

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

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

JURISDICTION

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

VENUE

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

PARTIES

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

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

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

STATUTORY BACKGROUND

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

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

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

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

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

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

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

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

FACTS

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

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

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

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

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

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

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

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

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

depositing millions of cubic yards of sediment within confined disposal sites in the State of New Jersey.

37. Following the 1997 SEIS, the USEPA has designated Camden and Gloucester Counties, New Jersey, as non-attainment areas for fine particulate and ozone emissions under the Clean Air Act, and has amended its general conformity CAA regulation to include de minimis emission levels for fine particulate matter and its precursors.
38. Following execution of the project agreement and based on significant changes in the project area and significant new information about natural resources within the project area, the State of New Jersey urged the ACOE to conduct supplemental coordination under the CZMA, obtain a Water Quality Certificate from New Jersey under the CWA, update the environmental analyses of the Project, adequately sample and analyze the sediment to be dredged, and assist in the development of an equitable dredged materials management plan.
39. Defendants failed to conduct any of the activities requested by New Jersey; failed to update the environmental analyses of the Project through an SEIS; failed to conduct supplemental coordination under the CZMA; failed to adequately sample or analyze sediment within the areas to be dredged; failed to obtain a New Jersey Water Quality

Certificate for the Project under the CWA; and failed to assist or participate in any way in the development of an equitable dredged materials management plan.

40. Instead of completing the required sampling and environmental analyses and obtaining the required approvals as requested by New Jersey, on December 17, 2008, the ACOE published a public notice requesting comment on the Project and the identification of new information since finalization of the 1997 SEIS. This public notice arbitrarily and capriciously provided only a two-week public comment period, from December 17 to December 31, 2008.

41. On December 31, 2008, in response to public objections to the unreasonable public comment period previously announced, including objections from USEPA and New Jersey, the ACOE extended the public comment period by two weeks, to January 14, 2009.

42. On January 14, 2009, New Jersey provided extensive comments on the Project, detailing the many additional studies and new information gathered since the 1997 SEIS; advising the ACOE that New Jersey could not determine the Project's consistency with the New Jersey coastal zone management program, New Jersey water quality standards, or the Clean Air Act until this new information was reviewed and

analyzed by the ACOE; and requesting that any updated environmental review conducted by the ACOE be subject to public review and comment.

43. On April 6, 2009, before adequately sampling or analyzing the sediment to be dredged, updating the environmental analyses of the Project through an SEIS, conducting supplemental coordination with respect to the Project under the CZMA, obtaining a Water Quality Certificate for the Project from New Jersey under the CWA, determining the Project's conformity under the CAA, or conducting required consultations regarding threatened and endangered species and essential fish habitat, the ACOE published an Environmental Analysis of the Project.
44. The ACOE Environmental Analysis failed to address or analyze the extensive new information and data that exists regarding the project area and natural resources within the project area, and relied on outdated, limited, and inadequate sampling and analysis of sediment within the project area.
45. In the ACOE Environmental Analysis, the ACOE arbitrarily, capriciously, and unreasonably concluded that the Project impacts remain as analyzed in the 1997 SEIS, and that no additional analyses or public comment are required before the Project proceeds.

46. In the ACOE Environmental Analysis, the ACOE arbitrarily, capriciously, and unreasonably concluded that disposal of nearly all of the dredged material that will be generated by the Project and project maintenance over a 50-year period will and can be safely handled at confined disposal facilities located in the States of New Jersey and Delaware.
47. On April 24, 2009, the ACOE provided a letter purporting to respond to New Jersey's comments of January 14, 2009. This letter failed to address New Jersey's comments in any substantive way, and contained no review or analysis of the numerous issues discussed in New Jersey's comments aside from references to the deficient Environmental Analysis of April 6, 2009.
48. On June 23, 2009, New Jersey provided additional, detailed comments to the ACOE on the deficient Environmental Analysis. To date, the ACOE has not provided any formal response to this letter.
49. On July 23, 2009, Delaware denied the ACOE's application for permits under the Subaqueous Lands Act and Wetlands Act, and for a Water Quality Certification under Section 401 of the Clean Water Act, based among other things on the unprecedented size and scope of the Project, and on significant changes in the Delaware River and estuary since

the 1997 SEIS, including the Athos oil spill of 2004. In its denial, Delaware found that the Project had the potential to significantly alter public subaqueous lands, wetlands, and beaches, but that the ACOE proposed to conduct the Project with little knowledge of the Delaware River's current environment.

50. On August 25, 2009, New Jersey sent the ACOE a letter detailing the critical need for adequate sampling and analysis of the material to be dredged; detailing deficiencies in the limited, inadequate sampling and analyses previously conducted; and outlining the exceedances of New Jersey non-residential or residential soil standards for contaminants disclosed by the limited, inadequate sampling previously conducted. These exceeded standards include standards for contaminants associated with toxic and bioaccumulative impacts such as polychlorinated biphenyls (PCBs), arsenic, thallium, vanadium, heptachlor epoxide, benzo(a)anthracene, benzo(b)fluoranthene, dibenz (a, h) anthracene, and benzo (a) pyrene. To date, defendants have not responded to this letter.
51. On August 7 and 14 2009, the ACOE issued a General Conformity Analysis and Mitigation Report for the Project, and a Draft Conditional Statement of Conformity for the

Project, purporting to comply with CAA requirements. These documents did not satisfy the ACOE's obligations under the CAA to demonstrate that the Project will conform with the SIP of New Jersey.

52. On September 15, 2009, the USEPA advised the ACOE by letter that its General Conformity Analysis and Mitigation Report, and its Draft Conditional Statement of Conformity, did not satisfy CAA requirements. Among other things, the Draft Conditional Statement of Conformity did not describe the specific mitigation measures and offsets that the ACOE would use to make the Project's indirect and direct annual nitrogen oxide (NOx) emissions for each project year conform to the SIP of New Jersey. In addition, the Draft Conditional Statement of Conformity improperly provided that NOx or ozone emissions credits from the New York Channel deepening project would be used for the Project, even though the New York Channel deepening project is located in a different non-attainment area, and project emissions must be fully offset within the same non-attainment or maintenance area.

53. On September 14, 2009, New Jersey advised the ACOE by letter that its Conditional Statement of Conformity and General Conformity Analysis and Mitigation Report did not satisfy the applicable CAA requirements. Among other

things, the analyses did not include emission estimates for all parts of the Project, both for purposes of identifying emissions above the conformity determination threshold and identifying necessary mitigation; proposed to use emissions credits from another non-attainment area to offset emissions in the Project's non-attainment area; did not include a specific emissions mitigation plan for the Project detailing the specific measures that would be undertaken to ensure all emissions from the Project would conform to New Jersey's SIP; and failed to demonstrate compliance with the notice requirements of the conformity determination regulations. In addition, New Jersey pointed out that the ACOE had never taken reasonable steps, such as convening an air team including New Jersey, Delaware, and other states, to address the Project's conformity with the SIPs of all affected states.

54. The ACOE has solicited bids for an award of a contract for new dredging by no later than December 26, 2009, and commencement of new dredging as soon as January 2010, notwithstanding its failure to adequately sample and analyze the sediment within areas to be dredged; failure to review the Project's environmental impacts based on current information and adequate sampling of the material to be dredged; failure to obtain a water quality certificate from

New Jersey for the Project; failure to conduct supplemental coordination with New Jersey under the CZMA; and failure to complete and finalize conformity determinations under the CAA.

CLAIMS FOR RELIEF

Administrative Procedure Act

55. Plaintiffs hereby incorporate and reassert the foregoing paragraphs of the Complaint.
56. Defendants propose to conduct a project that is not consistent with New Jersey's coastal zone management program, and have failed to insure that the project will be consistent with that program to the maximum extent practicable. In addition, the Secretary of Commerce has not found that the Project is consistent with the purposes of the CZMA or necessary in the interest of national security.
57. The Project will affect the coastal uses and resources of New Jersey substantially differently than originally described in the 1997 SEIS. Defendants therefore must prepare a supplemental consistency determination for the State of New Jersey, but have arbitrarily, capriciously, and unreasonably failed to prepare such determinations.

58. Defendants' decision to conduct a project in conflict with the coastal zone management plan of New Jersey, and refusal to conduct supplemental coordination with the State of New Jersey, violate the Coastal Zone Management Act and 33 C.F.R. §336.1, and are prohibited actions that are arbitrary, capricious, and not in accordance with law under the Administrative Procedure Act, 5 U.S.C. §706.
59. The Clean Water Act ("CWA"), 33 U.S.C. §1251 et seq., and implementing regulations, including 33 C.F.R. §336.1, require defendants to obtain a state water quality certification for the Project from New Jersey, and to comply with the water quality standards of New Jersey and with any conditions New Jersey may impose for compliance with State standards when conducting and maintaining the Project.
60. Defendants have failed to obtain a New Jersey Water Quality Certificate for the Project and project maintenance.
61. The ACOE has failed to comply with the conditions of its existing New Jersey water quality certificate for maintenance of the existing Delaware River and Bay navigational channel, through, among other things, its failure to develop a dredged materials management plan for the millions of cubic yards of dredged material that maintenance currently generates and failure to timely

submit groundwater monitoring reports for the confined disposal sites located in New Jersey.

62. Defendants' failure to obtain a water quality certification from New Jersey for the Project and to comply with the existing New Jersey water quality certificate constitute violations of the Clean Water Act and of 33 C.F.R. §336.1, and are prohibited actions that are arbitrary, capricious, and not in accordance with law under the Administrative Procedure Act, 5 U.S.C. §706.
63. The Clean Air Act (CAA) requires each federal agency, including the ACOE, to make a conformity determination before taking an action or issuing a permit. This requires the agency to make a finding that its action conforms to the applicable State Implementation Plan, ("SIP"), which is the State's plan for how it will attain the National Ambient Air Quality Standards ("NAAQS"). 42 U.S.C. § 7506(c)(1); 40 C.F.R. § 93.150(b).
64. A conformity determination is required for the Project, which is located in Gloucester and Camden Counties, New Jersey, which are areas designated by the EPA as non-attainment and/or maintenance areas for the NAAQS for fine particulate matter and for ozone.
65. The ACOE conformity determination has not yet been finalized in conformity with CAA procedural regulations.

Further, the draft ACOE conformity determinations fails to meet CAA requirements because it did not take all aspects of the Project into account when determining which project emissions would exceed de minimis levels and require a conformity determination, or to address the Project's impacts on New Jersey's SIP for fine particulate matter or ozone.

66. As a result of defendants' failure to perform an adequate conformity determination for the Project, they have failed to provide the analysis of whether the Project will impede attainment by New Jersey of the NAAQS for fine particulate matter or ozone by causing or contributing to a new violation of the NAAQS, by increasing the frequency or severity of any existing violation of the NAAQS, by delaying timely attainment of the NAAQS for fine particulate matter, or by delaying the achievement of any required interim emission reduction or milestone towards attaining the NAAQS. 42 U.S.C. § 7506(c)(1)(B).

67. Defendants' plan to proceed with the Project without complying with the requirements of the CAA to prepare a conformity determination constitutes a violation of law and is a prohibited action that is arbitrary, capricious, and not in accordance with law under the Administrative Procedure Act, 5 U.S.C. §706.

68. Defendants have failed to adequately sample or analyze the sediment within the area to be dredged, and have failed to develop a long-term strategy for the disposal of the millions of cubic yards of dredged material that the Project will generate. Defendants' plan to proceed with the Project without having conducted these analyses or developed this strategy, and to instead rely on inadequate, limited, and outdated sampling and analysis is arbitrary, capricious, an abuse of discretion, and not in accordance with law under the Administrative Procedures Act, 5 U.S.C. §706.

National Environmental Policy Act

69. Plaintiffs hereby incorporate and reassert the foregoing paragraphs of the Complaint.
70. The Project is a major federal action within the meaning of NEPA, and the ACOE prepared an EIS in 1992 and prepared an SEIS in 1997.
71. The National Environmental Policy Act, and implementing regulations, including 40 C.F.R. § 1506.2, require a Supplemental EIS ("SEIS") to be prepared for a major federal action where there have been substantial changes in the proposed actions; where significant new circumstances or new information exists; or where an SEIS would further

the purpose of NEPA. The ACOE has adopted regulations, codified at 22 C.F.R. § 230.1 et seq., to guide, in conjunction with the CEQ regulations, its implementation of NEPA. The ACOE's rules, at 33 C.F.R. § 230.6, indicate that proposed major changes to projects which increase size substantially or add additional purposes will ordinarily call for preparation of an EIS.

72. Since completion of the 1997 SEIS, changes have been made to the Project, and significant new circumstances and information exist and have become known. The EIS and SEIS previously prepared for this Project fail to take these changes, new circumstances, and information into account, and no longer satisfy the requirements of NEPA, and/or the implementing regulations of the CEQ.

73. On April 6, 2009, ACOE issued an Environmental Analysis in which it concluded that no further analysis of the environmental impact of the Project was necessary, and the ACOE has taken additional steps, including a bid solicitation process and an announcement that the Project will commence in December 2009. Since April 6, 2009, the ACOE has refused to adequately sample and analyze the material to be dredged, even though the limited, inadequate, and outdated sampling previously conducted disclosed exceedances of New Jersey non-residential or

residential soil standards for contaminants associated with toxic and bioaccumulative impacts such as polychlorinated biphenyls (PCBs), arsenic, thallium, vanadium, heptachlor epoxide, benzo(a)anthracene, benzo(b)fluoranthene, dibenz (a, h) anthracene, and benzo (a) pyrene. These steps show that the ACOE is proceeding with the Project without preparing a new SEIS, and that it considers its environmental inquiry concluded.

74. Defendants' decision to proceed with the Project without a new SEIS or further analyses, without adequate sampling and analysis of the material to be dredged, and in reliance on limited, inadequate, and outdated sampling and analysis of the material to be dredged violates NEPA and is arbitrary, capricious, and not accordance with law in violation of the Administrative Procedure Act, 5 U.S.C. §706.

WHEREFORE, plaintiffs demand as relief:

- 1) That the Court declare defendants' decision to proceed with the Project to be arbitrary, capricious, an abuse of discretion, in violation of law and in violation of the CZMA, the CWA, NEPA, the CAA, and the Administrative Procedure Act;
- 2) That the Court enjoin defendants from proceeding with the Project unless and until defendants comprehensively

sample and analyze the sediment within the areas to be dredged; adequately analyze the impacts on surface water and groundwater of the proposed new dredging and disposal of dredged material in New Jersey; issue a new SEIS pursuant to NEPA; obtain a water quality certificate for the Project from New Jersey pursuant to the CWA; conduct complete supplemental coordination with New Jersey pursuant to the CZMA; and conduct and complete all conformity determinations required by the CAA; and

- 3) Such other relief as the Court deems appropriate and just.

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CERTIFICATION PURSUANT TO L.R. CIV. PR. 11.2

I hereby certify pursuant to L.Civ. Rule 11.2 that I am currently aware of no other pending actions of administrative proceedings related to the subject matter of this litigation, with the exception that the State of Delaware Department of Natural Resources and Environmental Control (DNREC) filed a complaint for declaratory and injunctive relief in the United States District Court for the District of Delaware on October 30, 2009. The parties to that action are: DNREC; United States Army Corps of Engineers (USACOE); the Honorable John McHugh, Secretary of the Army, in his official capacity; the Honorable Jo-Ellen Darcy, Assistant Secretary of the Army for Civil Works, in her official capacity; Lt. Gen. Robert L. Van Antwerp, Jr., Commander, USACOE, in his official capacity; and Lt. Col. Thomas Tickner, Commander USACOE, North Atlantic Division, Philadelphia District, in his official capacity. The docket number assigned to that action is 1:09-cv-00821-UNA. A judge has not yet been assigned to that action.

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