



STATE OF DELAWARE
DEPARTMENT OF NATURAL RESOURCES
AND ENVIRONMENTAL CONTROL

OFFICE OF THE
SECRETARY

89 KINGS HIGHWAY
DOVER, DELAWARE 19901

PHONE: (302) 739-9000
FAX: (302) 739-6242

Secretary's Order No. 2009-W-0025

Re: APPLICATION OF THE UNITED STATES ARMY CORPS OF ENGINEERS FOR AUTHORITY TO DREDGE PORTIONS OF THE DELAWARE RIVER AND DELAWARE BAY IN NEW CASTLE, KENT AND SUSSEX COUNTIES

Date of Issuance: July 23, 2009

Effective Date: July 23, 2009

Under the authority granted to the Secretary of the Department of Natural Resources and Environmental Control ("Department"), the following findings, reasons and conclusions are entered as an Order of the Secretary. This Order considers the United States Army Corps of Engineers' ("Army Corps") January 19, 2001 permit application. The application was submitted to the Department's Division of Water Resources' ("DWR") Wetlands and Subaqueous Land Section ("WSLS"), requesting permits to conduct activities regulated by the Subaqueous Lands Act¹ and the Wetlands Act,² and for a Water Quality Certification required by the Environmental Control Act³ and Section 401 of the federal Clean Water Act.⁴

On December 4 and 5, 2001, the Department held a public hearing on the application. The Department's Hearing Officer, Timothy Bureau, prepared a Report of Recommendations, dated December 12, 2003 ("Report") and attached hereto. The

¹ 7 Del. C. Ch. 72.

² 7 Del. C. Ch. 66.

³ 7 Del. C. Ch. 60.

⁴ 33 U.S.C. § 1341(a)(1).

Delaware's Good Nature depends on you!

Hearing Officer recommended that the requested permits be denied, because the Army Corps' application did not satisfy the statutory permit requirements of the Wetlands Act and the Subaqueous Lands Act and their respective regulations. The Hearing Officer further recommended that the Department provide the Army Corps with a list of deficiencies and potential permit requirements, including potential permit conditions and specifications, and allow the Army Corps to modify the current proposal accordingly. If the Army Corps agreed to abide by all the conditions, then the Hearing Officer suggested that the Department reconsider whether to issue the permits. If the Army Corps did not agree to the permit conditions, then the Department would allow the Army Corps to submit a new application that was limited in scope to those identified statutory deficiencies or to any new information that could change the Hearing Officer's findings.

I adopt and incorporate the Report and its analysis and findings as a part of this Order.

BACKGROUND

The Army Corps requested permits from the Department to deepen the federal Navigational Channel⁵ ("Main Channel") of the Delaware River and Delaware Bay, which, among other things, involves dredging Delaware's public subaqueous lands. The scope of the Army Corps' proposal spans 102.5 miles – from the Philadelphia Harbor, Pennsylvania and Beckett Street Terminal, Camden, New Jersey to the mouth of the Delaware Bay (hereinafter "Project").⁶ The Project proposes to deepen the Main Channel

⁵ The Army Corps and the United States Coast Guard are responsible for this navigational channel, which was originally created as the Philadelphia to the Sea Project in 1910 and revised in 1930, 1935, 1938, 1954, and 1958.

⁶ <http://www.nap.usace.army.mil/cenap-pl/drmcdp/overview.html>.

from its current authorized depth of 40 feet to 45 feet,⁷ and to widen the Main Channel at seven bends in Delaware.⁸ In its application, the Army Corps proposed to remove up to 18,970,000 cubic yards⁹ of dredge material from the Delaware River's publicly-owned subaqueous lands using hydraulic and mechanical methods and by blasting rock near the Pennsylvania state line. The Army Corps also proposed to place the dredge materials at locations in Delaware, including the federally-controlled disposal site near Reedy Point, New Castle County; Kelly Island, Kent County for beneficial reuse in a wetlands restoration area; and Port Mahon, Dewey Beach, Rehoboth Beach, and Broadkill Beach for beach renourishment projects to be determined by the Department. The Army Corps would place the other dredge material at federally-controlled sites in New Jersey.

I. As outlined in the Hearing Officer's Report, the deficiencies in the permit application justify denial of the permits.

Based upon my careful review of the Report, I hereby find that the pending January 19, 2001 permit application is not adequately supported by information that the applicable statutes and regulations require before the Department can make a well-informed and reasoned decision, and, therefore, the Army Corps' permit application is deficient.

II. The time passed since the application was submitted and the changed estuary conditions independently justify denial of the permits.

The amount of time that has passed since the Hearing Officer issued his Report is an independent reason for denying the permits. The Department's decision to deny the

⁷ Measured at Mean Low Water and allowing for a one foot overdepth.

⁸ The current Main Channel is between 400-1,000 feet wide and the widening would occur off of the following locations: Port Mahon (BW-1), Artificial Island (BW-2), Reedy Point south and north (BW-3, BW-4), Pea Patch Island (BW5), New Castle (BW6) and Cherry Island (BW7).

⁹ All factual references are to the January 19, 2001 application.

required permits is made only after carefully considering the Project's significant environmental policy implications.

I find that the Project would be one of the largest public works activities, in cost and geographic scope, undertaken in this Department's history and possibly Delaware's history. The Project has the potential to significantly alter public subaqueous lands, wetlands, and beaches. It could also affect maritime commerce in the Delaware River and Bay. Therefore, the Department's position is that any decision on the Army Corps' application should be based upon the most detailed and current information possible about the Project. Accordingly, because five years have passed since the Report was issued, the record is now stale.

The Army Corps prepared its most recent environmental impact statement in 1997. But the Delaware River's environment is subject to constant change, and there have been several incidents in recent years that may have caused significant alterations that warrant further study. For example, in 2004, an oil tanker leaked approximately 265,000 gallons of oil into the Delaware River,¹⁰ but there is nothing in the record discussing the consequences of this spill on the estuary resource. If the Army Corps conducted the proposed dredging now, it would do so with little knowledge of the Delaware River's current environment. I find that approval now, based upon outdated information, would impose an undue risk of harm to Delaware's environment and public health.

¹⁰

<http://www.dnrec.delaware.gov/News/Pages/NOAAandPartnerAgenciesAcceptingPublicCommentson.asp>.

III. The Army Corps has announced significant changes to the Project that are not reflected in the application, which justify denial of the permits.

The Army Corps has publicly announced on its website¹¹ and elsewhere that it has modified and changed the Project. These numerous, publicly-announced changes are not part of the application pending before the Department, and the Army Corps is not seeking the Department's approval for these Project modifications. The changes contradict representations contained in the application and thus are relevant to the Department's decision-making process.

The April 3, 2009 Environmental Assessment states:

“1.1 Purpose

The purpose of this Environmental Assessment (EA) is to evaluate the impacts of changes to the Congressionally authorized project for the Delaware River Main Stem and Channel Deepening Project, which are the result of detailed Preconstruction, Engineering and Design (PED) studies, as well as changes to the existing conditions in the project area from those described in the 1992 Environmental Impact Statement (EIS), 1997 Supplemental Environmental Impact Statement (SEIS), and 1998 Record of Decision (ROD), and to consolidate in one document the results of post-SEIS monitoring and data collection efforts.”

The fact that the Army Corps is now proposing a project which substantially differs from the Project proposed in its permit application independently justifies denial of the requested permits.

¹¹ (http://www.nap.usace.army.mil/cenap-pl/MainChannel_EA_3Apr09.pdf).

CONCLUSION

In sum, after carefully balancing the Project's potential benefits and detriments, I adopt and direct the following as the final order of the Department:

1. The Department has jurisdiction under its statutory authority to make a determination in this proceeding under its state and delegated federal authority;
2. The Department provided adequate public notice of the January 19, 2001 application and the public hearing, and held the public hearing in a manner required by the law and its regulations;
3. The Department has considered all timely and relevant public comments and as part of its decision-making process, has utilized its expert's professional judgment in its analysis of all the information in the record;
4. The Department denies the requested permits for the Project based upon, among other reasons, the reasons and findings in the Report;
5. The Department denies the requested permits, because the Project has significantly changed from what is represented in the pending application, and those changes occurred after public notice of the application occurred;
6. The Department denies the requested permits, because the passage of time and the changed estuary conditions make the original application stale and inaccurate;
7. The Department shall provide notice of the determination made by this Order similar to the legal notices required of the applications and public hearing;
8. The Army Corps may submit a new permit application that reflects the Project in its present state. The application must be supported with the most detailed and current information available, including, but not limited to the present environmental

conditions of the Delaware River and Bay and the potential impacts the Project may have on Delaware's resources.

A handwritten signature in black ink, appearing to read "Collin P. O'Mara", written over a horizontal line.

Collin P. O'Mara
Secretary