

DECISION AND FINDINGS
IN THE
CONSISTENCY APPEAL OF
MICHAEL P. GALGANO FROM
AN OBJECTION BY THE
NEW YORK DEPARTMENT OF STATE
OCTOBER 29, 1990

SYNOPSIS OF DECISION

Appellant owns an approximately 42,000 square foot residential parcel. The parcel is split into a northern and southern section by Cobb Isle Road which is a private road. The northern section of the parcel is improved with a single family residence. The southern section of the parcel is unimproved and is bounded to the north by Cobb Isle Road and to the south by Meyers Pond. Appellant proposes to construct and install a timber bulkhead with backfill along the southern boundary of his property which abuts Meyers Pond. Installation of the bulkhead would involve the placement of approximately 65 cubic yards of fill and would eliminate approximately 1400 square feet of vegetated wetland in the littoral zone.

Pursuant to § 404 of the Federal Water Pollution Control Act, as amended, (FWPCA), 33 U.S.C. § 1344, Appellant applied to the U.S. Army Corps of Engineers (Corps) for a permit to install the bulkhead with backfill. In compliance with Section 307 (c)(3) (A) of the Coastal Zone Management Act of 1972, as amended (CZMA), in his application to the Corps, Appellant certified that his project complied with and would be conducted in a manner consistent with the federally approved New York Coastal Zone Management Program.

On June 10, 1988, the New York Department of State (State) objected to Appellant's project on the grounds that the project will result in the loss of valuable wetlands and fish and wildlife habitats, and, consequently is inconsistent with the State Coastal Management Plan. Under CZMA Section 307(c)(3)(A) and 15 C.F.R. Section 930.131, 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) finds that the activity, notwithstanding the State's objection, is either consistent with the objectives or purposes of the CZMA (Ground I), or otherwise necessary in the interest of national security (Ground II). If the requirements of either Ground I or Ground II are met, the Secretary must override the State's objection.

On July 14, 1988, in accordance with CZMA section 307(c)(3)(A) and 15 C.F.R. Part 930, Subpart H, counsel for Appellant filed with this Department a notice of appeal from the State's objection to Appellant's consistency certification for the proposed project. Appellant has only argued the first ground for Secretarial override of the State's objection. Upon consideration of the information submitted by Appellant, the State and several Federal agencies, the Secretary made the following findings pursuant to 15 C.F.R. Section 930.121:

Ground I

Appellant's proposed project which will require the filling and bulkheading of wetlands is not consistent with the objectives of the CZMA.

Conclusion

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

DECISION

I. Background

Michael P. Galgano (Appellant) owns an approximately 42,000 square foot residential parcel. The parcel is split into a northern and southern section by Cobb Isle Road, which is a private road that runs easterly from Cobb Road in Water Mill, Town of South Hampton, Suffolk County, New York. Appellant's Brief at 1. The northern section of the parcel is improved with a single family residence. *Id.* The southern section of the parcel is unimproved and is bounded to the north by Cobb Isle Road and to the south by Meyers Pond. *Id.* Meyers Pond is a tributary of Mecox Bay which is connected to the Atlantic Ocean through the intermittent opening of Mecox Inlet. Appellant's Response Brief Exhibit #4.

Appellant proposes to construct and install a timber bulkhead with backfill along the southern boundary of his property which abuts Meyers Pond. Appellant's Brief at 1. The bulkhead would connect with an existing bulkhead at the west end of Appellant's southern property line and run in a easterly direction along the mean low water mark¹ of Meyers Pond, approximately 168.5 feet, and continue for an additional 30 feet along the contiguous properties of Brown and Rosenberg². Appellant's Brief at 1-2. Installation of the bulkhead would involve the placement of approximately 65 cubic yards of fill and would eliminate approximately 1400 square feet³ of vegetated wetland in the littoral zone. State's Brief at 2; Appellant's Exhibit # 4. Appellant contends that the bulkhead is necessary to prevent the

1. Appellant's original application proposed locating the bulkhead at the mean high water line which is approximately 3.5 feet from the edge of Cobb Isle Road. The revised application, which is the subject of this appeal, places the location of the proposed bulkhead at approximately 11 feet from the edge of Cobb Isle Road which is the mean low water line.

2. Brown and Rosenberg have approved and given their consent to the installation of the bulkhead.

3. The evidence regarding the amount of area to be filled is contradictory. The State defines the area as 1200 square feet. State's Brief at 2. The Appellant defines the area as 1500 feet. Appellant's Reply Brief at 8. In the light of this discrepancy, for purposes of this appeal I will operate under the premise that the area proposed to be filled is approximately 1400 feet which is the defined area to be filled in the public notice which announced Appellant's application. Appellant's Exhibit #4.

continued erosion of his property and the threatened erosion of Cobb Isle Road. Cobb Isle Road is the only means of ingress and egress for 14 homeowners on Cobb Isle Road. Appellant's Brief at 3.

Pursuant to § 404 of the Federal Water Pollution Control Act, as amended, (FWPCA), 33 U.S.C. § 1344, Appellant applied to the U.S. Army Corps of Engineers (Corps) for a permit to install the bulkhead with backfill. In his application to the Corps, Appellant certified that his project complied with and would be conducted in a manner consistent with the federally approved New York Coastal Management Program (NYCMP).⁴ State's Exhibit #1. Appellant also applied to the New York State Department of Environmental Conservation (DEC) for a tidal wetlands permit to construct the bulkhead. State's Brief at 3.

On June 10, 1988, the New York Department of State, Division of Coastal Resources and Waterfront Revitalization (State), objected to Appellant's consistency certification for the proposed project. State's Exhibit J. The State contends that the construction and installation of the timber bulkhead with backfill will result in the loss of valuable wetlands and fish and wildlife habitats and, consequently, is inconsistent with NYCMP policies 7 and 44. Letter from George R. Stafford, Director, Division of Coastal Resources and Waterfront Revitalization, New York Department of State, to Michael Galgano, June 10, 1988. NYCMP policies 7 and 44 provide, respectively, for the protection and preservation of significant coastal fish and wildlife habitats, and the preservation and protection of tidal and fresh water wetlands. In addition to explaining the basis of its objection, the State also notified Appellant of his right to appeal the State's decision to the Department of Commerce (Department) as provided under the Coastal Zone Management Act (CZMA or the Act) Section 307(c)(3)(A) and 15 C.F.R. Part 930, Subpart H. *Id.* Pursuant to CZMA Section 307(c)(3)(A) and 15 C.F.R. § 930.131, the State's consistency objection precludes the Corps from issuing any permit or license necessary for Appellant's proposed activity to proceed unless the Secretary of Commerce (Secretary) finds that the activity, notwithstanding the State's objection, is either consistent with the objectives or purposes of the CZMA, or otherwise necessary in the interests of national security.

4. That consistency statement defined the project as involving an 168.5 foot bulkhead rather than the 198.5 foot bulkhead as defined in Appellant's revised application. This discrepancy does not, however, appear to have affected the state's objection in this case.

II. Appeal to the Secretary of Commerce

On July 14, 1988, in accordance with CZMA section 307(c)(3)(A) and 15 C.F.R. Part 930, Subpart H, counsel⁵ for Appellant filed with this Department a notice of appeal from the State's objection to Appellant's consistency certification for the proposed project. Letter from John P. Mahon, Esquire, to William E. Evans, Under Secretary for Oceans and Atmosphere, July 8, 1988. Appellant's notice of appeal requested a sixty-day extension to file additional supporting information and data. That request was granted. On August 12, 1988 the Secretary delegated to the Under Secretary the authority to decide this appeal. On August 25, 1988, Appellant requested, and was granted, a six-month stay of the appeal which expired on March 25, 1989. Letter from William E. Evans, Under Secretary for Oceans and Atmosphere, to John P. Mahon, Counsel to Michael P. Galgano, October 5, 1988. Upon conclusion of the stay, Appellant requested and was granted an extension of time to file his brief. Letter from William E. Evans, Under Secretary for Oceans and Atmosphere, to John P. Mahon, April 17, 1989. The State also requested and was granted an extension of time to file its brief. Letter from William E. Evans, Under Secretary for Oceans and Atmosphere, to George R. Stafford, June 8, 1989. Appellant's brief was timely filed with the Department on May 10, 1989. The State's brief was timely filed with the Department on July 5, 1989.

When Appellant perfected the appeal by filing a brief and supporting information and data pursuant to 15 C.F.R. § 930.125, public notices soliciting comments on issues pertinent to the appeal were published in the Federal Register, 54 Fed. Reg. 109, 24576-77(1989) (request for comments), and the Albany Times Union (June 8-11, 1989). No public comments were received.⁶ On June 26, 1989, the Department solicited the views of four federal agencies⁷ on the four regulatory criteria that Appellant's proposed project must meet for it to be found consistent with the

5. Although John P. Mahon initiated this appeal on the behalf of Appellant, Appellant now represents himself in this appeal.

6. Although no public comments were received in response to the public notice, Appellant has submitted, as an exhibit with his brief, a March 14, 1988 letter from the Cobb Isle Association, Inc. to Andrew J. Milliken of the New York Department of State, in support of his proposed project.

7. These agencies were the Army Corps of Engineers, the Department of Interior Fish and Wildlife Service, the Environmental Protection Agency, and the National Fisheries Service.

objectives and purposes of the CZMA. These criteria are defined in 15 C.F.R. § 930.121. All the agencies except the National Marine Fisheries Service responded.

After the period for public and federal agency comments expired, the Department provided the parties with a final opportunity to respond to any submittal filed in the appeal by September 22, 1989. Both Appellant and the State submitted response briefs. All documents and information received by the Department during the course of the appeal have been included in the administrative record. I have considered the documents only as they are relevant to the statutory and the regulatory grounds for deciding consistency appeals, and for compliance with the regulations governing the conduct of such appeals.

III. Grounds for Sustaining an Appeal

Section 307(c)(3)(A) of the CZMA provides that the Federal permit required for Appellant's proposed activity may not be granted until either the State concurs in the consistency of such activity with its Federally-approved coastal zone management program, or the Secretary finds that the activities are (1) consistent with the objectives of the CZMA or (2) otherwise necessary in the interest of national security. See also 15 C.F.R. § 930.130(a). Appellant has argued only the first ground.⁸

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. § 930.121. 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).
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).

8. As a preliminary argument Appellant contends that the State of New York's Division of Coastal Resources and Waterfront Revitalization has denied him his "right of due process" by not affording him a right to appeal the division's decision to the New York Department of State. Appellant's argument appears to be that he was not permitted to exhaust his state remedies prior to the initiation of this appeal. Appellant has, however, failed to submit any authority to support the proposition that a right of appeal from the Division to the Department of State exists. Accordingly, I reject this argument.

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).

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)

Element Two is dispositive of the issues in this case. Accordingly, I turn immediately to that issue.

IV. Element Two

This element requires that I identify the adverse effects of the objected to activity on the natural resources of the coastal zone and then determine whether those effects are substantial enough to outweigh the activities' contribution to the national interest. Decision and Findings of the Secretary of Commerce in the Consistency Appeal of Texaco, Inc., from an objection by the California Coastal Commission, May 19, 1989 at 6. In evaluating the adverse effects of the project on the natural resources of the coastal zone, I must consider the adverse effects of the project by itself and in combination with other past, present, or reasonably foreseeable activities affecting the coastal zone. Id.

A. Adverse Effects

Appellant argues that the site of his proposed project does not involve tidal wetlands or significant fish and wildlife habitat. Accordingly, he contends that his proposed project will not adversely effect the natural resources of the coastal zone and result in the loss of valuable wetlands or habitat area. Alternatively, he argues that even if his project involves tidal wetlands or significant fish and wildlife habitat, his project is defined as a compatible use with these areas pursuant to State law. Appellant further argues that there are sufficient wetlands, marsh areas, and Nature Conservancy lands in the area of his proposed project to offset the effects, if any, of his project.⁹

9. Appellant also contends that he has consented to develop a replanting plan that would mitigate the loss of habitat areas which might result from his proposed project. No such plan or description of the plan was submitted as evidence in this appeal, however, and consequently the effects of such a plan can not be considered on appeal.

The State contends that the site of Appellant's proposed project involves littoral zone and tidal wetlands. As such, the State identifies the primary adverse effect of Appellant's proposed project as the loss of valuable tidal wetlands, and fish, benthic, and wildlife habitat due to the backfill associated with Appellant's proposed bulkhead project. The State contends that the loss of these wetlands is inconsistent with NYCMP policy 44¹⁰ which mandates that tidal wetlands be preserved and protected. Additionally, the State argues that backfill of the area is a presumptively incompatible use pursuant to article 25 of the Environmental Conservation Law (the Tidal Wetlands Act) which implements NYCMP policy 44.¹¹ The State also argues that the site of Appellant's proposed project is "a significant coastal fish and wildlife habitat" and that Appellant's proposed bulkheading and backfill activities would impair the areas' viability as a habitat area and consequently is inconsistent with NYCMP policy 7.

In support of his position that the site of his proposed project does not involve tidal wetlands, Appellant offers several newspaper articles. Those articles explain that the Mecox Bay area waters are spring fed except for three to four times a year when Mecox Inlet is opened to the Atlantic Ocean. In support of his position that the area does not involve significant wildlife habitat and that his proposed project does not adversely effect the natural resources, Appellant offers a April 28, 1988 letter from Phillip Anderson to Appellant. Appellant's Exhibit 5. Mr. Anderson is President of Anderson Environmental, Inc. *Id.* In that letter Mr. Anderson first states that, "the site area concerned is not a significant wildlife habitat due to the narrow (11') width and the minimally productive vegetation." (emphasis

10. New York Coastal Management Program (NYCMP) policy 44 requires that actions in designated wetland areas "[P]reserve and protect tidal and freshwater wetlands and the benefits derived from these areas."

11. The regulatory program associated with the law is contained in New York Code of Rules and Regulations (N.Y.C.R.R.) Title 6 Part 660 and 661.6. N.Y.C.R.R. § 661.5(b)(30) provides that "filling" in an intertidal zone is a "presumptively incompatible use" and that a permit is required to do so. 6 N.Y.C.R.R. § 661.5(a)(3) provides:

(3) Any type of use designated in this section as a "presumptively incompatible use" for the type of area involved shall be presumed not to be compatible with the type of area involved or with the preservation, protection or enhancement of the present and potential values of tidal wetlands if undertaken in that area. Any such use is subject to the permit requirements of this Part.

added) Additionally, Mr. Anderson identifies the site of Appellant's project as wetlands and littoral zone but finds that bulkheading is considered a generally compatible use in these areas.¹²

In support of its position that the site of Appellant's proposed project involves valuable tidal wetlands and fish and wildlife habitat, which would be adversely affected by the project, the State first offers the document and map designating Mecox Bay, Mill Creek, Hayground Cove, Channel Pond, and adjoining wetlands as "significant coastal fish and wildlife habitat" pursuant to Section 915 (5)(9) of the Executive Law and NYCMP policy 7. State's Exhibit B. Meyers Pond is within the designated boundaries of the significant habitat area as identified on the map. The document also states that the entire designated area "is important to a variety of fish and wildlife species throughout the year." The document explains that the area "serves as an important nesting site" for least terns and piping plovers and as a waterfowl wintering area. The document further states that the area provides important habitat for marine finfish and shellfish and contains populations of many estuarine species. Consequently, the document states that within the designated area "[e]limination of salt marsh and intertidal areas, through excavation or filling, would result in a direct loss of valuable habitat area."¹³

The State next offers a letter dated May 13, 1988 by George W. Hammarth, an Environmental Analyst with the Department of Environmental Conservation, to John P. Mahon. State's Exhibit H. In that letter Mr. Hammarth explains that Appellant's proposed project is unacceptable because it will result in the filling of a substantial area of littoral zone and tidal wetlands which will "eliminate spawning area for fish and shellfish as well as destroy the benthic organisms so important to the marine food web." The State also offers the June 30, 1989 affidavit of Michael E. Corey, a Senior Environmental Analyst with the New York Department of State, Division of Coastal Resource and Waterfront Revitalization. State's Exhibit I. Mr. Corey conducted the staff level consistency review of the proposed project. Mr. Corey states that,

12. In support of his position Mr. Anderson cites 6 NYCRR § 661.(b)(29) which provides that construction of a bulkhead in a littoral zone is a "generally compatible use."

13. NYCMP policy 7 provides specifically that, "[s]ignificant coastal fish and wildlife habitats will be protected, and where practical, restored so as to maintain their viability as habitats."

"The area proposed for the bulkhead/backfill project includes open water (littoral zone), intertidal mudflats, intertidal vegetated wetlands, and high marsh between mean high water and spring high water. The filling would result in the direct loss of important intertidal habitat within the State designated Mecox Bay significant coastal fish and wildlife habitat area."

He adds that,

"[i]n addition to the loss of littoral zone and intertidal marsh, the high marsh fringe dominated by reed grass will also be obliterated as a result of this activity. High marsh is similar to intertidal marsh in that it is important in flood and storm control, absorption of silt and organic material, and as wildlife habitat. Based upon these observations, I felt that the proposed bulkhead and backfill were neither reasonable nor necessary. I determined that the project would have adverse impacts on the coastal area. The proposed project will have an adverse effect on fish and wildlife habitat; erosion, flood and storm control; and natural pollution treatment. Constructing a bulkhead with backfill will not result in more natural habitat at this site; rather, it will result in less natural habitat."

In support of its position the State also submits the comments of the United States Army Corps of Engineers (Corps) and the United States Environmental Protection Agency (EPA), regarding the proposed project.¹⁴

The Corps states that based on the standards defined in 15 C.F.R. § 930.121, it has no basis for urging that I override the decision of the New York Department of State. Letter from Lester Edelman, Chief Counsel to Margo E. Jackson, Office of the General Counsel, National Oceanic and Atmospheric Administration, July 28, 1989.

The EPA describes the proposed project as resulting in the elimination of 1200 square feet of shoreline designated by New York as tidal wetland and as an area of "significant fish and wildlife habitat," which consists of littoral area, intertidal marsh, mudflats and shoals. The EPA notes that the area has been identified by the State as being important to migratory birds,

14. The Acting Deputy Director of the Fish and Wildlife Service, indicated that the Service did not review the proposed project and declined the opportunity to comment. Letter from Richard N. Smith, Acting Deputy Director, Fish and Wildlife Service, Department of Interior, to Margo E. Jackson, Attorney-Adviser, Office of General Counsel, National Oceanic and Atmospheric Administration, August 3, 1989.

finfish and shellfish. In regards to the adverse effects of the project, the EPA concludes that, "[t]he available evidence indicates that the proposed project could cause adverse impacts on the natural resources in the area, specifically to the shoreline habitat of Meyers Pond." Letter from Richard E. Sanderson, Director, Office of Federal Activities to B. Kent Burton, Acting Under Secretary for Oceans and Atmosphere, Department of Commerce, August 19, 1989.

Based upon my review of the evidence presented by both parties, I find that the evidence on balance dictates a finding that the site of Appellant's proposed project involves tidal wetlands. I base this finding on the opinions of State Environmental Analyst, George Hammarth and State Senior Environmental Analyst, Michael E. Corey, offered by the State. Both Mr. Hammarth and Mr. Corey visited the site and based upon their expertise concluded that the area involved tidal wetlands. In contrast, I do not find the evidence presented by Appellant on this issue persuasive. Additionally, I find that the site of Appellant's proposed project involves significant coastal fish and wildlife habitat. I base this finding first on the fact that the area has been designated pursuant to the NYCMP and State law as "a significant coastal fish and wildlife habitat." Secondly, I again find persuasive the opinions of Mr. Hammarth and Mr. Corey that the area of the site involves valuable habitat for benthic organisms and wildlife in addition to spawning areas for fish. In contrast, Phillip Anderson's letter, submitted by the Appellant, neither addresses the issue of whether the site involves fish or benthic habitat nor the designation of the area as a "significant coastal fish and wildlife habitat". Additionally, Mr. Anderson never clearly identifies, the status of his credentials as an environmental analyst.

More importantly, I find persuasive the State's evidence regarding adverse effects of the backfill associated with Appellant's project on the natural resources of the coastal zone. Mr. Hammarth, Mr. Corey, and the EPA each, based upon their expertise and a review of the evidence, opined that the backfill associated with the Appellant's project would eliminate valuable fish and wildlife habitats and, consequently, is an unacceptable use of the area.¹⁵ The only evidence Appellant offers to contradict this evidence is the letter by Phillip Anderson. In

15. Although Mr. Hammarth, Mr. Corey, and the EPA each find that the project would have adverse effects on the natural resources of the coastal zone, they also conclude that the construction of the bulkhead at mean high water (approximately 3.5 feet from the edge of the road) rather than mean low water (approximately 11 feet from the road) would be an acceptable alternative in the light of the fact that backfill would not be required under this second scenario.

that letter Mr. Anderson states that bulkheading in a littoral zone is considered a compatible use pursuant to State law. However, whereas, 6 N.Y.C.F.R. Part 661.5(b)(29) provides that the construction of bulkheading alone is considered a generally compatible use in a littoral zone, 6 N.Y.C.F.R. Part 661.5(b)(30) provides that the filling of any type of tidal wetland, including littoral zone is presumptively an incompatible use. As previously discussed, Appellant's proposed project involves in addition to bulkheading the placement of approximately 65 cubic yards of fill which would eliminate approximately 1400 square feet of vegetated wetland in the littoral zone. Consequently, I find that Appellant's project will adversely affect the natural resource of the coastal zone.

Appellant next contends that, regardless of the amount of habitat area that will be eliminated by his project, there exists in the vicinity of his proposed project ample wetlands and habitat area to offset the effects of his project. In support of his position, Appellant again offers the April 28, 1988 letter by Phillip Anderson. Appellant's Exhibit 5. In that letter Mr. Anderson states, "[F]urther since there is a wildlife conservation area further east on Cobb Isle, any migratory or other birds or mammals can quite productively habitat there."

In response, the State offers statements by Michael Corey in his June 30, 1989 affidavit and George Hammarth in his May 13, 1989 letter. Mr. Corey states,

"Much of the Meyers Pond shoreline is now bulkhead, which makes the loss of 168.5 linear feet of natural shoreline and intertidal area even more severe in terms of available natural shoreline habitat."

Mr. Hammarth echoes this concern and adds,

"The waters of the bay are presently polluted enough to allow shellfishing only when the inlet to the Atlantic Ocean is open to provide adequate water circulation and flushing of the bay. Any activity that will further stress the waters of Mecox Bay will adversely effect the biological productivity of the system. This includes the loss of benthic habitat and diminished food producing effects of eliminating 1,200 sq. ft., of littoral zone associated with the project."

As previously discussed, in reviewing a project, I must review the project's adverse effects both independently and in combination with other past, present or reasonably foreseeable activities. Accordingly, I find the States' evidence persuasive that the elimination of wetlands which would result from the Appellant's proposed project would, in combination with the amount of bulkheading which has already occurred on Meyers Pond

and the level of pollution in the Pond and associated waters, adversely effect the biological productivity of Meyers Pond. Although, land owned by the Nature Conservancy on Meyers Pond provides some habitat for mammals and birds, there is no evidence that this area provides sufficient fish and benthic habitat to offset the effects of Appellant's proposed project.

B. Contribution to the National Interest

The national interests to be considered and balanced under this element are limited to those recognized or defined by the objectives or purposes of the CZMA. Decision and Findings of the Secretary of Commerce in the Consistency Appeal of the Korea Drilling Company, from an Objection by the California Coastal Council, January 19, 1989 at 16. In order to determine the national interest in this project I solicited the views of the Army Corps of Engineers, the Department of Interior Fish and Wildlife Service, the Environmental Protection Agency, and the National Fisheries Service. See Decision and Findings of the Secretary of Commerce in the Consistency Appeal of Ford S. Worthy Jr. from an objection by the North Carolina Department of Natural Resources and Community Development, May 9, 1984 at 10. None of these federal agencies identified any national interest that would be served by Appellant's proposed project. Appellant contends that his proposed project would benefit the national interest by protecting the rights of property owners to preserve their access to their property without danger of loss or erosion. The management of coastal development to minimize the loss of life and property caused by improper development in an erosion prone area is among the national objectives of the CZMA. 16 U.S.C. § 1452(2)(B). However, I am persuaded by the State's argument that the construction of 198 feet of bulkhead alongside a private road contributes minimally to this national objective. Id.

C. Balancing

I have held that Appellant's proposed project would effect adversely the natural resources of the coastal zone by eliminating valuable habitat for wildlife, fish, and benthic communities. I also held that Appellant's proposed project would contribute minimally to the national interest. I now find that these adverse affects, particularly in the light of the degree of bulkheading which has already occurred on Meyers Pond and the limited availability of natural shoreline habitat, are substantial enough to outweigh the proposed project's contribution to the national interest.

V. Conclusion

Appellant's proposed project must satisfy all four elements of 15 C.F.R. § 930.121 in order for me to find that it is consistent with the objectives of the CZMA. The project's failure to satisfy any one element precludes me from making that finding. Having found that the Appellant's proposed project has failed to satisfy the second element of the regulation, it is unnecessary for me to examine the other three elements. Consequently, I will not override the State's objection to Mr. Galgano's consistency certification.¹⁶

A handwritten signature in black ink, consisting of a large, stylized initial 'R' followed by a series of connected loops and a final horizontal stroke.

Secretary of Commerce

16. In his reply brief, Appellant argues that if his appeal is denied, Executive Order 12630 requires that a "Takings Implication Assessment" (TIA) be completed. Appellant is correct that a TIA must be done and the Secretary has complied with Executive Order 12630. However, the substance of the TIA, in essence whether denial of the appeal is considered by agency counsel to constitute a taking, is irrelevant to the issue of whether Appellant's project is consistent with the objectives of the Coastal Zone Management Act. Accordingly, for the purposes of this appeal I need not address the substance of the TIA, which is a predecisional document and is not made public.