

DECISION AND FINDINGS
IN THE
CONSISTENCY APPEAL OF
A. ELWOOD CHESTNUT
FROM AN OBJECTION BY THE
SOUTH CAROLINA COASTAL COUNCIL
NOVEMBER 4, 1992

SYNOPSIS OF DECISION

Mr. A. Elwood Chestnut (Appellant) owns farmland and adjacent, freshwater wetlands associated with Buck Creek and Blakes Bay Branch, both of which are tributaries of the Waccamaw River, near the town of Longs, Horry County, South Carolina. The Appellant proposed to fill 0.7 acres of his wetland property and to impound another eight acres of his wetland property in order to create a livestock watering and irrigation pond.

Pursuant to § 404 of the Federal Water Pollution Control Act, as amended, (FWPCA), 33 U.S.C. § 1344, the Appellant applied to the U.S. Army Corps of Engineers (Corps) for a permit to fill the wetlands and to construct the impoundment. In conjunction with that Federal permit application, the Appellant submitted to the Corps for the State of South Carolina's review under § 307 (c) (3) (A) of the Coastal Zone Management Act of 1972, as amended (CZMA), 16 U.S.C. § 1456(c)(3)(A), a certification that the proposed activity was consistent with South Carolina's Federally approved Coastal Management Program (CMP).

On July 24, 1989, the South Carolina Coastal Council (SCCC) objected to the Appellant's consistency certification for the proposed project on the ground that it violates South Carolina's CMP policies providing for the protection of wildlife and fisheries resources from significant negative impacts and for the protection of productive freshwater wetlands from significant permanent alteration. In its letter of objection, the SCCC identified the alternative of constructing the pond on the Appellant's upland property.

Under CZMA § 307(c)(3)(A) and 15 C.F.R. § 930.131 (1988), the SCCC's consistency objection precludes the Corps from issuing a permit for the activity unless the Secretary of Commerce (Secretary) finds that the activity is either consistent with the objectives of the CZMA (Ground I) or 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 SCCC's objection.

On August 14, 1989, 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 (Department) a notice of appeal from the SCCC's objection to the Appellant's consistency certification for the proposed project. The Appellant based his appeal on Ground I. In order to find Ground I satisfied, the Appellant's project must satisfy the four elements specified at 15 C.F.R. §930.121. Upon consideration of the information submitted by the Appellant, the SCCC and several Federal agencies, the Secretary of Commerce made the following findings pursuant to 15 C.F.R. § 930.121(d):

Ground I

In order to find the fourth element of Ground I satisfied, the Secretary must find that there is no reasonable alternative to the Appellant's proposed project available that would permit the activity to be conducted in a manner consistent with South Carolina's CMP. Because the Secretary found that the alternative identified by the SCCC in its consistency objection was both an available and reasonable alternative that would be consistent with South Carolina's CMP, the Secretary held that the fourth element of Ground I was not satisfied. Because the fourth element of Ground I was not met, it was therefore unnecessary to examine the other three elements. Accordingly, the proposed project is not consistent with the objectives or purposes of the CZMA. (Pp. 5-12).

Conclusion

Because the Appellant's proposed project failed to satisfy the requirements of Ground I, and the Appellant did not plead Ground II, the Secretary did not override the SCCC's objection to the Appellant's consistency certification, and consequently, the proposed project may not be permitted by Federal agencies.

DECISION

I. BACKGROUND

A. Elwood Chestnut (Appellant) owns farmland and adjacent, freshwater wetlands associated with Buck Creek and Blakes Bay Branch, both of which are tributaries of the Waccamaw River, near the town of Longs, Horry County, South Carolina. Appellant's Exhibit, A. Elwood Chestnut's U.S. Army Corps of Engineers 404 Permit Application (Appellant's 404 Application Exhibit). Brief in Support of South Carolina Coastal Council's Determination that 404 Permit Application Number SAC-26-89-098-D is Inconsistent with the Coastal Zone Management Program (State's Brief) at 1. The isolated¹ wetland, formerly vegetated with a variety of hardwood, (including tupelo, sweet gum and red maple,) has been cleared of timber. Letter from Roger L. Banks, U.S. Department of the Interior, Fish and Wildlife Service to Steve Snyder, South Carolina Coastal Council, (FWS Letter to the SCCC), June 14, 1989. Letter from A. Elwood Chestnut to the Secretary of Commerce, (Appellant's Reply Brief), (not dated) filed May 7, 1991.

Traditionally, the Appellant has utilized his upland property (which borders the proposed wetland project site) for rotating tobacco crops every two to three years and for inter-planting with cover crops to prevent erosion and for livestock grazing in the alternating years of crop rotation. Appellant's Exhibit, "Narrative". The Appellant proposes to fill 0.7 acres of his wetland property and to impound another eight acres of his wetland property in order to create a livestock watering and irrigation pond. Appellee's Final Brief in Opposition to Appellant's Request for an Override (State's Reply Brief) at 2.²

Specifically, the Appellant proposes to construct two dikes, each six feet high, 15 feet wide and 178 feet long. Appellant's Exhibits, (not numbered) "Cross Section of Dikes" and "Proposed Pond: End View". The Appellant's proposal provides for the construction of one dike along his upland property bordering his wetland property and for the construction of a second dike across an expanse of the wetlands, running parallel to the first dike. State's Reply Brief, Exhibit A. Appellant's Exhibits, "Proposed Pond: End View" and "Proposed Pond: Top View".

¹An isolated wetland is "one located above the headwaters." Appellant's Exhibit, (not numbered) Letter from Clarence A. Ham, U.S. Army Corps of Engineers to Steve Snyder, South Carolina Coastal Council, May 31, 1989.

²The use of the term "Appellee" is inappropriate to this civil proceeding. The consistency appeal process is an open process wherein the opinions of many entities are solicited; namely, the objecting state, federal agencies and the public. The regulations only reference the term "Appellant"; the applicant submitting an appeal to the Secretary of Commerce. See 15 C.F.R. § 930.123.

Construction of the dikes would involve the placement of approximately 2,373 cubic yards of fill that would be obtained from excavation of the wetlands. *Id.* The eight-acre impoundment would be created over existing seasonally flooded wetlands and would approximate six feet in depth. *Id.* The Appellant asserts that the construction of the pond is necessary to provide a dependable water supply for crop irrigation and livestock watering which, in turn, would provide the Appellant with a "more stable agricultural income resource." Letter from Mr. A. Elwood Chestnut to John A. Knauss, Under Secretary for Oceans and Atmosphere, National Oceanic and Atmospheric Administration (NOAA), (Appellant's Brief), November 16, 1989, at 1-2.

Pursuant to § 404 of the Federal Water Pollution Control Act, as amended, (FWPCA), 33 U.S.C. § 1344, the Appellant applied to the U.S. Army Corps of Engineers (Corps) for a permit to fill the wetlands and to construct the impoundment.³ In conjunction with that Federal permit application, the Appellant submitted to the Corps for the State of South Carolina's review under § 307(c)(3)(A) of the Coastal Zone Management Act of 1972, as amended (CZMA), 16 U.S.C. § 1456(c)(3)(A), a certification that the proposed activity was consistent with the State's Federally approved Coastal Management Program (CMP).

On July 24, 1989, the South Carolina Coastal Commission (SCCC)⁴ objected to the Appellant's consistency certification for the proposed project on the grounds that it violates South Carolina's CMP policies provided at Chapter III, Policy Sections VII. A.(1)(a) and XII. E.(1). Letter from H. Stephen Snyder, Director of Planning and Certification, SCCC, to LTC James Scott, District Engineer, Corps, (State Objection Letter), July 24, 1989. South Carolina's CMP policies at Section VII. A.(1)(a) and XII. E.(1) provide, respectively, for the protection of wildlife and fisheries resources from significant negative impacts and for the protection of productive freshwater wetlands from significant permanent alteration. *Id.* The SCCC determined that the Appellant's project "would result in

³The Appellant's 404 Permit Application Exhibit indicates that the amount of fill will total 3,500 cubic yards, whereas his "Proposed Pond: End View" Exhibit indicates that the maximum fill yardage in wetlands will total 2,373 cubic yards. Appellant's Exhibits. The Appellant has noted his intention to fill in upland areas at both ends of the dikes, which may account for the difference in total cubic yards of fill. Appellant's Exhibit, "Proposed Pond: Top View". This discrepancy does not appear to have affected the State's objection in this case.

⁴The SCCC is South Carolina's Federally approved coastal management agency under §§ 306 and 307 of the CZMA, 16 U.S.C. §§ 1455 and 1456, and 15 C.F.R. Parts 923 and 930 of the Department of Commerce's implementing regulations.

permanent alteration of 8.7⁵ acres of productive freshwater wetlands." State's Brief at 1.

As an alternative that would be consistent with South Carolina's Federally approved CMP, the SCCC recommended the construction of an irrigation/watering pond from high ground. State Objection Letter. In addition to explaining the basis for its objection, the SCCC also notified the Appellant of his right to appeal the SCCC's objection to the Department of Commerce (Department) as provided under section 307(c)(3)(A) of the CZMA and 15 C.F.R. Part 930, Subpart H. *Id.*

Under section 307(c)(3)(A) of the CZMA and 15 C.F.R. § 930.131, the SCCC's consistency objection precludes the Corps from issuing a permit for the Appellant's proposed activity unless the Secretary finds that the activity may be Federally approved, notwithstanding the SCCC's objection, because the activity is either consistent with the objectives or purposes of the CZMA, or is otherwise necessary in the interests of national security.

II. APPEAL TO THE SECRETARY OF COMMERCE

On August 14, 1989, in accordance with CZMA section 307(c)(3)(A) and 15 C.F.R. Part 930, Subpart H, the Appellant filed a notice of appeal from the SCCC's objection to the Appellant's consistency certification for the proposed project. Letter from Mr. A. Elwood Chestnut to the Secretary of Commerce (Notice of Appeal), dated August 9, 1989. On March 8, 1990, the SCCC filed a response to the appeal, after the Appellant perfected his appeal by filing supporting data and information pursuant to 15 C.F.R. § 930.125. The parties to the appeal are Mr. A. Elwood Chestnut and the State of South Carolina.

On June 29, 1990, the Department solicited the views of four Federal agencies⁶ on the four regulatory criteria that Appellant's proposed project must meet for it to be found consistent with the objectives and purposes of the CZMA.⁷ All of the agencies responded. Public comments on the issues pertinent to the decision in the appeal were also solicited by notices in the Federal Register, 55 Fed. Reg. 27295, (July 2, 1990), (Notice of Appeal and Request for Comments), and The Sun News (December 24, 26 and 27, 1990). No public comments were received.

⁵The Appellant asserts that the amount of wetland reduction would not be significant, "less than an acre if any at all." Appellant's Brief at 1. This discrepancy is discussed *infra* at 8.

⁶Comments were requested from the Corps, the National Marine Fisheries Service, the Department of the Interior - Fish and Wildlife Service (FWS) and the Environmental Protection Agency (EPA).

⁷These criteria are defined at 15 C.F.R. § 930.121 and are discussed *infra* at 4-5.

After the period for public and Federal agency comments expired, the Department provided the parties with an opportunity to file a final response to any submission filed in the appeal. Both the Appellant and the SCCC submitted response briefs. All documents and information received by the Department during the course of this appeal have been included in the administrative record. However, I will only consider those documents relevant to the statutory and regulatory grounds for deciding an appeal. See Decision and Findings in the Consistency Appeal of Shickrey Anton, May 21, 1991, at 3, citing, Decision and Findings in the Consistency Appeal of Amoco Production Company, July 20, 1990, at 4.

Consistent with prior consistency appeals, I have not considered whether the SCCC was correct in its determination that the proposed activity was inconsistent with South Carolina's CMP. See Decision and Findings in the Consistency Appeal of Korea Drilling Company, Ltd., (Korea Drilling Decision), January 19, 1989, at 3-4. Rather, I have examined the SCCC's objection only for the purpose of determining whether it was properly lodged, i.e., whether the SCCC's objection complied with the requirements of the CZMA and its implementing regulations. Id. I conclude that the SCCC's objection was properly lodged.

III. GROUNDS FOR SUSTAINING AN APPEAL

Section 307(c)(3)(A) of the CZMA provides that the Federal permit required for the Appellant's proposed activity may not be granted until either the SCCC concurs in the consistency of such activity with its Federally-approved coastal zone management program, or the Secretary finds that the activity is (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). The Appellant has pleaded only the first ground.

To reach a finding on the first ground, that the project is consistent with the objectives and purposes of the CZMA, I must determine that the activity satisfies all four elements specified at 15 C.F.R. § 930.121. Failure to satisfy any one element precludes me from finding that the project is consistent with the objectives of the CZMA. These requirements are:

1. The proposed activity furthers one or more of the competing national objectives or purposes contained in §§ 302 or 303 of the CZMA. 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).

3. The proposed 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).

In its letter of objection, the SCCC asserts that an alternative exists permitting the activity to be conducted in a manner consistent with South Carolina's CMP. Because the fourth element of Ground I is dispositive of this appeal, I will turn immediately to consideration of the fourth element.

IV. FOURTH ELEMENT: LACK OF REASONABLE ALTERNATIVE

In past consistency appeal decisions, I have reached a determination on the fourth element of Ground I by evaluating the alternative(s) proposed by a state in the consistency objection. See Decision and Findings in the Consistency Appeal of Sucesión Alberto Bachman, (Bachman Decision), October 10, 1991, at 4 and previous decisions cited therein. The Department's regulations at 15 C.F.R. § 930.121(d)⁸ read together with the regulations at 15 C.F.R. § 930.64(b)(2)⁹ place the burden of describing existing alternatives that would permit the proposed activity to be conducted in a manner consistent with the State's CMP on the objecting state coastal management agency. See Bachman Decision at 4-5.

As discussed in the Bachman Decision, the provisions requiring a state to identify alternatives serve two purposes:

First, it gives the applicant a choice: adopt the alternative (or, if more than one is identified adopt one of the alternatives) or, if the applicant believes all alternatives not to be reasonable or available, either abandon the proposed activity or appeal to the Secretary and demonstrate the unreasonableness or unavailability of the alternatives. Second, it establishes that an alternative is consistent with a State's program because the State body charged by the Act with determining

⁸15 C.F.R. § 930.121(d) is described supra.

⁹"State agency objections must describe ... (2) alternative measures (if they exist) 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)(2).

consistency makes the identification of the alternative.

Bachman Decision at 4-5.

As I have previously stated, the SCCC has described an alternative that would permit the activity to be conducted in a manner consistent with South Carolina's CMP. The SCCC has proposed that the Appellant can comply with the enforceable coastal management policies of South Carolina's CMP by constructing an irrigation/watering pond from high ground. State Objection Letter. In its Reply Brief, the SCCC asserts that within the "many acres of uplands" owned by the Appellant, an irrigation pond could be dug entirely out of high ground, thereby obviating any need to permanently alter the freshwater wetlands on the Appellant's property. State's Reply Brief at 6.

The burden therefore shifts to the Appellant to demonstrate that the alternative identified by the SCCC is unavailable or unreasonable. See Korea Drilling Decision at 22-23. I will first consider whether the identified alternative is available.

The Appellant opposes the alternative of constructing an irrigation pond on his high ground property because, he argues, "[t]he high cropland adjacent to the pond site is not suitable for an irrigation pond, is essential for crop production and is considered prime farmland." Notice of Appeal. The Appellant argues that he has no "marginal lands" for construction of an irrigation pond other than "wetlands and cropland that is prime farmland." Appellant's Brief at 2. The Appellant further argues that the proposed alternative is "not feasible at all" because relocating the pond to his upland property would involve three times as many acres and four times the total cost of constructing the pond in his wetland property. Id.

The SCCC submitted as an Exhibit to its Reply Brief correspondence from the South Carolina Wildlife and Marine Resources Department, which supports the SCCC's position that the Appellant has the option of constructing a pond in an upland area. State's Reply Brief, Exhibit A, Letter from Robert E. Duncan, South Carolina Wildlife & Marine Resources Department to H. Stephen Snyder, SCCC, (Duncan Letter), June 23, 1989. In addition, the FWS responded to the request for comments by Federal agencies on the instant appeal and recommended the alternative of the construction of a pond¹⁰ in the Appellant's upland property. Letter from James W. Pulliam, Jr., Regional

¹⁰ The FWS also identified the alternative of the construction of water wells on the Appellant's upland property. FWS Letter to NOAA. However, I will first consider the alternative recommended by the State because that is the alternative that has been identified by the State as being consistent with South Carolina's CMP.

Director, FWS, to Hugh C. Schratwieser, Attorney-Adviser, NOAA, (FWS Letter to NOAA), August 17, 1990.

I have previously noted that the Appellant asserts that "[r]elocation is not feasible at all." Appellant's Brief at 2. However, the Appellant has failed to provide any evidence or documentation to support this assertion. The Appellant argues that because of "water table depth and earth moving and placement requirements" the relocation of his proposed pond would involve three times the acreage and four times the cost of constructing the pond in the proposed wetland site. *Id.* The Appellant further argues that relocating the pond would destroy "most of the only cropland on [his] farm." *Id.*

Concerning the availability of the alternative suggested by the SCCC, I find the SCCC's counter-argument persuasive that the Appellant offers no reason why a pond cannot be "created out of the many acres of uplands Appellant owns rather than in freshwater wetlands." State's Reply Brief at 6. There is no evidence in the administrative record before me concerning water table depth analysis or earth placement requirements as noted by the Appellant. Appellant's Brief at 2. Although the Appellant argues that his upland property adjacent to the wetlands is not suitable for constructing an irrigation pond, he does not substantiate his claim. Further, he has acknowledged that he owns property other than the wetland area he has chosen for his project site. Three resource management agencies have identified the Appellant's upland property as an available relocation site.

Absent documentation in the administrative record before me that would substantiate the Appellant's claims that the land is unavailable for the alternative, I am compelled to reach a finding that the relocation of the Appellant's project is available.

Having determined that the State has identified an available alternative as discussed above, I must now determine whether the alternative is reasonable, *i.e.*, economically feasible. In order to reach a determination whether the alternative identified by the SCCC is reasonable, I must weigh the increased costs of the project against its advantages. *See* Decision and Findings in the Consistency Appeal of Exxon Company, U.S.A., (Exxon SRU Decision), November 14, 1984 at 14. Economic feasibility is determined by balancing the advantages of the alternative against the estimated increased costs. *Id.* Balancing the advantages against the estimated increased costs requires the consideration of two factors: first, how much less of an adverse effect on the wetlands would occur under the alternative and second, the increased costs to the Appellant of carrying out the proposed project in a manner that is consistent

with South Carolina's CMP. Id. I will address each of these factors in turn.

In order to properly evaluate any possible adverse effects to the wetland property at issue in the instant matter, I must initially address an apparent discrepancy concerning the total amount of wetlands that will be affected by the proposed project. The Appellant contends that the 0.7 acres of fill that he proposes to place in the proposed wetland site for the construction of the pond embankments (dikes) will be offset by at least 0.7 acres of new wetland areas. Notice of Appeal. The Appellant further asserts that the eight acre impoundment that will be created will convert the wetland site to a permanent water source for species of both upland and wetland wildlife. Id. In addition, the Appellant argues that his proposed project will "not significantly reduce wetlands (less than an acre if any at all)". Appellant's Brief at 1. The SCCC asserts that a total of 8.7 acres will be affected because the Appellant's proposal involves filling 0.7 acres of wetlands and impounding an additional eight acres. State's Brief at 1.

A review Appellant's 404 Permit Application Exhibit reveals that in filing for the Corps 404 Permit, the Appellant stated the following: "Wetland area proposed for fill (acreage/sqare [sic] feet): 0.7 ac. spoil, 8 ac. water." Appellant's 404 Permit Application Exhibit. There is, in fact, substantial evidence in the record which reveals that the Appellant's proposed project would affect 8.7 acres of freshwater wetlands. This determination is supported by comments by the FWS: "Mr. Chestnut's proposed project . . . will destroy 8.7 acres of . . . wetland." FWS Letter to NOAA. I find Exhibit A produced by the SCCC in its Reply Brief particularly persuasive:

The proposed dike fill would result in the permanent loss of productive wetlands. An additional 8 acres of wetlands would be isolated from the rest of the system and unable to provide a number of the existing functions. . . . Of major concern is the loss and fragmentation of wildlife habitat. Pond construction in this area will lead to segmentation of this system and result in constant human intrusion and alteration or [sic] normal animal patters [sic] of activity.

State's Reply Brief, Exhibit A, Duncan Letter.

The Appellant has failed to offer any evidence to support his assertion that there will not be a reduction of his wetland property. Balancing the Appellant's unsubstantiated assertions against the findings of resource management agencies involved in this appeal, I find that 8.7 acres of wetlands would be affected by the Appellant's proposed project. Having determined that the project will affect 8.7 acres of wetlands, I may now turn to

analyzing the reasonableness, or economic feasibility, of the SCCC's proposed alternative by deciding the first balancing factor: how much less of an adverse effect on the 8.7 acres of wetlands would occur under the alternative proposed by the SCCC.

The Appellant asserts that the overall function of the wetlands will not be altered by the construction of his proposed pond. Appellant's Brief. As mitigation for any potential impact to his wetland property, the Appellant has offered to "improve the adjacent wetlands with the installation of vegetative filter strips on adjacent erosive cropland." *Id.* at 1. In support of his position, the Appellant argues that "convert[ing his] highly erodible cropland to grass . . . is nature's best filter and is recommended by EPA as an option for waste treatment" and that "[v]egetative filter strips are recognized and promoted by USDA." *Id.* at 2. The response of the SCCC, which I find convincing, is the following:

Appellant contends that the destruction of eight acres of wetlands is allowable because his proposed pond will perform the same filtering functions as the existing wetland. He offers no proof for this erroneous statement. Though ponds may provide some of the same functions in varying degrees as wetlands, the two are different resources, and cannot be as easily exchanged as Appellant would like."

State's Reply Brief at 5. Further, in its initial brief, the SCCC responded to the Appellant's Brief with the following:

The proposed dike fill would result in the permanent loss of productive wetlands which provide important habitat for a variety of wildlife species, and serve important hydraulic and water quality functions, including flood water storage and filtration of excess sediment, nutrients and agricultural chemicals.

State's Brief at 1-2.

The SCCC's position is supported by letters contained in the administrative record from the FWS to the SCCC and to NOAA. FWS Letter to SCCC, FWS Letter to NOAA. After reviewing aerial photography of the proposed site and obtaining information from Soil Conservation Service personnel, the FWS concluded that the proposed site contained valuable wildlife habitat and was important for its many hydrologic and water quality functions. *Id.*

In contrast to the Appellant's assertion concerning EPA recommendations, the following statement is the EPA's response to the request for Federal agency comments concerning the instant appeal:

It is general EPA policy to recommend that where any activity will adversely affect the natural functions of a wetland, that activity should be avoided to the maximum extent practicable. Wetlands serve a variety of functions including shoreline erosion control, habitat for commercial and recreational fin and shellfish species and wildlife habitat.

Letter from Richard E. Sanderson, EPA to the Honorable Gray Castle, Deputy Under Secretary for Oceans and Atmosphere, NOAA, August 17, 1990.

I am persuaded by the evidence in the record that, notwithstanding the Appellant's assertions to the contrary, the construction of a pond as proposed by the Appellant on his wetland property would have the effect of permanently altering, and thereby adversely affecting, the natural resources of those wetlands.¹¹ The SCCC's suggested alternative of relocating the pond to the Appellant's upland property would not permanently alter the freshwater wetlands on his property. State's Reply Brief at 6. I therefore find that relocating the pond as proposed by the SCCC would have "measurably less adverse effects on land and water resources of the coastal zone." See Bachman Decision at 6; citing Decision and Findings in the Consistency Appeal of Southern Pacific Transportation Company, September 24, 1985, at 19.

Having determined that there would be measurably less adverse effects on the wetlands under the alternative proposed by the SCCC completes my analysis of the first factor involved in balancing the advantages against the estimated increased costs of the alternative. In order to complete my analysis of the reasonableness, or economic feasibility, of the SCCC's proposed alternative, I must turn my consideration to the second balancing factor and evaluate the increased costs to the Appellant of carrying out the proposed project in a manner that is consistent with South Carolina's CMP. The Appellant asserts that constructing the pond on his upland property would impose burdensome costs equaling four times the cost of digging the pond out of his wetland property. Appellant's Brief at 2. The Appellant also suggests that he must "use these natural resources in a normal manner to be able to stay in farming."

¹¹ It is worth noting that the Appellant has cleared at least a portion of his wetland property of timber. Appellant's Reply Brief. In its June 14, 1989, letter to the SCCC, the FWS identified the Appellant's wetland property as a "palustrine, forested wetland vegetated with a variety of tree species, including tupelo, sweet gum and red maple." FWS Letter to the SCCC. I will not comment upon the Appellant's action in this matter and will take at face value his assertion that "[t]he hardwood in the area [was] scheduled to be harvested regardless of the pond situation." Notice of Appeal. Regardless of the Appellant's actions in clearing his wetlands of timber, I find, based upon the comments of the State and resource management agencies discussed in the analysis above, that the wetlands continue to provide valuable habitat and hydrologic and water quality functions.



Notice of Appeal. Further, the Appellant argues that his upland property is "required to produce agricultural crops to pay for the land and provide an income source for the farmer/landowner [Appellant]." Appellant's Brief at 3.

I am not insensitive to the Appellant's attestation for the need for a dependable water supply to irrigate his crops and water his livestock. I do not doubt that the Appellant is sincere in his assertion that he has suffered drought and economic losses in his profession. Appellant's Reply Brief. However, the record in this appeal does not provide any evidence concerning the magnitude of the costs to the Appellant, either for the construction of a pond in the Appellant's wetland property or in the Appellant's upland property. The Appellant has not provided supporting documentation substantiating his claims that the cost of irrigating his crops on the farmland site would involve substantially more resources than impounding his wetland property and pumping the water to irrigate his crops and water his livestock. As I have previously determined in other decisions and as I have previously stated in the instant decision, the burden is upon the Appellant to support his position. Korea Drilling Decision at 23. Despite a lack of documentation in the administrative record before me to substantiate the Appellant's claims that relocation of his proposed project would be economically prohibitive, I find that there will be some increased costs involved in relocating the proposed project site. Without documentation in the administrative record as to the costs of the alternative, I am unable to conclude that these costs outweigh the documented advantages. Therefore, I am unable to conclude that the alternative is unreasonable. Accordingly, the Appellant's application has failed to satisfy Element IV.

In accordance with the foregoing analysis, I find that there is an available, reasonable alternative that would permit the Appellant's proposed activity to be conducted in a manner consistent with South Carolina's CMP. Having found that this alternative is reasonable and available, I will not consider any other alternative.

V. CONCLUSION

Because the Appellant must satisfy all four elements of the regulation in order for me to sustain his 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]." 15 C.F.R. § 930.121. Having found that the Appellant has failed to satisfy the fourth element of Ground I, it is unnecessary to examine the other three elements.

Therefore, I will not override the SCCC's objection to the Appellant's consistency certification.


Secretary of Commerce