



Main Stem and Channel Deepening Project ("the Project") proposed to be conducted by defendant United States Army Corps of Engineers, Philadelphia District ("the ACOE"). The Project would dredge 102 miles of the main channel of the Delaware River from Philadelphia to the Delaware Bay, increasing the depth of the main channel from 40 to 45 feet and resulting in the disposal of millions of cubic yards of dredged materials at disposal facilities located in the State of New Jersey. In determining to proceed with the Project, defendants have failed to conduct the necessary sampling or analyses of the sediment to be dredged and then deposited in the State of New Jersey; failed to perform and update the necessary environmental studies; failed to conduct supplemental coordination with the State of New Jersey as required by the Coastal Zone Management Act; failed to obtain a Water Quality Certificate from the State of New Jersey as required by the Clean Water Act; and failed to complete conformity determinations as required by the Clean Air Act. Further, defendants propose to conduct and then maintain the Project and main channel without devising any disposal management strategy for the millions of cubic yards of material that will be dredged from the Delaware River bed to construct and then maintain the project. As currently proposed, the Project is arbitrary

and capricious, and will be conducted in violation of the Coastal Zone Management Act, the Clean Water Act, the Clean Air Act, the National Environmental Policy Act, the Water Resources Development Act, and the Administrative Procedure Act.

#### JURISDICTION

2. This court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §1331 (federal question), 5 U.S.C. §§701 et seq. (Administrative Procedures Act), and 28 U.S.C. §2201(a) (Declaratory Judgment Act).

#### VENUE

3. Venue over this action is proper in this District pursuant to 28 U.S.C. §1391(e)(3), which establishes venue in an action against an officer or agency of the United States in any judicial district in which one of the plaintiffs resides, if no real property is involved in the action. Venue is additionally appropriate in this District because the action sought to be reviewed affects residents, natural resources, waters, and air of the State of New Jersey, and lands within the State of New Jersey where dredging will occur and dredged material is proposed to be deposited.

#### PARTIES

4. Plaintiff Department of Environmental Protection is a principal State agency of the State of New Jersey, with offices located at 401 E. State Street, Trenton, New Jersey 08625, and is responsible for the environmental protection of the waters, lands, and wildlife and plant life of and in the State of New Jersey, including lands, air, waters, wildlife, and plant life that will be adversely impacted by the project. The State of New Jersey has a sovereign interest in the fish, wildlife, and natural resources that will be affected by defendants' project.
5. Plaintiff Mark Mauriello is the Acting Commissioner of the Department of Environmental Protection, with offices located at 401 E. State Street, Trenton, New Jersey, and is responsible for the implementation of the environmental laws, regulations, and standards that pertain to the Project.
6. Defendant United States Army Corps of Engineers, with offices located at 441 G. Street NW, Washington, D.C. , is a part of the United States Department of Defense and is responsible for conducting the deepening project; for conducting required environmental studies and analyses of the project's impacts; for conducting sampling of the material to be dredged and proposed to be deposited within

the State of New Jersey; for conducting all required coordination under the federal Coastal Zone Management Act; and for conducting all studies and obtaining all approvals required under the Clean Water Act and Clean Air Act.

7. Defendant Lieutenant Colonel Thomas Tickner is the District Commander of the Philadelphia District of the Army Corps of Engineers, with offices located at The Wanamaker Building, 100 Penn Square East, Philadelphia, Pennsylvania, and is responsible for conducting the project.
8. Defendant Jo-Ellen Darcy is the Assistant Secretary for Civil Works, United States Army Corps of Engineers, with offices located at 108 Army Pentagon, Room 3D446, Washington, D.C., and is responsible for conducting the project.

#### STATUTORY BACKGROUND

9. The Water Resources Development Act, 33 U.S.C. §2311 et seq., authorizes the ACOE to conduct navigation projects. The Project is subject to Public Law 102-580, Section 101(6) of the Water Resources Development Act, as modified by Public Law 106-53, Section 308 of the Water Resources Development Act of 1999, and as further modified by Public Law 106-541, Section 306 of the Water Resources Development Act of 2000.

10. The National Environmental Policy Act ("NEPA"), 42 U.S.C. §4321 et seq., was enacted to promote harmony between humans and their environment and to prevent or eliminate damage to the environment. NEPA requires all federal agencies, in every proposal for major federal action, to prepare and consider a detailed environmental impact statement that includes the action's adverse affects that cannot be avoided, alternatives to the action, and the action's long term effects.
11. Pursuant to 40 C.F.R. §1502.9, a Supplemental Environmental Impact Statement ("SEIS") must be prepared for a major federal action if there have been substantial changes in the proposed actions; significant new circumstances or new information exists; or an SEIS would further the purpose of NEPA.
12. Pursuant to 40 C.F.R. §1506.2, federal agencies must cooperate with states to the fullest extent on environmental studies, and address inconsistencies between the proposed major federal action and state or local plans.
13. The Clean Water Act ("CWA"), 33 U.S.C. §1251 et seq., was enacted to protect and improve the quality of the nation's waters. The Act recognizes that water quality is a primary State function, and requires any person seeking to conduct a project subject to the Act to obtain a State water

quality certification through which the State certifies that the person will comply with the State's water quality standards and may impose any conditions required for compliance with State standards. 33 U.S.C. §1341.

14. The CWA requires any person conducting a regulated project under the Act to comply with state water quality standards when conducting the project. 33 U.S.C. §1341; 33 C.F.R. §336.1.
15. The Coastal Zone Management Act ("CZMA"), 16 U.S.C. §1451 et seq., was enacted to ensure coordination and consistency between federal, state, and local actions in the coastal zone. The CZMA requires federal activities within or that affect a State's coastal zone to be consistent to the maximum extent practicable with that State's coastal management programs.
16. Pursuant to the CZMA, a federal agency that undertakes a project in the coastal zone of a State must provide a consistency determination from that State that the project is consistent with the State's coastal zone management programs, and must insure that the project is consistent with those programs to the maximum extent practicable. In addition, state or local governments receiving federal assistance for a project affecting any land or water use of a State's coastal zone shall indicate the views of the

appropriate State as to the relationship of their activities to the State's approved management program for the coastal zone.

17. Federal agencies may not approve proposed projects that are inconsistent with the policies of a coastal state's management program, except upon a finding of the Secretary of Commerce that such project is consistent with the purposes of the CZMA or necessary in the interest of national security.
18. For proposed federal agency activities that were previously determined to be consistent with a state's coastal zone management program, but which have not yet begun, federal agencies must further coordinate with the State and prepare a supplemental consistency determination if the proposed activity will affect any coastal use or resource substantially differently than originally described. 15 C.F.R. §930.46.
19. The Clean Air Act (CAA), 42 U.S.C. §7401 et seq., was enacted to protect and enhance the quality of the nation's air resources, to promote public health and welfare, and to promote federal, state, and local actions consistent with the Act for pollution prevention. The Act precludes federal agencies from engaging in activities that do not conform to a State Implementation Plan ("SIP") approved by

the Environmental Protection Agency, and requires the agency to make a finding that its action conforms to the applicable SIP, which is the State's plan for how it will comply with State Clean Air Act obligations and attain the National Ambient Air Quality Standards ("NAAQS"). 42 U.S.C. § 7506(c)(1); 40 C.F.R. §93.150(b).

20. Under the CAA, a federal agency proposing an action that will affect air quality must perform SIP conformity determinations for each priority pollutant or precursor where the total of direct and indirect emissions of such pollutants caused by the federal action exceed the thresholds set forth at 40 C.F.R. §§93.153(b)(1) and (2). Such conformity determinations require public notice and comment before final agency action. 40 C.F.R. §293.154 to 40 C.F.R. §293.156.

#### FACTS

21. The ACOE submitted an environmental impact statement ("EIS") to Congress for the Project in 1992 pursuant to NEPA. The EIS stated that the Project would require dredging 33 million cubic yards to deepen the main channel, followed by maintenance dredging of six million cubic yards per year.

22. The ACOE issued a supplemental environmental impact statement ("SEIS") for the Project in 1997, and a Record of Decision was issued in 1998. The SEIS stated that four new disposal sites, all located in New Jersey, would be required to handle the dredged material from the Project, and that nearly all dredged materials would be disposed of at new and existing confined disposal facilities located in New Jersey.
23. New Jersey issued a federal consistency determination for the Project in 1997 under the CZMA. In 2002, however, New Jersey revoked the federal consistency determination and advised the ACOE that the federal consistency determination was outdated and that supplemental coordination under the CZMA was required, based among other things on the need for a more equitable distribution of dredged materials.
24. In 1996, the Delaware River and Bay from New Castle, Delaware and Pennsville, New Jersey, was designated as Essential Fish Habitat for over twenty species of fish under the Magnuson-Stevens Fishery Conservation and Management Act.
25. In January 2001, the ACOE applied to the State of Delaware for permits under the Subaqueous Lands Act and Wetlands Act, and for a Water Quality Certification under Delaware's Environmental Control Act and Section 401 of the Clean

Water Act. The Delaware hearing officer held a public hearing on December 4 and 5, 2001, and recommended on December 12, 2003 that the requested permits be denied. To date, the ACOE has not received these required approvals from the State of Delaware.

26. In 2002, the Project was suspended.
27. In 2007, New Jersey renewed a conditional Water Quality Certificate previously issued to defendant ACOE under the CWA for maintenance of the existing navigational channel in the Delaware River and Bay. Defendant ACOE is not in compliance with the conditions of this Water Quality Certificate. Among other things, the ACOE has not devised a long term strategy for managing the millions of cubic yards of material to be dredged and disposed, and has not timely submitted groundwater monitoring reports for the confined disposal facilities located in New Jersey.
28. On June 23, 2008, the ACOE signed a project agreement with the Philadelphia Regional Port Authority (the "PRPA") to dredge and deepen the main channel of the Delaware River. The project agreement was signed before conducting adequate sampling of the area to be dredged; before updating environmental analyses and studies or evaluating the Project's current environmental impacts; before conducting supplemental coordination with New Jersey under the CZMA;

before receiving a Water Quality Certificate from New Jersey under the CWA; and before conducting conformity determinations under the CAA.

29. The project area has undergone a significant transformation following the 1997 SEIS, and significant new information, studies, and requirements exist related to the natural resources within the project area. Among other things, new information has been gathered on the endangered shortnose sturgeon; a new and expansive oyster habitat has been identified within the project area; new water quality assessments have been performed; new benthic habitat data has been collected; the Delaware Bay female winter crab population has been evaluated; new data on horseshoe crabs on the Delaware Bay and their spawning activities has been collected and updated; the USEPA has designated Camden and Gloucester Counties, New Jersey as non-attainment areas for fine particulate and ozone emissions under the Clean Air Act; the USEPA has amended its general conformity CAA regulation to include de minimis emission levels for fine particulate matter and its precursors; surface water quality standards for the project area waters have been updated; atlantic sturgeon have been listed as threatened and endangered species by Pennsylvania and Delaware, proposed for listing by New Jersey, and listed as a Federal

Species of Concern and a Candidate Species by the federal authorities; New Jersey has updated its list of threatened and endangered plants; fisheries data for the project area has been updated; revised environmental windows for dredging, blasting, and overboard disposal have been adopted by Delaware; wild celery and other submerged aquatic vegetation have rebounded in the project area; the American eel population has expanded in the project area; and groundwater investigations have been conducted at the upland confined disposal facilities.

30. Following the 1997 SEIS, New Jersey, other states, and the federal authorities have adopted new measures to protect natural resources within the project area, including new restrictions by the Delaware Basin Fish and Wildlife Management Cooperative to protect winter crab; and revised environmental windows for dredging, blasting, and overboard disposal to protect fisheries.
31. On July 8, 2004, the ACOE issued public notice that it would accept comments on a Draft Statement of Conformity for the Project, which identified project emissions of nitrogen oxides (NOx) above the conformity determination threshold limits for all project years, and emissions of carbon monoxide (CO) above the threshold limit in year four of the Project.

32. By letter of August 20, 2004, New Jersey objected to deficiencies in the 2004 Draft Statement of Conformity, including the inadequacy of the proposed mitigation measures and the failure of the Draft Statement of Conformity to address fine particulate matter (PM 2.5). ACOE responded to and rejected New Jersey's comments on its Draft Statement of Conformity by letter of February 23, 2005, but New Jersey never received notification of ACOE's final adoption of this Draft Statement.
33. Following the 1997 SEIS, New Jersey, other states, and the federal authorities have gathered new information on federally-listed threatened and endangered species within the project area.
34. Following the 1997 SEIS, the massive Athos oil spill occurred on the Delaware River in the States of New Jersey, Pennsylvania, and Delaware.
35. Since the 1997 SEIS, defendants have never adequately sampled or analyzed the millions of cubic yards of sediment which they propose to dredge.
36. Since the 1997 SEIS, defendants have never analyzed the impact on surface water quality within New Jersey of dredging millions of cubic yards of sediment within the project area, or the impact on groundwater quality of

