would contribute minimally to the national interest in increasing recreational boating opportunities in the coastal zone).

C. Balancing

Above, I found that the Appellant's proposed project would affect adversely the natural resources of the coastal zone by eliminating wetlands that improve water quality and provide wildlife habitat. In addition, I found that the proposed activity's contribution to the national interest would be minimal. I now find, therefore, that the proposed activity's adverse effects on the natural resources of the coastal zone would outweigh the project's contribution to the national interest. Accordingly, the proposed project has failed to satisfy Element Two.

Conclusion

Because the Appellant must satisfy all four elements of the regulation in order for me to sustain its appeal, failure to satisfy any one element precludes my finding that the Appellant's project is "consistent with the objectives or purposes of the [CZMA]." Having found that the Appellant has failed to satisfy the second element of the regulation, it is unnecessary to

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

Under Secretary for Oceans
and Atmosphere