UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
Nos. 11-1414; 11-1412; 11-1238; 11-1424
(consolidated)

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| STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION, et al.,<br><br>Plaintiffs,<br>v.<br><br>UNITED STATES ARMY CORPS OF ENGINEERS, et al.;<br><br>Defendants,<br>v.<br><br>PHILADELPHIA REGIONAL PORT AUTHORITY,<br><br>Intervenor-Defendant. | On Appeal from Judgment of the United States District Court, District of New Jersey<br><br>Sat Below:<br>Hon. Joel A. Pisano, U.S.D.J. |
| DELAWARE RIVERKEEPER NETWORK, et al.,<br><br>Plaintiffs,<br>v.<br><br>UNITED STATES ARMY CORPS OF ENGINEERS, et als.,<br><br>Defendants,<br>v.<br><br>PHILADELPHIA REGIONAL PORT AUTHORITY,<br><br>Intervenor-Defendant. | APPENDIX OF STATE OF NEW JERSEY<br><br>APPENDIX VOL. I, pp. 1-75 |
| STATE OF DELAWARE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL,<br><br>Plaintiff<br>STATE OF NEW JERSEY,<br><br>Plaintiff-Intervenor,<br><br>DELAWARE RIVERKEEPER NETWORK, | |

et als.,

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| Plaintiffs-Intervenors, | : | On Appeal from Judgment of the |
| v. | : | United States District Court, |
| UNITED STATES ARMY CORPS OF ENGINEERS (USACOE), et als., | : | District of New Jersey |
| Defendants, | : | Sat Below: Hon. Sue L. Robinson, |
| PHILADELPHIA REGIONAL PORT AUTHORITY, | : | U.S.D.J. |
| Defendant-Intervenor. | : | |

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APPENDIX ON BEHALF OF PETITIONERS, STATE OF NEW JERSEY, et al.
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## JURISDICTIONAL STATEMENT

This matter presents consolidated appeals from decisions of the District Courts of Delaware and New Jersey upholding a final decision by the United States Army Corps of Engineers ("USACE"), to proceed with the Delaware Main Stem and Channel Deepening Project ("the Project").

*State of New Jersey, Department of Environmental Protection, et al. v. USACE, et al.*, Docket No. 11-1414, is an appeal by the New Jersey Department of Environmental Protection and Bob Martin, Commissioner of the New Jersey Department of Environmental Protection (hereinafter collectively "New Jersey"), from the Order of the United States District Court, District of New Jersey, denying New Jersey's motion for summary judgment and granting the cross-motions for summary judgment of defendants United States Army Corps of Engineers, ("USACE"), Lieutenant Colonel Thomas Tickner, as District Commander of the USACE Philadelphia District, and Jo-Ellen Darcy, as Assistant Secretary for Civil Works, USACE (hereinafter collectively referred to as "USACE"), and the intervernors-defendants Philadelphia Regional Port Authority ("PRPA"). The District Court's decision upheld the USACE's determination to proceed with the Project against challenges by New Jersey pursuant to the Administrative Procedures Act, 5 U.S.C. §§ 702, alleging

violations of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 1331 et seq., the Clean Water Act ("CWA"), 33 U.S.C. § 1311 et seq., the Coastal Zone Management Act ("CZMA"), 16 U.S.C. § 1451 et seq., and the Clean Air Act, 42 U.S.C. § 7401 et seq.[1] A related action by the Delaware Riverkeeper Network, Civil No. 09-5889, was consolidated with New Jersey's action and resolved by the same decision, and is the subject of an appeal that is also consolidated with this action, under Docket No. 11-1283.

The New Jersey District Court's order was a final determination that disposed of all issues as to all parties.

New Jersey's appeal is timely because it was filed on February 15, 2011, less than sixty days after the New Jersey District Court's Order was entered on January 13, 2011. *See* F.R.A.P. 4(a)(1)(B)(NJa 13, NJa 39).[2]

*State of Delaware, Department of Natural Resources and Environmental Control*, Docket No. 11-1421, is an appeal by the State of New Jersey from the determination of the Delaware District Court denying summary judgment motions by the State of Delaware Department of Natural Resources and Environmental Control ("Delaware" or "DNREC"), and the Riverkeeper Network,

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[1] New Jersey does not assert its CAA claims on appeal.

[2] Citations to the record are as follows:
NJa - Appendix of State of New Jersey

and granting cross motions by defendants USACE, Darcy, and Lieutenant Colonel Tickner, as well as the Honorable John McHugh, Secretary of the Army, and Lieutenant General Robert L. Van Antwerp, Jr., Commander, USACE, in their official capacities (collectively "USACE"), and intervenor-defendant PRPA (NJa 39-71). The Delaware District Court granted New Jersey intervenor status by Order entered December 1, 2009. The Riverkeeper also appeals this decision in a consolidated appeal of the same name, Docket No. 11-1283.

The Delaware District Court's order was a final determination that disposed of all issues as to all parties.

New Jersey's appeal is timely pursuant to F.R.A.P. 4(a)(1)(B) and 4(a)(3), because it was filed on February 15, 2011, within 14 days of the Riverkeeper's Notice of Appeal, which was timely filed within sixty days after the December 17, 2010 Order of Judgment.

The District Courts had jurisdiction to review the USACE's determination pursuant to the Administrative Procedure Act, 5 U.S.C. § 702. The Court of Appeals has jurisdiction to hear this matter pursuant to 28 U.S.C. § 1291.

**STATEMENT OF THE ISSUES PRESENTED**

1. Whether the USACE violated the National Environmental Policy Act, ("NEPA"), 42 U.S.C. §4321 et seq., by issuing an

Environmental Assessment ("EA") in which it concluded that it was not required to prepare a Supplemental Environmental Impact Statement ("SEIS"), without adequately providing for notice and comment, or a Finding of No Significant Impact ("FONSI"), as required by NEPA and implementing regulations (NJa 16-18).

2. Whether the USACE violated NEPA, 42 U.S.C. §4321 et seq., by concluding in its EA that it was not required to prepare an SEIS, without considering or responding to significant and substantive new information and environmental changes brought to its attention by New Jersey and others (NJa 20-22).

3. Whether the USACE violated the Coastal Zone Management Act, 16 U.S.C. §1456(c), by determining that it did not need to engage in supplemental coordination with New Jersey, based the conclusions of its inadequate and unsupported EA that there was no new significant environmental information calling for additional sampling or investigation, and because this action was inconsistent with the USACE's agreement to perform additional testing, on which New Jersey's concurrence was conditioned (NJa 22-24).

4. Whether the USACE was entitled, pursuant to 33 U.S.C. § 1344(r), to assert an exemption from compliance with the requirement of the Clean Water Act, 33 U.S.C. § 1341(d), to

obtain water quality certifications from New Jersey and Delaware (NJA 24-226; NJa 62).

5. Whether New Jersey's claims under the CWA are properly raised under the APA, 5 U.S.C. § 706, or whether they are barred by the notice requirements of 33 C.F.R. § 1365 as claims alleging violation of an "effluent standard or limitation." (NJa 26-27).

**STATEMENT OF THE CASE**

This matter presents consolidated appeals by New Jersey from decisions of the United States District Courts of New Jersey and Delaware upholding the determination of the USACE and PRPA to proceed with the Project, which will ultimately dredge and deepen 102 miles of the main navigation channel of the Delaware River. *State of New Jersey, et al. v. USACE, et al.*, Docket No. 11-1414, is New Jersey's appeal from the decision of the New Jersey District Court denying New Jersey's motion for summary judgment, and granting cross-motions for summary judgment by the USACE and PRPA. New Jersey filed its suit on November 9, 2009, and an Amended Complaint on March 1, 2010 (NJa 78-122).

New Jersey filed its motion for summary judgment on August 12, 2010, in which it sought to vacate the decision of the USACE to proceed with its deepening project. The USACE and PRPA filed

cross-motions for summary judgment on September 13, 2010. The District Court denied the motions for summary judgment by New Jersey and the Riverkeeper, and granted the cross-motions for summary judgment by the USACE and PRPA, in an opinion and Order issued January 13, 2011 (NJa 7-37). The Riverkeeper's appeal from the same decision, Docket No. 11-1434, is consolidated with New Jersey's appeal.

*State of Delaware, DNREC v. USACE, et al.*, is an appeal from the United States District Court, District of Delaware, denying summary judgment motions by the State of Delaware and the Riverkeeper. New Jersey sought intervenor status, which was granted by Order of the Court dated November 11, 2009 (NJa 167). On January 27, 2010, the Delaware District Court partially denied and partially granted a motion by Delaware for a preliminary injunction (NJa 136-167). This ruling allowed the first phase of the Project (Reach C), located entirely in the State of Delaware, to proceed, but enjoined the rest of the Project.

The Riverkeeper and DNREC filed motions for summary judgment in the Delaware District Court matter on August 19, 2010. New Jersey did not file a motion or brief but filed a letter with the Court in support of DNREC. The District Court denied the summary judgment motions, and granted cross-motions

of the USACE and PRPA, in an opinion issued November 17, 2010 (NJa 37-70). Judgment dismissing the complaints was entered December 7, 2010 (NJA 74-75).

**SUMMARY OF ARGUMENT**

The USACE violated the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 1321 *et seq.*, by proceeding with the Project based an outdated EIS and SEIS, adopted in 1992 and 1997 respectively. The USACE made its determination that it did not need to supplement these analyses in a 2009 Environmental Assessment ("EA") that is both procedurally and substantively flawed. Procedural irregularities in the EA process included USACE's failure to provide notice and comment on the EA prior to its final adoption, and its failure to issue the EA with a Finding of No Significant Impact ("FONSI"). Moreover, although NJDEP and others attempted to bring to USACE's attention specific and substantive flaws in the data and assumptions on which the EA relied, USACE failed to provide any analysis or to respond to these concerns. These flaws notably include the failure to provide adequate sediment sampling in those Project areas in which most of the new dredging will occur, which are, ironically, the areas where contaminants are most likely to have accumulated. In short, the USACE arbitrarily, capriciously, and unreasonably failed both to provide an adequate process for

public participation, and to analyze these and other substantial concerns that NJDEP identified during the NEPA process. Therefore, the USACE has failed both to provide an adequate process or public participation and review, and to take the "hard look" at environmental impacts required by NEPA. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350, 369 (1989).

The USACE also failed to conduct responsible analyses of the likely environmental impacts of the Project on New Jersey's coastal zone requirements as mandated by the Coastal Zone Management Act ("CZMA"), 16 U.S.C. § 1451 *et seq.* The USACE relies on a 1997 consistency concurrence issued by New Jersey. This concurrence was expressly conditioned on USACE's agreement in a Memorandum of Understanding ("MOU") that it entered with New Jersey in 1997, in which it agreed to perform additional testing and analysis. Further, in 2002 USACE agreed to supplemental coordination to address new information. However, on November 9, 2009, USACE unilaterally determined that no further sampling or supplemental coordination was necessary. Because the USACE's action rested on the unsupported findings of its 2009 EA, it was arbitrary and capricious, and should be vacated.

The USACE also failed to comply with the requirement of the Clean Water Act, ("CWA"), 33 U.S.C. § 1341(d), that it obtain and comply with a state water quality certification from either New Jersey or Delaware. The USACE claims that it is exempt from this requirement pursuant to 33 U.S.C. § 1344(r), which applies to projects that have been specifically approved by Congress, after Congress has been provided with information as to environmental impacts in the form of an EA that complies with NEPA. However, a review of the record shows that the USACE fails to qualify for this exemption. New Jersey also appeals from the New Jersey District Court's determination that its claims are barred by the citizens' suit provisions of the CWA, 33 U.S.C. § 1365.

New Jersey challenged the USACE's determinations in the District Court pursuant to the Administrative Procedure Act, 5 U.S.C. § 706. New Jersey now appeals from the decision of the District Court that these actions were not arbitrary and capricious, or otherwise contrary to the requirements of these statutes.

On these appeals, New Jersey raises the claims in the Delaware matter only insofar as they pertain to the USACE's failure to obtain water quality certifications pursuant to the CWA. Because its interests are otherwise protected by its own

claims in the New Jersey District Court matter, it does not brief here the other issues raised by Delaware and the Riverkeeper in the Delaware District Court.

**STANDARD OF REVIEW**

New Jersey brought its claims before the District Courts pursuant to the Administrative Procedure Act, 5 U.S.C. § 702 ("APA"). The APA, 5 U.S.C. § 706, allows the Court to "hold unlawful and set aside" an agency decision if it is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[,]" 5 U.S.C. § 706(1)(A), or undertaken "without observance of procedure required by law[.]" 5 U.S.C. § 706(1)(D). To make this finding, the court must review the administrative record before the agency, and "'consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.'" *C.K. v. New Jersey Department of Health and Human Services*, 92 F.3d 171, 182 (3d Cir. 1996), citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420, 416 (1971). *See also South Trenton Residents Against 29 v. Federal Highway Administration,* 176 F.3d. 658, 663 (3d Cir. 1999) (an agency's decision not to draft a Supplemental Environmental Impact Statement "must be 'reasonable under the circumstances' when viewed 'in the light of the mandatory requirements and high

standards set by NEPA.'"). However, the Court "owes no deference" to an agency's "interpretation of NEPA or the CEQ regulations because NEPA is addressed to all federal agencies and Congress did not entrust administration of NEPA" to one agency alone. *Grand Canyon Trust v. FAA*, 290 F3d 339, 452 (D.C. Cir. 2002); *see also Sierra Club v. USDA*, 2011 U.S. District Lexis 41561, *67 (D.C. Cir. April 18, 2011)("agency is not entitled to substantial deference with respect to the CEQ regulations").

This matter is before this Court on an appeal from an order denying a motion for summary judgment, and granting cross-motions for summary judgment. Summary judgment is appropriate if "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 242, 250 (1986). To successfully withstand a summary judgment motion, a nonmoving party must produce a minimal amount of evidence showing that the allegations are the subject of a genuine issue of material fact. *Business Loan Center, LLC v. Nischal*, 331 F. Supp. 2d 301, 305 (D.N.J. 2005).

A decision to grant or deny summary judgment is reviewed *de novo* by the Court of Appeals. *Texas-Capital Contractors, Inc. v. Abdnor*, 933 F.2d 261, 264 (5th Cir. 1990), citing *Polcover v.*

*Secretary of the Treasury*, 477 F.2d 1223, 1226 (D.C. Cir. 1973), *cert. denied*, 414 U.S. 1001 (1973)(no deference to the decision of the District Court on an appeal under the APA); *Kulak v. City of New York*, 88 F.3d 63 (2d Cir. 1996). Similarly, an interpretation of a law, statute, or regulation by the District Court is reviewed by the Court of Appeals *de novo*. *Williams v. Lambert*, 46 F.3d 1275, 1281 (2d Cir. 1995).

**STATEMENT OF RELATED CASES**

Appellants are not aware of any other cases that raise the issues or factual contentions at issue here.

**STATEMENT OF FACTS**

A. The Project

The Delaware River is a designated essential fish habitat for over twenty species of fish, including threatened and endangered species. *See* NOAA letter dated 12/30/2008 (NJa 172-175); NOAA letter dated 4/16/2009 (NJa 569-585). The Project will dredge 102 miles of the main navigation channel of the Delaware River from Philadelphia to the Delaware Bay and increase the main navigation channel depth from 40 to 45 feet, generating an estimated 16.3 million cubic yards of dredged material that is likely contaminated, and will increase dredging to maintain the channel by 20 percent, to 4.3 million cubic yards of dredged material per year (NJa 238, NJDEP letter dated

1/14/2009). It also calls for disposal of sediment at confined disposal facilities ("CDFs") in New Jersey, where it has the potential to affect groundwater through leaching of contaminants, or surface water as a result of discharges of runoff from the dredged materials to the River. (NJa 531, DEP letter 6/23/09; NJA 242, DEP letter 1/14/09).

B. The NEPA Process

1. Chronology.

The National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, calls for agencies to create a "detailed statement" evaluating the environmental impact of a proposed major action, known as an Environmental Impact Statement ("EIS"). This is the project analysis prepared for major federal actions and is to include a "full and fair discussion of significant environmental impacts" and their "reasonable alternatives[]" 40 C.F.R. § 1502.1. In addition to an EIS, the NEPA process may also result in the issuance of other documents that are relevant here. NEPA requires a Supplemental Environmental Impact Statement ("SEIS") where an EIS previously has been prepared, but there have been "substantial project changes" or "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts[.]" *See* 40 C.F.R. § 1502.9(c)(1). An

agency may also prepare an Environmental Analysis, ("EA"), which is used to "'briefly provide sufficient evidence and analysis for determining whether to prepare an [EIS]." 40 C.F.R. § 1508.9(a)(1). If the agency issues an EA in which it concludes that an EIS is not warranted, it then must issue a Finding of No Significant Impact ("FONSI"). 40 C.F.R. § 1508.13.

New Jersey's NEPA claims concern the USACE's 2009 EA, which determined that it did not need to supplement its 1997 SEIS for the Project, in order to address environmental impacts arising since that time. A short chronology of the various reports issued by the USACE as part of the NEPA process for the Project is helpful to understanding its current status.

The USACE issued its original EIS for the Project in 1992. In 1997, the USACE updated its EIS by issuing an SEIS, the purpose of which was to address concerns raised during the review process for the 1992 EIS. (NJa 811, Abstract to 1997 SEIS). The Project did not move forward until June of 2008, more than ten years later, when the USACE and PRPA executed a Project Partnership Agreement. Upon learning that the project was again active, NJDEP urged the USACE to update its environmental analyses based on extensive new information and studies postdating the 1997 SEIS. (NJa 211-212, NJDEP letter 10/6/2008).

The USACE did not undertake the suggested analysis. However, on December 17, 2008, USACE published a public notice asking DEP and others to identify information pertaining to changes to the environment that would affect the project (NJa 213-218). NJDEP provided comments in response to this public notice on January 14, 2009 (NJa 232-243). Thereafter, on April 6, 2009, the USACE issued an EA in which it determined that the conclusions of the 1997 SEIS remained valid and required no further study, and that no new SEIS was necessary (NJa 290-468). The EA itself was never proposed for public comment, nor did the USACE respond to NJDEP's January 14, 2009 comments before it adopted the EA as final.

2. 1992 EIS and 1997 SEIS.

In 1992, USACE promulgated an EIS for the Project, which was criticized by both federal and State officials as incomplete and insufficient. *See*, U.S. Dept. of Interior comment letter dated 8/30/1990 (NJa 172-175); NOAA comment letter dated 7/27/1990 (NJa 176-177);, NJDEP comment letter dated 9/12/1990 (NJa 178-183); U.S. Fish and Wildlife Service comment letter dated 2/10/1992 (NJa 184-185). Among other things, the EIS was faulted for not having been based on adequate sediment sampling. *See Id.*

In 1997, the USACE completed an SEIS. The 1997 SEIS stated that its "purpose . . . was to provide additional information and environmental analysis to address environmental concerns raised during review of the 1992 Feasibility Report and Environmental Impact Statement." (NJa 811, Abstract to SEIS). The 1997 SEIS established that nearly all dredged material would be deposited at new and existing confined disposal facilities ("CDFs") in New Jersey. The National Park confined disposal facility is located within a quarter mile of an active water supply well in New Jersey (NJa 469-470, Groundwater Study of Upland Dredged Material Disposal Areas).

The USACE did not act to provide the 1997 SEIS to Congress until 2009, 12 years after its preparation, when the USACE provided the 1997 SEIS and the 2009 EA to the Chairpersons of the House and Senate Subcommittees on Energy and Water Development, Committee on Appropriations (NJa 469-470).

3. The December 17, 2008 "Public Notice" Concerning the Project

On December 17, 2008, following execution of a June 2008 Project Partnership Agreement with PRPA, the USACE published a public notice requesting new information affecting the Project. The public notice indicated that "(a)t present, the Philadelphia District has found no factors precluding the Project from moving forward based on previous studies." (NJa 213). In a two-page

attachment, the USACE listed changes to the Project and the environment since the 1997 SEIS and indicated it would entertain public comments on these issues (NJa 214-215).

New Jersey's January 14, 2009 comments in response to the public notice pointed out that "it is critical that the Philadelphia District complete a comprehensive sediment sampling effort for the entire Delaware River Main Channel Deepening Project, due to overall changes in sediment quality in the Delaware River since the 1997 SEIS." (NJa 236). Among other things, NJDEP questioned the continued accuracy of the 1997 SEIS in light of changes wrought by the 2004 Athos oil spill. It also stated that limited sediment sampling (45 samples) performed in 2003 and 2005 in connection with maintenance dredging in the main channel was inadequate in scope and location to characterize the sediments to be dredged in light of the effects of the spill over the entire 102-mile project area (NJa 242).

4. The April 6, 2009 Environmental Analysis ("EA").

On April 6, 2009, the USACE issued a final EA, without first having proposed the analyses or conclusions therein for public comment (NJa 232-243). On April 24, 2009, after the EA had already been issued, the USACE purported to respond to New Jersey's January 14, 2009 comments on its earlier Public Notice.

(NJa 471-472). The USACE did not address New Jersey's substantive criticisms, but rather reiterated, without analysis or explanation, its conclusion that "there have been no substantive project changes or changed environmental conditions that would invalidate" the analysis of the 1992 EIS or the 1997 SEIS, and that a second SEIS did not need to be proposed. *Id.; see* also, (EA Conclusion and Findings, Section 7.0) (NJa 414).

The USACE issued its EA without including a FONSI pursuant to 40 C.F.R. § 1501.4 and 33 C.F.R. § 230.11 (NJa 257, Memo from USACE Chief Counsel Stockdale).

Defendants' own documents show that they were aware of the need for adequate, updated environmental analyses postdating the 1997 SEIS before they issued the 2009 EA in reliance on the analyses in its original EIS and SEIS. *See*, USACE and PRPA Draft Meeting Minutes (NJa 484-517); Stockdale memo (NJa 518-530). Defendants also were cautioned by their chief counsel, Earl Stockdale, that updated analyses were necessary in light of changes postdating the 1997 SEIS; that a FONSI was required as part of any EA; that "without preparation of a FONSI, the USACE will simply not have completed its required NEPA process[;]" and that any EA should be subject to public comment (NJa 520). Indeed, the Stockdale memorandum points out that the Public

Notice used "does not conform to any known NEPA process or protocol." (NJa 522).

Because New Jersey was not afforded the opportunity to comment on the EA's conclusions and analyses before finalization of the EA, it filed objections to the EA on June 23, 2009 that highlighted numerous deficiencies (NJa 531-550). **(26)** The NJDEP pointed out that the 1997 SEIS on which USACE continues to rely is outdated and does not reflect changes to the Delaware River ecosystem since 1997, including the effects of a 2004 oil spill from the Athos oil tanker. *See* also NJDEP comment letter 6/23/2009 (NJa531-534); NJDEP comment letter dated 1/14/2009 (NJa 241, 243). NJDEP's objections and comments are summarized below.

a. Inadequacy of the Samples Due to their Age.

NJDEP objected to the USACE's reliance on the 1997 SEIS because the age of the samples used in that study raised questions as to their reliability. NJDEP pointed out that "Section 4.0 of the 1998 USEPA/USACE Inland Testing Manual . . . states 'the general recommendation of EPA and the USACE is that the internal interval between reevaluating of Tier 1 data for . . . projects not exceed three years or the dredging cycle, whichever is longest.'" (NJa 533, NJDEP comment letter 6/23/09). The samples underlying the 1997 SEIS dated from the early 1990s.

USACE did not respond to this concern, or explain its reasons for rejecting the recommendations of its own guidance document.

b. Inadequacy of Athos I Injury Assessment and USACE Maintenance Samples to Characterize Post-1997 Environmental Impacts Affecting Dredging and Sediment Disposal.

In November 2004, the M/T Athos struck a submerged anchor and discharged nearly 265,000 gallons of crude oil into the Delaware River (NJa 394-495). In order to assess the environmental impact of this spill, the 2009 EA relied 1) on a January 2009 Draft Damage Assessment and Restoration Plan and Environmental Assessment prepared by the National Oceanographic and Atmospheric Administration ("NOAA"), (EA Sediment Quality, Section 4.1.4), and 2) on samples from the USACE's routine maintenance dredging in 2003 and 2005 (NJa 395, NJDEP comments 6/23/09). The EA concluded that the Athos Spill did not affect sediments.

The DEP's comments pointed out that these samples were inadequate both because they were too few, and because they were not taken in the relevant areas of the river. More specifically, NJDEP's objections showed that the samples predominantly fail to address the sediments in areas where new dredging would occur, which are mostly located in channel side banks and bend areas outside the main channel, which were the areas to be widened. This is particularly significant because,

as the USACE itself recognized in its 1997 SEIS, sediment in channel bends and side slopes outside the main channel are also likely to be more contaminated with toxic and bioaccumulative chemicals at levels of concern than sediment in the main navigation channel, which is subject to annual maintenance dredging. *See* SEIS Bulk Sediment Analyses, Section 4.1 (NJa 209-210); NJDEP comment letter dated 6/23/2009 (NJa 535-536; 540-542); NJDEP comment letter 8/25/2009 (NJa 245). Because channel bends and side slopes are not routinely dredged as part of annual maintenance work, sediments in these areas of the river have significant potential to be contaminated by toxic and bioaccumulative chemicals at levels of concern. *Id.* As stated in NJDEP's comment letter, "the 1997 SEIS states that 'bend widening locations provide a worst case picture of contaminant concentrations that would potentially be in the dredged material. These areas are not currently dredged, as such contaminants could accumulate over a long period of time. Within the channel, accumulated sediment is quickly removed to maintain project dimensions, thus precluding contaminant accumulation over time.'" (NJa 250, NJDEP letter 8/25/09, citing 1997 SEIS Section 4.1, page 4-2). In making its decision, USACE never analyzed or responded to any of NJDEP's legitimate concerns.

Further, to the extent that the NOAA study did contain samples relevant to side slopes and bend areas, the USACE did not analyze them. As the NJDEP's objections pointed out, "the EA evaluated a limited data set from the sediment data collected by NOAA as part of the Injury Assessment from the Athos Spill (5 channel samples of the 162 sediment samples)." (NJa 54, NJDEP letter dated 6/23/2009). The USACE "did not even evaluate any of the NOAA sediment data that would be in proximity to areas of new dredging and would equate to the largest volume of dredging for the Project. Instead, the USACE limited its evaluation to samples in the existing federal navigation channel in which minimal dredging is necessary to deepen the channel." *Id.* The USACE did not explain why it limited its analysis in this manner.

Indeed, NOAA itself acknowledged that the sediment samples it collected for its Athos Injury Assessment provided only a "limited overview of the potential degree and spatial extent of oiling in the Delaware River mainstem." NOAA Injury Assessment, Section 1.5.5. Moreover, the Athos Injury Assessment itself states that all but four of the subtidal samples NOAA took were "either collected in tributaries or outside the area that appears to be most affected by the discharge [*i.e.*, oil spill]." (AR023841).

NJDEP advised USACE of similar concerns regarding the locations of USACE's 2003-2005 maintenance dredging samples, which USACE had performed for its ongoing maintenance dredging. (NJa 540, NJDEP letter dated 6/23/2009). NJDEP objected that the maintenance dredging sampling was insufficient because, like the NOAA sampling, the limited sample size and the area of testing excluded the new areas to be dredged, which were outside the main channel. Because its purpose is to maintain the existing channel, maintenance dredging by its nature does not occur outside that channel. As NJDEP pointed out, these side slope and river bend areas, including shallow water areas in which USACE's own EA recognizes the concentrations of PCBs from the Athos spill would be greatest, had not been evaluated at all since long before the Athos spill. *Id.*

Further, even the limited samples provided by the NOAA analysis contained information that refuted the USACE's conclusion that there was no impact from the oil spill. (NJa 444, EA Findings and Conclusions, Section 7.0); (NJa 540-541, NJDEP letter dated 6/23/2009). NJDEP identified samples from the new dredging areas that showed very high concentrations of PAH, which are toxic compounds that may be generated by oil spills or automobiles (NJa 541, NJDEP letter 6/23/2009); (NJa 393-396, EA Sediment Quality, Section 4.1.4). Despite these

objections, the record contains no evidence that defendants considered whether to update their sediment sampling within the channel bends and side slopes where new work will occur, or that they ever responded to the substance of New Jersey's comments indicating it should do so.

c. Failure to Consider Improved Conditions in the River since 1992 and 1997.

The NJDEP, along with NOAA, also criticized the USACE's failure to address the Project's environmental impact in light of the fact that Delaware River and Bay ecosystem has improved in recent decades, after contaminants of significant concern that were previously discharged into the river, such as PCBs, were banned pursuant to the CWA, as did NOAA. 15 U.S.C.S. § 2605(e); *see also* NOAA letter 12/30/2008 (NJa 227-228); NJDEP comment letter 1/14/2009 (NJa 233-243; NJa 241); NOAA letter dated 4/16/2009 (NJa 576-577). However, as NJDEP pointed out repeatedly, these contaminants are likely embedded in the sediment where defendants proposed new dredging, and will be dispersed into the river when new dredging occurs. *See* NJDEP comment 6/23/2009 (NJa 535-536; NJa 540-542); NJDEP comment letter dated 8/25/2009 (NJa 245). The subject of this comment was not addressed.

d. Failure to Adequately Characterize Environmental Impacts of Sediment Disposal.

The EA concluded that the 1997 SEIS did not need to be updated to adequately evaluate concerns regarding the environmental effect of disposing of the dredged sediment. Concerns regarding the adequacy of the data underlying this conclusion were also brought to the USACE's attention by the NJDEP's comments. NJDEP objected that the EA does not contain any appropriate leaching data for sediments that will be dredged from channel bends and side slopes (NJa 532, NJDEP letter 6/23/2009). The EA does not contain precipitation-induced Surface Runoff data for the dredged sediments that will be disposed of in upland CDFs. *Ibid.* at 533. Thus, NJDEP objected that it is not possible to evaluate potential impacts to groundwater quality that may result from disposal of this material in upland CDFs. *Ibid.* The USACE did not respond to or analyze NJDE's concerns. [3]

C. The CZMA Process

Under the Coastal Zone Management Act of 1972, 16 U.S.C. § 1451 *et seq.*, a federal agency is required to ensure the

[3] The NJDEP Office of Dredging and Sediment Technology evaluated the NOAA sediment data and found that 21 of NOAA's 42 samples exceeded the State's Non-residential Soil Remediation Standard for benzo(a)pyrene, a toxic compound with bioaccumulative impacts that is generated by sources such as oil spills (NJA 249, NJDEP letter 8/25/2009); (NJa 541, NJDEP letter dated 6/23/2009). The USACE's EA did not address the environmental impact of dredging and disposing of sediment with this level of benzo(a)pyrene.

consistency of its proposed actions with local coastal zone management programs by submitting a consistency determination to the relevant State agency. 16 U.S.C. § 1456(c)(1)(C); 15 C.F.R. § 930.36. The consistency process undertaken here resulted in a 1997 consistency concurrence from New Jersey that was expressly conditioned on the signed agreement of the USACE to undertake additional sampling and analysis, in order to complete the characterization of the Project impacts on the River and on groundwater at disposal areas (NJa 632, 8-29-97 consistency concurrence). Later, by letter of October 10, 2002, USACE further agreed that it would perform a supplemental coordination to address new issues (NJa 649-650). Nevertheless, on November 9, 2009 USACE issued a Memorandum for the Record in which it concluded, based on the analysis made in its EA, that supplemental coordination was not necessary because there was no new information requiring further investigation of these issues (NJa 586-622, at 590-591).

In August of 1997, New Jersey issued a federal consistency concurrence for the Project "given the understandings set forth in the Memorandum of Understanding between the New Jersey Department of Environmental Protection and the U.S. Army Corps of Engineers dated August 29, 1997." (NJa 632). NJDEP reserved the right to object and request remedial action if the proposal

had an effect on the coastal zone which was substantially different than originally proposed. *Id.*

The Memorandum of Understanding ("MOU") sets forth the parameters and conditions based on which New Jersey provided its coastal zone concurrence. With regard to sediments to be dredged and disposed of, the MOU provided that previously collected data would be used to identify contaminants of concern, which would then be the focus of additional tests.[4] *See* MOU Sections entitled "Sediment Sampling and Testing" and "Surface Water Management and Monitoring" (NJa 595-596). The MOU further acknowledged that "the full spectrum of contaminants will require periodic testing over the life of the project, to insure that sediment conditions have not changed(,)" and that modifications to the design and method of operation of disposal facilities would be evaluated by the working group and implemented by the USACE "as needed to protect human health and wildlife" and "water quality." (NJa 596). It is clear from the record that but for this agreement, New Jersey would not have granted coastal zone consistency. *See* NJDEP letter 8/28/1997 (NJa 640); Memo to USACE dated 7/21/1997 (NJa 642-648); USACE

[4] With respect to surface water management and monitoring, the MOU provided that additional surface water quality tests would be performed, and that this testing would include modified elutriate testing of sediment (AR025031).

letter dated 5/21/1997(NJa 647); NJDEP letter 5/21/1997 (NJa 548).

In 2002, New Jersey issued a letter advising that it was revoking the August 29, 1997 federal consistency determination advising the USACE that supplemental coordination was required. The letter included a list of reasons calling for supplemental coordination. *See* NJDEP letter dated 9/30/2002 (NJa 649-650). [5] By letter of October 10, 2002, the USACE agreed that "we will provide supplemental information to the 1997 determination in response to your letter and Justification for Supplemental Coordination" and "[o]ur technical staffs will continue their coordination . . . ." *See* USACE letter 10/10/2002 (NJa 649-650). Since that time, New Jersey has repeatedly asserted the need to supplement its consistency determination to analyze and address significant new information available to address, among other things, groundwater and surface water quality in the Delaware River. *See* Letter of NJDEP October 6, 2008 (NJa 211-212); NJDEP letter 1/14/2009 (NJa 242); NJDEP letter August 25, 2009 (NJa 244-247), and September 24, 2009(NJa 669).

The USACE did not provide supplemental coordination, nor did it engage in sampling in coordination with NJDEP as required

[5] An incomplete version of this document appears to have been filed with the Administrative Record; it is missing the last page.

by the 1997 MOU. Rather, on November 9, 2009, a week after New Jersey filed its complaint, USACE created a document called a "Memorandum for the Record," the stated purpose of which was to "determine the adequacy of the existing Coastal Zone Management consistency determination from New Jersey and Delaware." (NJa 586-620). The Memorandum identified some changes to the Project that it deemed not to be substantial (NJa 586-587). It also adopted the findings of its April 7, 2009 EA that the 2004 M/T Athos oil spill had not caused any change in post-spill sediment quality (NJa 589). Thus, the Memorandum adopted the findings of the EA and concluded that the changes and circumstances noted did not rise to the level of significance required for formal supplemental coordination under the CZMA. *Id.*

D. The CWA and Water Quality Certification

The USACE has refused to obtain a water quality certificate from New Jersey for the disposal of dredged material that will occur as a result of the Project. The Project will result in disposal of an estimated 16.3 million cubic yards of dredge material, and will increase annual maintenance dredging in subsequent years by 20 percent, to 4.3 million cubic yards per year (NJa 232, NJDEP letter dated 1/14/2009; NJa 214, 2009 EA). Because de-watering dredged sediment at upland confined disposal facilities results in effluent discharges to the Delaware River

and discharges of leachate to groundwater, the USACE has, for the past twenty years, obtained from New Jersey the water quality certificates that 33 U.S.C. § 1341 requires for disposal of dredged sediment from the USACE's routine maintenance dredging. *See, e.g.*, Conditional Water Quality Certifications for Pedrickstown, Oldmans, and Kilcohook (NJa 674-679).

The USACE did not submit the 1997 SEIS to the Chairpersons House and Senate Subcommittees on Energy and Water Development, Committee on Appropriations, until 2009 (NJa 469-70, Letters to the Honorable Byron L. Dorgan and Honorable Perer J. Visclosky).

E. Decision on Motions for Summary Judgment, District of New Jersey.

New Jersey sought summary judgment on its claims under NEPA, the CZMA, the CWA, and the CAA in a motion filed August 12, 2001. First, New Jersey argued that the USACE violated NEPA both because it failed to comply with NEPA's procedural requirements, and to provide the "hard look" at environmental impacts brought to its attention by New Jersey. The District Court concluded that the USACE had complied with the procedural requirements of NEPA. First, the District Court rejected New Jersey's claim that the EA process was flawed because the USACE failed to provide a FONSI with its EA (NJa 16). The Court found that although a FONSI ordinarily is required when the agency determines that an EIS is not required, the action the USACE

took here was "not to determine whether to prepare an EIS, but rather to assess project changes and new information and to determine whether the existing EIS and SEIS required supplementation." *Id.* The Court noted that "(f)ederal regulations do not provide a specific process to determine whether to prepare an SEIS or an additional SEIS." *Ibid.* Therefore, the District Court found a FONSI was not required. The District Court similarly rejected New Jersey's contention that the USACE erred by not providing a draft of the 2009 EA for public comment prior to its finalization, because it found that there are "no regulations in place that prescribe a specific process to determine whether to supplement an existing EIS." (NJa 17). More specifically, the District Court found that while NEPA requires specific periods for notice and comments when determining whether to issue an EIS in the first instance, there are no applicable to the issuance of an EA to determine whether to supplement an existing EIS. *Id.* The Court further relied on the history of public involvement with the project, and concluded that the notice provided by the USACE complied with NEPA. *Ibid.*

In addition to identifying procedural deficiencies in the notice and comment procedures surrounding the EA, New Jersey also challenged the failure of the USACE to consider significant

information or environmental impacts arising since the 1997 SEIS, which it brought to the USACE's attention. The District Court rejected these claims, and concluded that the 2009 NOAA draft damage assessment on which USACE relied "analyzed the potential effects of the Athos spill on the quality of the human environment as required by NEPA." (NJa 18). The District Court concluded that analyses of this nature require "'a high level of technical expertise [that mandates] defer[ence] to the informed discretion of the responsible federal agenc[y]," (NJa 19), citing *Marsh, supra*, 490 U.S. at 377. Thus, the Court deferred to the USACE's conclusion that it gave the matter the requisite "hard look" required by NEPA (NJa 18-19). The Court similarly dismissed the Riverkeeper's challenge to the USACE's decision not to further investigate impacts on the shortnose sturgeon, the Atlantic Sturgeon, and the Riverkeeper's contention that changes to the project were significant and required a new EIS (NJa 20-12)

New Jersey also sought summary judgment on its claim that the Project violated the requirements of the CZMA. New Jersey challenged USACE's conclusion, stated in its November 11, 2009 Memorandum for the Record, that it was not required to engage in supplemental coordination because there were no "significant new circumstances or information relevant to the proposed

activity[,]" because it was based on the inadequate 2009 EA. *See* 15 C.F.R. § 930.46(a). The Court rejected this challenge because it concluded that the EA was adequate (NJa 22-23). The Court further agreed with the USACE that the MOU in which the USACE agreed with NJDEP to undertake additional testing was not a condition precedent to starting the project, since the testing required by that agreement was "'to be implemented throughout the life of the [Project].'" (NJa 23).

Finally, the District Court dismissed New Jersey's claim that the USACE's failure to obtain a water quality certificate for its confined disposal facilities, in which it would dispose of material dredged from the river, violated the Clean Water Act, 33 U.S.C. 1251 *et seq.* The Court concluded that the requirement for a water quality certificate under 33 U.S.C. § 1344(t) is not applicable here because the USACE qualified for an exemption pursuant to 33 U.S.C. § 1344(r).[6] The Court also rejected New Jersey's claim that the USACE's own regulations, 33 C.F.R. § 336.1(a), which require it to comply with "all applicable substantive legal requirements[,]" require it to obtain a water quality certificate pursuant to 33 U.S.C. § 1344(d) (NJa 24). Because the Court found that the USACE qualified for the exemption from permit requirements provided by

[6] The Court also rejected New Jersey's claims pursuant to 33 U.S.C. § 1317, which New Jersey does not contest here.

33 U.S.C. § 1344(r), it determined that the water quality certification requirement was not "applicable" within the meaning of the USACE regulation. *Id.*

The Court further found that the claims of New Jersey and the Riverkeeper were barred by the citizens' suit provisions of 1365(b), which requires sixty days' notice before bringing suit on CWA violations (NJa 26).

The Court also dismissed a number of claims by the Riverkeeper not raised by New Jersey either in the District Court or in this Court.

F. Delaware District Court Decision.

Delaware's claims under the CWA concerned the USACE's assertion that 33 U.S.C. § 1344(t) did not require it to obtain a Delaware Subaqueous Land Permit because it had concluded that compliance with Delaware law would impair the USACE's authority to "maintain navigation." Although 33 U.S.C. § 1344(t) requires the USACE to comply with requirements of State law, it creates an exception for the maintenance of navigation. The Delaware District Court accepted the USACE's contention that this exception applied here, and concluded that Delaware permits were not required (NJa 58-59). The Court found that it did not need to rule on the alternate CWA exemption provided by 33 U.S.C. §

1344(r), since the Project was already exempt under 33 U.S.C. § 1344(t) (NJa 62).

The Delaware District Court rejected challenges to the CZMA process, concluding that the Project remained unchanged since Delaware's consistency concurrence, and that Delaware's concurrence was irrevocable (NJa 60-61). The Court also found the parties had conceded their Clean Air Act claims (NJa 61).

## ARGUMENT

### POINT I

### THE USACE'S EA AND ITS DECISION NOT TO PREPARE A SECOND SEIS ARE ARBITRARY, CAPRICIOUS, AND IN VIOLATION OF THE REQUIREMENTS OF NEPA.

The National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, "promotes its sweeping commitment to 'prevent or eliminate damage to the environment or biosphere' by focusing Government and public attention on the environmental effects of proposed agency action." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 372 (1989) (quoting 42 U.S.C. § 4321). Federal agencies are required to take a "hard look" at possible environmental consequences prior to taking actions that may have a significant impact on public health or the environment. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (internal citation and quotation omitted). NEPA also aims to ensure public participation by "guarantee[ing] that the

relevant information will be made available to the larger audience that may also play a role in both the decision-making process and the implementation of that decision." *Id.* at 349.

Contrary to NEPA requirements, the USACE failed to integrate public comment into its decision not to supplement its more than ten year old SEIS. Despite the attempts of NJDEP and others to make their concerns known in the inadequate public input process provided, the USACE's final EA did not evaluate or even acknowledge these substantial concerns. *See* Final EA; 4/14/20009 Letter Responding to Comments). In effect, USACE adopted its EA without reference to any of the substantive input provided by the public. The District Court's deference to the agency's expertise was not warranted where, as here, the agency arbitrarily and capriciously ignored public comments. *See South Trenton Residents Against 29 v. Federal Highway Administration, supra,* 176 F.3d. at 663 (an agency's decision not to draft a Supplemental Environmental Impact Statement "must be 'reasonable under the circumstances' when viewed 'in the light of the mandatory requirements and high standards set by NEPA.'"), quoting *Township of Lower Alloways Creek v. Public Service Elec. & Gas Co.,* 687 F.2d 732,742 (3d Cir. 1982). An agency's action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" if, among other things, "the agency

entirely failed to consider an important aspect of the problem[.]" *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 41 (1983). When determining whether an agency has taken the requisite "hard look" at environmental impacts, the Court should make a "pragmatic judgment whether the EIS' form, content, or preparation foster both informed decision-making and informed public participation[.]" *National Ecosystems Council v. U.S. Forest Service*, 418 F.3d 953, 960 (9th Cir. 2005).

The USACE's EA followed a NEPA process that ignored procedures required by the rules adopted by the Council on Environmental Quality ("CEQ") to facilitate public input. *See, e.g.*, 40 C.F.R.1506.6(d)(notice and comment), and 40 C.F.R. § 1508.13 (requiring the EA to be accompanied by a FONSI). The District Court found these regulatory requirements inapplicable, based largely on its conclusion that they apply only to the agency's decision to issue an EIS in the first instance, not to a decision whether to supplement an existing EIS. However, as the Supreme Court has recognized, the inquiry underlying a determination to supplement an EIS is virtually the same as the one required when deciding whether to issue an EIS in the first instance. *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 374 (1989). The District Court's decision thus rested on

an artificial distinction based on the "supplemental" nature of the EA process here. Therefore, its decision should be reversed.

A. THE USACE'S ADOPTION OF ITS EA VIOLATED PROCEDURAL REQUIREMENTS OF NEPA.

1. The Process USACE Employed When Determining Not to Prepare an SEIS was Arbitrary and Capricious Because It Did Not Adhere To Any Known NEPA Process.

On April 6, 2009, the USACE issued an EA in which it determined that it would not supplement its 1997 SEIS. The USACE's EA process was flawed at every step. First, the USACE never issued public notice that it was going to conduct an EA or that it was even considering conducting an EA. Rather, the Notice that it issued on December 17, 2008 merely said that the USACE was conducting an "environmental review" in order to "update the environmental record" and invited the public to "comment on the attached changes" to the Project and to "identify existing and new information." (NJa 216-218). The Public Notice did not identify the nature of the USACE's analysis or its proposed conclusions. *Id.* The USACE's Public Notice, as an internal USACE document itself admits, "does not conform to any known NEPA process or protocol." (NJa 522, n. 6, Memo from USACE Chief Counsel Stockdale). Regulations adopted by the CEQ require that an agency "involve environmental agencies, applicants, and the public, to the extent practicable"

in preparing an EA. 40 C.F.R. § 1501.4(b); *see* also 40 C.F.R.1506.6(a) (agencies "shall make diligent efforts to involve the public in preparing and implementing their NEPA procedures"); *Citizens for Better Forestry v. United States Dep't of Agriculture*, 341 F.3d 961, 970 (9th Cir. 2003) ("It is evident, therefore, that a complete failure to involve or even inform the public about an agency's preparation of an EA …violates NEPA's regulations"). The USACE cannot purport to have adequately involved the public in the preparation of an EA if the public was not informed that an EA was being prepared.

Second, to the extent that the USACE's chosen process did elicit public comments, the USACE never analyzed the comments or used them to inform its decision-making, but simply ignored them. "[P]ublic scrutiny" is "essential to implementing NEPA," 40 F.R. 25231, and NEPA mandates that the public be given an opportunity to "react to the effects of a proposed action at a meaningful time," *Marsh*, *supra*, 490 U.S. at 371. Here, however, the public input process was effectively nullified because before the USACE even responded to the comments that were received in response to the Public Notice, the USACE issued a final EA which declared that an SEIS was unnecessary. *See* April 6, 2009 EA (NJa 290); USACE's April 24, 2009 "response" to New Jersey's comments (NJa 483). When an agency seeks to simply go

through the motions of NEPA and "justify a decision that has already been made, [] genuine consideration may not be given to environmental factors." 40 F.R. 25231; *see also Davis v. Mineta*, 302 F.3d 1104, 1112, 1113 (10th Cir. 2002) (ruling against federal defendants where the "public opportunity to comment on the revised EA" was "evidently pro forma" and the agency "prejudged the NEPA issue" and never "adequately addressed in the EA" the concerns and "conflicting views" of another agency) (internal citation and quotations omitted).

In addition, the USACE deprived commenters of the benefit of the USACE's analysis of their key objections. This is contrary to the requirement of 40 C.F.R. § 1503.4(a)(5) that the agency shall "assess and consider comments both collectively and individually" and, if it rejects the comments, "explain why" and cite "the sources, authorities, or reasons which support the agency's position." Executive Order ("EO") 11514, as amended by Executive Order 11991 (May 24, 1977), mandates that, in "carrying out their responsibilities under the Act [i.e. NEPA] and this Order [i.e. EO 11514]," federal agencies shall "comply with the regulations issued by the Council except where such compliance would be inconsistent with statutory requirements." EO 11514 at §2(g). Thus, contrary to the District Court's finding, the CEQ regulations do not provide mere "guidance" to

federal agencies, but rather are binding. *See also* 40 C.F.R. §1500.3 (CEQ regulations are "applicable to and binding on all Federal agencies for implementing the procedural provisions of the National Environmental Policy Act of 1969").

The USACE need not ultimately agree with New Jersey, but the agency must show that it has taken the requisite "hard look" at the State's objections and not, as here, simply ignored them. *See* (NEPA "requires agencies which propose actions to consult with appropriate Federal and State agencies having jurisdiction or expertise in environmental matters and to include any comments made by those agencies"); *Sierra Club v. USACE,* 701 F.2d 1011, 1030 (2d Cir. 1983) (a court "may properly be skeptical" as to whether the agency's conclusions "have a substantial basis in fact" if the agency "has apparently ignored the conflicting views of other agencies having pertinent expertise"); *Silva v. Lynn*, 482 F.2d 1282, 1285 (1st Cir. 1973) (holding that "where comments from responsible experts or sister agencies disclose new or conflicting data or opinions that cause concern that the agency may not have fully evaluated the project and its alternatives, these comments may not simply be ignored. There must be good faith, reasoned analysis in response").

Third, USACE failed to issue either a draft or final FONSI with its EA. *Cf.* 33 C.F.R. Part 230, Appendix A at 3(a) (Corps'

regulation mandating that for "Projects in Preconstruction Engineering and Design, Construction, and Completed Projects in an Operations and Maintenance Category, "[d]istrict commanders will review the existing NEPA document(s) to determine if there are new circumstances or significant impacts which warrant the preparation of a draft and final supplement to the EIS. If the proposed changes and new impacts are not significant an EA and FONSI may be used") (emphasis added). Although the USACE did include a conclusory sentence in its EA that a supplemental SEIS was not required, a single sentence at the end of a 155-page EA that was not denominated as a FONSI does not satisfy that requirement. *Cf.* 40 C.F.R. § 1508.13.

2. The Process USACE Employed When Determining Not to Prepare an SEIS was in Violation of the Spirit and Letter of NEPA, Executive Mandate, and Implementing Regulations.

The District Court's decision is premised on its assumption that the CEQ regulations apply only to an agency's decision to issue an EIS in the first instance, not to a decision whether to supplement an existing EIS. However, the determination as to whether environmental impacts are sufficiently significant to require the "hard look" that an EIS provides is one of the central inquiries that NEPA requires, and it is immaterial whether this determination forms the predicate of a decision to prepare an initial EIS or to supplement an existing one. *See*

*Marsh, supra*, 490 U.S. at 374 ("the decision whether to prepare a supplemental EIS is similar to the decision whether to prepare an EIS in the first instance"). The District Court erred in establishing an artificial distinction based on the "supplemental" nature of the process and in permitting the USACE to neglect the central requirements of NEPA. As explained more fully below, the District Court's decision is contrary to the spirit and letter of NEPA, executive mandate, and implementing regulations, all of which seek to achieve the twin goals of informed decision-making and robust public participation in the NEPA process.

Executive Order ("EO") 11514, entitled "Protection and Enhancement of Environmental Quality," was issued on March 5, 1970, shortly after the passage of NEPA, and addresses the "Responsibilities of Federal [A]gencies" under that Act. EO 11514 provides that "[h]eads of agencies shall consult with appropriate Federal, State and local agencies in carrying out their activities as they affect the quality of the environment." *Id.* at §2(a) (emphasis added). Federal agencies must also "[d]evelop procedures to ensure the fullest practicable provision of timely public information and of Federal plans and programs with environmental impact in order to obtain the views of interested parties." *Id.* at §2(b) (emphasis added). Here,

as described more fully above, the USACE never alerted the State in particular or the public in general that it was preparing an EA that would be used to determine whether an SEIS was necessary. Further, to the extent that the notice that the USACE did issue concerning what it termed its "environmental review" solicited comments, the USACE never took these comments into consideration. Rather, the USACE simply issued a final EA which declared that an SEIS was not necessary. The "history of public involvement" with the Project that the district court cites notably entails nothing after July 1997 other than the deficient December 2008 "notice" that, as an internal USACE document admits, does not conform to any known NEPA process or protocol. Such a "history" is at odds with the "fullest practicable provision" of public input that EO 11514 mandates.

While it is true that the CEQ regulations do not explicitly detail the process that must accompany the determination whether or not to prepare a supplemental EIS, a review of the regulatory history reveals that the procedural protections outlined in the CEQ regulations were meant to apply to the entirety of the NEPA process and not just the preparation of the EIS. On May 31, 1978, the CEQ issued proposed regulations to implement NEPA. *See* 43 F.R. 25230. As the CEQ explained:

> These regulations replace the Guidelines issued by previous Councils, under Executive

> Order 11514 (1970), and apply more broadly. The Guidelines assist Federal agencies in carrying out NEPA's most conspicuous requirement, the preparation of environmental impact statements (EISs). These regulations were developed in response to Executive Order 11991 issued by President Carter in 1977, and implement "the procedural provisions of the Act." They address all nine subdivisions of Section 102(2) of the Act, rather than just the EIS provision covered by the Guidelines, and they carry out the broad purpose and spirit of the Act.
>
> *[Ibid.]*.

Thus, "[t]he Guidelines emphasized a single document, the EIS, while the regulations emphasize the entire NEPA process, from early planning through assessment and EIS preparation through provisions for follow-up." *Id.* at 25231.

An EA may be performed for many purposes. *See* 40 C.F.R. § 1501.3. However, where, as here, one is prepared for the purpose of determining whether it is necessary to supplement an EIS, it is in keeping with the "spirit and letter" of NEPA, *see* 40 C.F.R. § 1500.3, to require an agency to adhere to the same procedure as when determining whether to issue an EIS in the first instance. *Cf.* 40 C.F.R. §1502.9(c)(4) (an agency "[s]hall prepare, circulate, and file a supplement to a statement [i.e., an EIS] in the same fashion (exclusive of scoping) as a draft statement unless alternative procedures are approved by the Council"); National Environmental Policy Act of 1969, Debate

(Dec. 22, 1969), 115 Cong. Rec. 40923, 40925 (1969) (explaining that House adopted the "strengthening provisions" of the Senate bill because the latter contained "positive direction to all agencies of the Federal Government that they shall administer their programs to the fullest extent possible in a manner which reflects the declaration of national environmental policy"); 33 C.F.R. 230.13(b) (USACE regulation providing that a "supplement to a final EIS should be filed and circulated in the same manner as a draft and final EIS"). Here, the USACE should have been required to denominate the EA as an EA in its Public Notice; circulate a draft EA with response to comments before issuing a final EA, and prepare and circulate a FONSI, properly denominated as such, for public comment.

A firm requirement to circulate a draft EA and FONSI whenever an EA is used as a basis to determine whether or not to issue an SEIS is in keeping with the spirit of NEPA, the philosophy underlying *Marsh*, executive mandate, and CEQ regulations. Alternatively, however, in the absence of a firm rule the Court should view the "totality of the circumstances" surrounding the NEPA process. *See Bering Strait Citizens for Responsible Resource Dev. v. United States Army Corps of Engineers*, 524 F.3d 938, 953 (9th Cir. 2008). In that case, the Ninth Circuit addressed the "level of public disclosure [that]

is required under NEPA before issuance of a final EA[.]" *Id.* The Court "adopt[ed] this rule: An agency, when preparing an EA, must provide the public with sufficient environmental information, considered in the totality of circumstances, to permit members of the public to weigh in with their views and thus inform the agency decision-making process." *Ibid.* *See also Citizens for Better Forestry, supra*, 341 F.3d at 970 (holding that "a complete failure to involve or even inform the public about an agency's preparation of an EA and a FONSI, . . . violates these regulations") (citing 40 C.F.R. §§ 1501.4(b), 1506.6(a)).

Here, the public was denied the opportunity for meaningful comment because it was not informed that the USACE was preparing an EA that would be used as the basis for a determination whether or not an SEIS was necessary. The public notice invited parties to provide new information; it did not provide the USACE's analysis for review or apprise the public, for example, of the degree and manner in which it would rely on reports such as the NOAA Injury Assessment. Thus, the State and the public were unable to comment on these actions until after they received an EA that was already final.

Even assuming for the sake of argument that the public did respond to notice of an "environmental review" as robustly as it

would have to notice of an EA that included the basis for the USACE's action, the public's comments could not have informed the agency's decision-making process because the final EA that the USACE issued did not address or respond to public comments in any way. Even under a totality of the circumstances test[7], the USACE did not make "diligent efforts" to involve the public "to the extent practicable" before issuing the EA. *See* 40 C.F.R. §§ 1506.6(a), 1501.4(b); EO 11514.

For all of the foregoing reasons, the District Court's decision should be overturned.

B. The USACE's Decision Not to Prepare a Second SEIS Violates NEPA Because the EIS and the First SEIS Are Outdated and Contain Inadequate Sampling Analyses.

The USACE purported to fulfill its NEPA obligation by issuing an EA, in which it concluded that it did not need to supplement its 1997 SEIS, because there was no significant new information that would call into question the conclusions of that earlier analysis. Cf. *Marsh,* supra, 490 U.S. at 373. The District Court upheld the USACE's action, concluding that its analysis involved technical matters within the USACE's expertise that required it to defer to the agency's judgment. The Court

[7] It is important to note that, under the "totality of the circumstances test," the processes associated with the 1992 EIS and the 1997 SEIS are irrelevant to whether the USACE provide adequate notice and allowed adequate public input for its 2009 EA. *See Bering Strait, supra,* 524 F.3d at 953.

thus found that the USACE's EA was not arbitrary and capricious. However, the USACE's conclusory EA does not reflect any analysis or response to the specific and material shortcomings, identified by New Jersey, in the sampling and methodology USACE used to reaffirm its 1997 SEIS. As a result, the USACE failed to meet the dual objectives of NEPA to "consider every significant aspect of the environmental impact of a proposed action[,]" *Baltimore Gas & Elec. Co., supra,* 462 U.S. 97, and to "guarantee[] that the relevant information will be made available to the larger audience that may also play a role in both the decision-making process and the implementation of that decision." *Robertson, supra,* 480 U.S. at 348.

The determination under review here is not the 1992 EIS or the 1997 SEIS, but whether the USACE erred in not performing a supplemental SEIS to review impacts that occurred in the years following those analyses. The CEQ rules direct that an agency "shall" prepare an SEIS if there are "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9. The key question in determining when NEPA requires supplementation of an EIS is whether the "new information is sufficient to show that the remaining action will affect the quality of the human environment in a significant manner or to a

significant extent not already considered."[8] *Marsh, supra,* 490 U.S. at 374. When "reviewing a decision not to supplement an EIS," the court should not "automatically defer to the agency's express reliance on an interest in finality," but rather should "ensure that agency decisions are founded on a reasoned evaluation of the relevant factors." *Id.* at 378. As set forth below, the USACE's EA is fatally flawed because it failed to provide any analysis or response to New Jersey's concerns.

1. The 2004 Athos Oil Spill.

According to its 2009 EA, the USACE based its finding that the Athos Spill did not affect its environmental evaluation on sampling performed by NOAA, ("NOAA sampling"), as well as on the USACE's own sediment sampling, performed in 2003 and 2005 in connection with its regular maintenance dredging ("maintenance dredging sampling") (NJa 296, EA Section 1.3 at page 7). The

[8] "Significant," in turn, "refers to severity of impact" and requires consideration of, among other things, the degree to which the proposed action affects public health or safety; unique characteristics of the geographic area, such as proximity to wetlands or ecologically critical areas; the degree to which the possible effects on the human environment are highly uncertain or involve unknown risks; cumulative impacts; the degree to which the action may adversely affect an endangered or threatened species or habitat; and whether the action threatens a violation of federal or State law or requirements imposed for the protection of the environment. 40 C.F.R. § 1508.27.

USACE concluded based on these studies "that there has been no change in sediment quality." *Id.*

New Jersey submitted comments, both in response to the USACE's December 17, 2008 Public Notice and the April 2009 final EA, that called into question the reasonableness of USACE's reliance on the NOAA sampling and the sampling from maintenance dredging. More specifically, neither of these studies adequately sampled or studied sediments located in channel side banks and bend widening areas outside the main channel, which are the primary areas proposed for new dredging. *See* NJDEP letters dated January 14, 2009 (NJa 242), and June 23, 2009 (NJa 541). New Jersey's comments also pointed out that, to the extent NOAA's study did in fact include limited sediment sampling in proximity to the areas of proposed new dredging, the USACE's EA failed to review and evaluate those samples, but limited its review of the samples to those from the existing main channel (NJa 540-541).

Unfortunately, the areas not sampled are also the areas likely to be most contaminated (NJa 540-541, NJDEP letter June 23, 2009). The assumption on which New Jersey's objection rests - that the side slopes and bends of the river are likely to have greater levels of contamination than areas subject to routine maintenance dredging - is one that the USACE itself recognized

in its 1997 SEIS. That analysis noted that "bend widening locations" may present worse concentrations of contaminants because these areas are not routinely dredged (NJa 209, 1997 SEIS § 4.0). Thus, these are areas where contaminants are particularly likely to accumulate. *See Id.* Nevertheless, the USACE never addressed New Jersey's concerns regarding the adequacy of the data, nor did it indicate why it disagreed with New Jersey's assessment. This failure to examine these concerns was arbitrary and capricious.

2. The USACE Failed to Respond to DEP's Comments Identifying Outdated Sampling.

The USACE similarly failed to respond to, or even acknowledge, NJDEP's objection that the USACE's continued reliance on the 1997 SEIS was unreasonable because the sampling on which that report relied was no longer viable because of its age. As NJDEP pointed out, the USACE's approach was contrary to the recommendation of the USEPA/USACE Inland Testing Manual, which recommends that the interval between reevaluating data not exceed the longer of three years or the dredging cycle. AR025088 (NJa 527, NJDEP comment letter 6/23/09); (NJa 242, NJDEP comment letter 1/14/09).[9] The USACE never responded to these comments or

[9] The USEPA/USACE testing manual was excluded from the record of decision based on USACE's objection. NJDEP's June 23, 2009 letter is in the record, and is properly considered here to show that New Jersey brought to USACE's attention significant issues

explained why its actions were reasonable despite these legitimate criticisms and concerns. Reliance on stale data in the NEPA process has been deemed arbitrary and capricious. *See The Lands Council v. U.S. Forest Service*, 395 F.3d 1019, 1031 (9th Cir. 2004) (finding NEPA violation where agency relied on "stale habitat data" that had not been updated in "the last thirteen years"); *Van de Kamp v. Marsh*, 687 F. Supp. 495, 499 (N.D. Cal. 1988) (finding NEPA violation where USACE's decision that the Salt Marsh Harvest Mouse "did not exist at the site was not based on the most up-to-date information available to the Corps"). While the guidelines of this Inland Testing Manual are not binding, the USACE's failure to respond to public comment by analyzing or explaining its reasons for deviating from its own guidelines, is inconsistent with its obligation under NEPA to provide full analysis of environmental impacts in light of public input, and is therefore arbitrary and capricious. *See Delaware Audubon Society v. Hall*, 612 F. Supp. 2d 442, 452 (D. Del. 2009) (noting that the agency's action in "contravention of

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as to the reliability of samples. The USACE's failure to address this issue as part of its NEPA evaluation is relevant to showing that it failed to provide the "hard look" required by NEPA. The full name of this manual is: U.S. Environmental Protection Agency and Department of the Army-U.S. Army Corps of Engineers' "Evaluation of Dredged Material Proposed for Discharge in Waters of the U.S.--Testing Manual." EPA 823-B-98-004, February 1998.

and in spite of" its own Policy shows that the agency had not "carefully considered and analyzed the environmental impact" of the proposed action) (internal parenthetical omitted).

3. Failure to Perform Adequate Sampling of Dredged Material to Characterize Discharges from CDFs.

Finally, New Jersey advised USACE in its objections that, because dredged material placed in upland CDFs is de-watered, resulting in effluent discharges to surface water from the facilities, it is necessary to provide Effluent (Modified) Elutriate testing to predict and evaluate potential impacts to surface water from the de-watering. (NJa 533, NJDEP letter 6/23/2009); (NJa 246, NJDEP letter 8/25/2009). The USACE, however, relied on Modified Elutriate data that are 17 years old and are of unknown reliability due to Quality Assurance/Quality Control issues. *Id.* The record in support of the EA does not reflect that USACE ever explained its basis for concluding that this testing is adequate, despite NJDEP's comments.

In short, the USACE's NEPA process does not reflect that it gave any consideration at all to the substantive and serious concerns raised by New Jersey. Its analysis neither evaluates nor provides reasons why it rejected these concerns. The USACE thus failed to comply with the dual objectives of NEPA to "consider every significant aspect of the environmental impact of a proposed action(,)" and to ensure that "the agency will

inform the public that it has indeed considered environmental concerns in its decision-making process." Id. See *Baltimore Gas & Elec. Co. v. Nat'l Res. Def. Coun., Inc.*, 462 U.S. 87, 97 (1983). The USACE's decision to proceed with the Project without examining the deficiencies identified by NJDEP and others is thus arbitrary, capricious, and in violation of the requirements of NEPA. Therefore, the District Court's decision upholding the USACE's decision not to supplement its 1997 SEIS should be reversed.

**POINT II**

**THE USACE'S DECISION NOT TO COMPLY WITH THE AGREED UPON CONDITIONS OF THE 1997 CZMA FEDERAL CONSISTENCY CONCURRENCE OR TO CONDUCT A SUPPLEMENTAL CONSISTENCY DETERMINATION UNDER THE CZMA IS ARBITRARY, CAPRICIOUS, AN ABUSE OF DISCRETION, AND NOT IN ACCORDANCE WITH LAW.**

The USACE terminated its coastal zone coordination efforts on November 11, 2009 by issuing a Memorandum for the Record ("Memorandum") in which it determined that there were no new environmental impacts that it considered significant enough to require it to perform Supplemental Coordination with the New Jersey CZMP.[10] The District Court upheld the USACE's actions as consistent with the CZMA because it found the USACE properly

[10] USACE's delineation of the record characterizes this Memorandum of Record as its final determination concluding the record on its consistency determination.

based these conclusions on its 2009 EA, which "was decided in accordance with law." (NJa 23); *see also* 15 C.F.R. § 930.46(a). The USACE's unilateral rejection of the obligation to perform additional testing, including sediment sampling, agreed to both in the MOU and in its 2002 agreement to perform supplemental coordination, was arbitrary and capricious because it relied on the unsupported conclusions of an EA that was fundamentally flawed.

The Coastal Zone Management Act of 1972, 16 U.S.C. § 1451 et seq. ("CMZA"), was enacted to preserve, protect, develop, and where possible, to restore or enhance the resources of the Nation's coastal zone, and ensure coordination and consistency between federal, state, and local actions in the coastal zone. 16 U.S.C. § 1452 (1) and (2). To accomplish these ends, 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 zone management program. 16 U.S.C. § 1456(c)(1)(A); 15 C.F.R. §§ 930.30; 930.32; 930.39(c); 930.41; 930.43. A federal agency ensures consistency of its proposed actions with State management programs by submitting a consistency determination to the relevant State agency. 16 U.S.C.S. § 1456(c)(1)(C); 15 C.F.R. § 930.36. A State may concur or object to the Federal agency's consistency

determination. 15 C.F.R. § 930.41. "A Federal agency shall not proceed with the activity over the State agency's objection unless" the Federal agency explains there are legal impediments to full consistency, or the Federal agency has explained that "its proposed action is fully consistent with the enforceable policies of the management program, though the State agency objects." 15 C.F.R. § 930.43(d) (1) and (2); *see also* 15 C.F.R. § 930.32(a) and (b).

A supplemental consistency determination must be prepared if changes to the activity or the environment are such that a proposed federal activity "will affect any coastal use or resource substantially different than originally described." 15 C.F.R. § 930.46; 15 C.F.R. § 930.31(e); 15 C.F.R. § 930.34 (a)(1). The rule further provides that "substantially different coastal effects are reasonably foreseeable" where there are "substantial changes to the proposed activity," 15 C.F.R. § 930.46(a)(1), or, relevant here, where "there are significant new circumstances or information relevant to the proposed activity and the proposed activity's effect on any coastal use or resource." 15 C.F.R. § 930.46(a)(2).

In both the 1997 MOU and its 2002 agreement to provide supplemental coordination, the USACE concurred with NJDEP's conclusion that more information was important for a full

consistency determination and committed to provide it. (USACE letter dated 10/10/2002 (NJa 649). Nevertheless, on November 9, 2009, the USACE issued its Memorandum, which asserts that no supplemental coordination is required (NJa 586, 590). The USACE based this finding on the conclusion of its EA that recent impacts such as the Athos oil spill will be the same as previously described, and that the Athos oil spill did not change sediment quality. *Id.* However, as discussed with respect to the 2009 EA, these conclusions have never been fully evaluated and thus are unsupported by the record of the decision. *See* NJDEP letter dated 1/14/2009 (NJa 232-243); NJDEP letter dated 6/23/2009 (NJa 251-550); NJDEP letter dated 8/25/2009 (NJa 244-254). Further, the USACE's determination that it can now proceed with the Project because the 1997 conformity determination is in place, without undertaking the additional testing or inquiry provided for by that agreement, unilaterally ignores the assumptions on which the conformity determination relied. The Corps cannot treat the provisions to which it agreed as a nullity, while at the same time relying on the existence of New Jersey's concurrence, as a basis for it to proceed with the Project. For the foregoing reasons, the judgment of the District Court should be reversed and remanded

for actions consistent with the 1997 MOU, and the preparation of a supplemental consistency determination.

## POINT III

### THE CORPS VIOLATED THE CLEAN WATER ACT BY NOT OBTAINING WATER QUALITY CERTIFICATIONS FROM NEW JERSEY AND DELAWARE FOR THE PROJECT AS REQUIRED BY 33 U.S.C. § 1341. (Pertaining to New Jersey and Delaware District Court Decisions).

The Clean Water Act generally prohibits the discharge of any pollutant, including dredged or fill material, into navigable waters. 33 U.S.C. § 1311(a). Where discharges of dredged or fill material are authorized or undertaken by the USACE, the Act requires the entity to obtain a State certification that "shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure" compliance with "any other appropriate requirement of State law set forth in such certification." 33 U.S.C. § 1341(d). *S. D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 374 (2006). Here, it is undisputed that the USACE did not obtain a water quality certification from New Jersey or Delaware for the Project; USACE rather claims it is exempt from this requirement pursuant to 33 U.S.C. § 1344(r). However, this claimed exemption is inapplicable, both according to the USACE's own rules, and because the USACE's submission of the 1997 SEIS to congressional committees failed to satisfy the requirements

of 33 U.S.C. § 1344(r). *See Board of Mississippi Levee Commissioners v. USEPA*, 2011 U.S. Dist. Lexis 32676 (March 28, 2011)(holding that the USACE had not effected a submission of its EIS to Congress sufficient to satisfy 33 U.S.C. § 1344(r).[11]

The exemption provided by 33 U.S.C. § 1344(r) applies to discharges of dredged materials from construction of a project that is specifically authorized by Congress "if information as to the effects of such discharge,…is included in an environmental impact statement for such project pursuant to (NEPA) that is provided to Congress" prior to project authorization or appropriation of funds. The USACE claims this exemption based on the submission of the 1992 EIS to Congress. However, because the 1997 SEIS was adopted to correct deficiencies in the 1992 EIS, USACE needed to obtain approval of that document as well in order to present a full assessment of the environmental effects to Congress. See Abstract to 1997 SEIS (stating that its purpose was "to provide additional information and environmental analysis to address environmental concerns raised during review of the 1992 Feasibility Report and Environmental Impact Statement.") (NJa 811). See also Committee

[11] The Riverkeeper argued on summary judgment motions in both the New Jersey and Delaware District Court matters that the USACE's submission of the 1992 EIS to Congress was deficient and did not qualify for the 404(r) exemption. New Jersey did not present argument on this issue below but now joins it in light of the additional rationale set forth by the *Mississippi* holding.

on Public Works, 95th Congress, 2d Session, A Legislative History of the Clean Water Act of 1977 - A Continuation of the Legislative History of the Federal Water Pollution Control Act, Volume 3 at 503 (Statement of Senator Chafee that "in order to qualify for an exemption, an adequate environmental impact statement on the project must have been submitted to Congress prior to authorization of the project or appropriation of construction funds….The statement must satisfy the requirements of (NEPA)."); *id.* at 473 (statement of Senator Bumpers)(noting that "depth and quality of discussion of the effects of discharges" are "crucial" to the 33 U.S.C. § 1344(r) exemption, and further noting that 33 U.S.C. § 1344(r) applies to "amendments of statements" and not just initial EIS).

The conclusion that the EIS submitted to Congress must satisfy NEPA is required by the rationale for the exemption itself. 33 U.S.C. § 1344(r) creates a limited exception to the CWA based on the fact that Congress takes legislative action based on its review of an EIS adopted pursuant to NEPA. Thus, logic requires that the EIS must be adequate for the exception to apply. Indeed, the 2009 cover letters by which the USACE transmitted the 1997 SEIS to the chairpersons of the House and Senate Subcommittees on Energy and Water Development, Committee on Appropriations appear to recognize the need to resubmit the

EIS, as they purport to tell the recipients to "[p]lease be advised that an appropriation of construction funds after your receipt of this SEIS will invoke the terms of CWA subsection 404(r)." (NJa 469-470).

The analysis provided by the recent decision in *Bd. of Mississippi Levee Comm'rs, supra,* 2011 U.S. Dist. Lexis 32676 (March 28, 2011), further supports the conclusion that the record here, as assembled by the USACE, does not establish the submission of the 1997 SEIS to Congress necessary to invoke the 33 U.S.C. § 1344(r) exemption. That case rejected a challenge by a third party plaintiff from an EPA veto of USACE's Project pursuant to 404(c). The plaintiff therein contended that the EPA lacked veto authority because the project was exempt from CWA requirements under 33 U.S.C. § 1344(r), because the USACE had submitted an EIS to Congress. *Id.* at *38-39. As evidence of that submission, the plaintiffs relied on cover letters addressed to the Chairmen of the Public Works Committees of the House and the Senate. *Id.*[12]

Among the several reasons for which the Court found the submission deficient was the fact that the EIS was sent to

[12] The USACE did not assert the 404(r) exemption in that case, since it had obtained water quality certifications from Mississippi.

committees rather than Congress as a whole. *Id.* at *48-49.[13] Interpreting 33 U.S.C. § 1344(r), the Court concluded that the "plain language of the statute requires an EIS to be submitted to Congress as a whole[,]" as distinguished from a "submission to certain committees." *Id.* at *49. The District Court found this distinction significant because the congressional approval required for 33 U.S.C. § 1344(r) requires Congress to take an affirmative legislative action based actual congressional review of the EIS. *Ibid.* at *49-50. The Court also relied on the legislative history of the CWA and other enactments to show that Congress recognized a difference between submission to Congress and submission to the relevant committee. *Ibid.* at *49-51. Finally, the Court concluded that the fact that funds were appropriated does not compel the conclusion that Congress received and reviewed the EIS. *Ibid.* at *63-64. As the Court

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[13] The Court found that the submission was also deficient in part because the transmittal letter did not sufficiently identify the EIS to conclude that its purpose was to obtain review of the Project, and because the EIS was not submitted in sufficiently final form, and was not sufficiently identified in the cover letter, to satisfy the requirements of subsection 33 U.S.C. § 1344(r). *Mississippi Levee Comm'rs, supra,* 2011 U.S. Lexis 32676, *45-46. The District Court also found that the submission violated Executive Order 12322, which directs that any report submitted to Congress for action "shall include a statement of the advice received from the Office of Management and Budget." *Id.* at *50-51. Further, submission directly to committee chairpersons also violated House rules, which call for submission to the Speaker. *Ibid.* at *50-51.

noted, in the vast majority of cases an EIS is reviewed by the agency, and Congress appropriates money without itself reviewing the EIS. *Ibid.* at *64-65. Thus, if an appropriation alone were sufficient to support the exemption, "[t]he 'limited' exemption in 404(r) would swallow the entire CWA regulation process." *Ibid.*

The record here, which was compiled by the USACE itself, did not include any evidence that the SEIS was provided to and reviewed by Congress, but only that it had been submitted to certain congressional committees. *See* Letters to Chairpersons of House and Senate Subcommittees on Energy and Water Development, Committee on Appropriations (NJa 469-470). Therefore, USACE has not shown that it is entitled to assert the exemption of 33 U.S.C. § 1344(r). *See also Comm. On Public Works Legislative History, supra,* Vol. 3 at 472 (Statement of Senator Muskie)(noting that "projects which are authorized by congressional committee resolution" as opposed to by the whole Congress "are not eligible for the exemption" under § 1344(r)).

The District Court also incorrectly concluded that the citizens' suit provision of the CWA, 33 U.S.C. § 1365, bars New Jersey from bringing CWA-related claims under the APA, because New Jersey and Delaware did not comply with the sixty day notice requirement of that provision. The CWA's citizens' suit

provision provides that a State may commence a civil suit against the United States if a federal agency is "in violation of (A) an effluent standard or limitation." 33 U.S.C. § 1365(a)(1). The definition of "effluent standard or limitation" includes various performance standards for discharges including "certification under" 33 U.S.C. § 1341. See 33 U.S.C. § 1365(f)(4)-(5).

New Jersey's summary judgment motion, however, did not assert the occurrence of a discharge in violation of any particular effluent standard set by a water quality certification; rather, New Jersey challenges the USACE's decision to proceed with its Project without first obtaining the required water quality certifications from New Jersey and Delaware for the dredging. Indeed, if New Jersey had filed an enforcement action based on future discharges, it may well have been challenged as premature because the use of disposal facilities had not yet commenced, and no discharge had yet occurred. The District Court's reading of 33 U.S.C. § 1344(r) would thus deprive New Jersey of any opportunity to challenge USACE's decision to proceed with the project.

Because New Jersey's claims are not based on a discharge that has occurred, but rather involve the determinations underlying the decision to proceed with the Project, they are

properly brought under the APA. *See Oregon Natural Resources Council v. U.S. Forest Service*, 834 F.2d 842, 851 (9th Cir. 1987) (holding that judicial review under the APA was "appropriate" where the citizen suit provision of the CWA did not provide a remedy and plaintiffs were "merely seeking a determination that the timber harvesting violates the Oregon water quality standards"). *Cf. Cape May Greene v. Warren*, 698 F.2d 179, 182, 190 (3d Cir. 1983) (finding action that EPA took under the CWA to be arbitrary and capricious under the APA). This conclusion is not affected by *Allegheny Co. Sanitary Authority v. United States EPA*, 732 F.2d 1167, 1177 (3d Cir. 1984), on which the USACE relied below. That case is inapposite because it merely states that relief under the CWA is exclusive and an action under the APA is precluded where in fact the CWA provides an adequate remedy. *Id.* That is not the case here.

For all of the foregoing reasons, the USACE should be required to comply with 33 U.S.C. § 1341 of the CWA and its own implementing regulations before being allowed to dispose of dredged materials at upland CDFs.

**CONCLUSION**

For the foregoing reasons, the Court should reverse the decision of the New Jersey District Court and enter judgment pursuant to the APA, 5 U.S.C. § 706(1)(A), finding the actions

of the USACE described above to be arbitrary and capricious and unsupported by the record, and 1) declaring the USACE's EA insufficient and vacating the EA because USACE failed to conduct analyses and otherwise comply with the procedures required by NEPA; 2) vacating the November 9, 2009 Memorandum for the Record, and requiring USACE to comply with the terms of the NJDEP's consistency concurrence and to undertake supplemental consistency coordination as required by the CZMA, and 3) reversing the judgments of the New Jersey and Delaware District Courts and requiring the USACE and PRPA to obtain and comply with a state water quality certification from the State of New Jersey pursuant to the CWA, 33 U.S.C. § 1341 .

Respectfully submitted,

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**CERTIFICATON OF COMPLIANCE WITH LOCAL RULE 31.1(c)**

I certify that the text of the paper copies of this brief and the text of the PDF version of this brief filed electronically with the court today are identical.

I further certify that this brief complies with L.A.R. 31.1(c) in that prior to it being electronically mailed to the Court today, it was scanned by the following virus detection software and found the be free from computer viruses:

Company: McAfee, Inc.

Product: McAfee Virus Scan Enterprise Version 8.7.0i

/s/Eileen P. Kelly
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Dated: May 18, 2011

**CERTIFICATION OF COMPLIANCE WITH LOCAL RULE 32(A)(7)(B) AND LOCAL RULE 32(A)(5) AND (A)(6)**

I, Eileen P. Kelly, a member in good standing of the bar of the United States Court of Appeals for the Third Circuit, certify that this Brief complies with Fed. R. App. P. 32(a)(7)(B) in that the principal portions of the brief contain 13,876 words according to the software program employed by the office of the Attorney General of New Jersey. I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Fed. R. App. P. 32(a)(6) because it has been prepared in a monospaced typeface using Word Perfect version 12 with 12 point Courier New font.

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**CERTIFICATE OF SERVICE**

I, Eileen P. Kelly, a member in good standing of the bar of the United States Court of Appeals for the Third Circuit, certify that copies of this Brief and of the Appendix, except for Volume VI which is the subject of a motion to file Disks containing additional portions of the record (which are already in the possession of the parties) were delivered for service by overnight mail on the following:

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**CERTIFICATE OF BAR MEMBERSHIP**

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