

ANNE MILGRAM  
 ATTORNEY GENERAL OF NEW JERSEY  
 R.J. Hughes Justice Complex  
 25 Market St., P.O. Box 093  
 Trenton, New Jersey 08625-0093  
 Attorney for Intervenors State of  
 New Jersey, Department of Environmental  
 Protection and Mark Mauriello, Acting  
 Commissioner of New Jersey Department of  
 Environmental Protection

By: Rachel Horowitz  
 Eileen P. Kelly  
 Kristen D. Heinzerling  
 Lauren J. Trasferini  
 Deputy Attorneys General  
 (609) 984-5612

Dated: November 9, 2009

**IN THE UNITED STATES DISTRICT COURT  
 FOR THE DISTRICT OF DELAWARE**

STATE OF DELAWARE DEPARTMENT OF	:	
NATURAL RESOURCES AND	:	C.A. No. 09- 821-SLR
ENVIRONMENTAL CONTROL,	:	
	:	
Plaintiff,	:	BRIEF IN SUPPORT OF
	:	DELAWARE'S MOTION
vs.	:	FOR A PRELIMINARY
	:	INJUNCTION
	:	
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,	:	
	:	
Defendants.	:	

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## STATEMENT OF THE CASE

Intervenors New Jersey Department of Environmental Protection (NJDEP) and Mark Mauriello, Acting Commissioner of the New Jersey Department of Environmental Protection, join in the application of plaintiff State of Delaware Department of Natural Resources and Environmental Control (“DNREC” or plaintiff), seeking a preliminary injunction to prevent defendants United States Army Corps of Engineers (USACOE), Secretary of the Army John McHugh, Assistant Secretary of the Army for Civil Works Jo-Ellen Darcy, Lieutenant General Robert L. Van Antwerp, Jr., Commander, USACOE, and Lieutenant Colonel Thomas Tickner, Commander, USACOE, North Atlantic Division, Philadelphia District (“the ACOE” or defendants), from commencing construction of a 102-mile project to dredge and deepen the Delaware River from the Port of Philadelphia to the Delaware Bay until defendants obtain Delaware subaqueous lands and wetlands permits; demonstrate conformity with Delaware’s State Implementation Plan (“SIP”) as required by Section 176 of the Clean Air Act; and obtain Delaware’s concurrence with a modified federal consistency determination as required by the federal Coastal Zone Management Act.

The Delaware River Main Stem and Channel Deepening Project (“the Project”) is unprecedented within the region in size and scope. It will dredge millions of cubic yards of likely contaminated sediment and disperse this material into the Delaware River and into New Jersey and Delaware waters, where environmental quality has significantly improved in the past several decades. Nearly all dredging will occur in Delaware and New Jersey, after which the dredged sediment will be deposited at confined disposal facilities within Delaware and New Jersey and discharged to surface and ground waters within Delaware and New Jersey. The Project also will increase air emissions within Gloucester and Camden Counties, New Jersey, an

area that does not meet National Ambient Air Quality Standards (NAAQS) for fine particulate matter and for ozone, a pollutant associated with significant, adverse impacts on human health. However, the ACOE has not completed required determinations that the Project's emissions will conform to the SIPs of either Delaware or New Jersey for attainment of NAAQS for those pollutants.

To avoid potentially significant regressions in water quality within the Delaware River, continued deterioration in air quality, likely harm to fragile environmental resources, marine, and terrestrial life, and risks to human health and safety, sediment dredging and disposal and related air emissions must comply with all state and federal requirements and environmental standards. Nevertheless, defendants are poised to commence project construction without obtaining approvals from the State of Delaware as required by the federal Clean Water Act (CWA) and Delaware law; without demonstrating that the Project will conform to Delaware's SIP to attain NAAQS as required by the federal Clean Air Act (CAA) and Delaware law; and without obtaining Delaware's concurrence that the Project will be consistent with Delaware's coastal zone management plan as required by the federal Coastal Zone Management Act (CZMA). The Project should not proceed until these fundamental requirements are met.

## STATEMENT OF FACTS

### A. Background

The Project defendants propose to start without obtaining approvals required under Delaware and federal law will dredge 102 miles of the main navigation channel of the Delaware River from Philadelphia to the Delaware Bay and increase the depth of the main channel from 40 to 45 feet. The Project will generate an estimated 16.3 million cubic yards of dredged material that is likely contaminated, and increase dredging to maintain the channel by 20 percent, to 4.3 million cubic yards of dredged material per year. Declaration of Suzanne Dietrick (“Dietrick Declaration”), ¶¶1, 13. The Project also will increase air emissions within Gloucester and Camden Counties, New Jersey, which do not comply with NAAQS for fine particulate matter and for ozone, and thus has the potential to cause air quality deterioration and harm to public health, exacerbate New Jersey’s efforts to attain NAAQS for those pollutants, and expose New Jersey to sanctions under the CAA. Declaration of Chris N. Salmi (“Salmi Declaration”), ¶¶4, 8-11, 18, 22. Significant new information exists regarding the project area, but defendants have not submitted updated applications to Delaware for subaqueous lands or wetlands permits, and continue instead to rely on outdated information. Dietrick Declaration, ¶¶17-21, Declaration of Joel A. Pecchioli (“Pecchioli Declaration”), ¶¶ 7, 11e, 11f.

Water quality within the Delaware River has improved over the past several decades, and the river is a designated essential fish habitat for many species, including threatened and endangered species. Dietrick Declaration, ¶ 9, Exhibits C, D. These improvements have largely occurred because discharges of contaminants that previously caused environmental harm, including PCBs (polychlorinated biphenyls) and pesticides such as DDT (dichlorodiphenylteochloroethane) and its metabolites, have been banned since the 1970s. The



sediment to be dredged likely contains these contaminants, as well as PAHs (polyaromatic hydrocarbons) and metals such as mercury, lead, and cadmium, which can have toxic and bioaccumulative impacts. Pecchioli Declaration, ¶¶ 9, 10, 35.

Defendants are poised to commence project construction within Reach C, where the limited sediment sampling done to date shows that the dredged sediment will likely exceed New Jersey standards for contaminants of significant concern. This sediment will be dispersed within Delaware and New Jersey waters that contain sensitive natural resources, including the endangered shortnose sturgeon and the atlantic sturgeon, and will then be deposited at the Kilcohook confined disposal facility, located in both New Jersey and Delaware. Dietrick Declaration, ¶34, Pecchioli Declaration, ¶15. Sampling done for maintenance dredging within Reach C exceeds New Jersey's Residential and Non-residential Soil Remediation Standards for arsenic or benzo(a)pyrene (a polyaromatic hydrocarbon, PAH). PAHs are a group of toxic compounds generated by sources that include oil spills, industrial processes, and automobile emissions. Most of the samples from Reach C also potentially exceed New Jersey's Residential Soil Remediation Standards for PCBs (polychlorinated biphenyls), which can have toxic impacts and are specifically designated as toxic compounds in the Toxic Substances Control Act (TOSCA), 15 U.S.C. § 2601 *et seq.* Groundwater monitoring summary reports from 2002 to 2006 for the Kilcohook confined disposal facility, which the ACOE did not supply to New Jersey until July 2009, also show exceedances of New Jersey groundwater quality standards. Pecchioli Declaration, ¶¶15, 36, Exhibit H.

#### B. Previous Environmental Analyses and New Information

In 1992, defendant ACOE submitted an environmental impact statement ("EIS") to Congress for the Project pursuant to the National Environmental Policy Act (NEPA) (42 U.S.C.

§ 4321 *et seq.*). The EIS stated that the Project would dredge thirty three million cubic yards to deepen the main channel, and then require annual maintenance dredging of six million cubic yards. In 1996, the National Marine Fisheries Service (NMFS) designated the Delaware River and Bay from New Castle, Delaware and Pennsville, New Jersey, as Essential Fish Habitat for over twenty species of fish pursuant to the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1801 *et seq.* Dietrick Declaration, ¶¶5, 9. In 1997, the ACOE completed a supplemental environmental impact statement (“SEIS”), which explained that nearly all dredged material would be deposited at new and existing confined disposal facilities in New Jersey. Dietrick Declaration, ¶6.

Pursuant to the Coastal Zone Management Act, 16 U.S.C. § 1451 *et seq.*, Delaware issued a conditional coastal zone consistency determination for the Project in 1997 but advised the ACOE that Delaware subaqueous and wetlands permits were required. The ACOE applied for those permits and for a Delaware water quality certification in 2001, but the Project was suspended in 2002. Plaintiff’s Brief in Support of Motion for Preliminary Injunction (“Pb”), at 6-7; Dietrick Declaration, ¶10. In 2002, New Jersey’s Commissioner of Environmental Protection revoked New Jersey’s federal coastal consistency determination of 1997 and advised the ACOE that supplemental coordination under the CZMA was required pursuant to 15 C.F.R. § 930.46. The ACOE agreed to conduct supplemental coordination but has not done so. Dietrick Declaration, ¶¶8, 23, 35. In 2003, the Delaware hearing officer recommended denial of the applications for Delaware permits. Pb at 7.

In 2004, the M/T Athos I tanker struck a large, submerged anchor while preparing to dock at an oil refinery in Paulsboro, Gloucester County, New Jersey. The anchor punctured the vessel’s bottom, resulting in the discharge of more than 263,000 gallons of crude oil into the

Delaware River and its tributaries. Dietrick Declaration, ¶11. Following that spill, the National Oceanic Atmospheric Administration (NOAA) collected 42 surface subtidal and intertidal grab samples in December 2004 and January 2005 as parts of a limited Injury Assessment that did not examine many of the areas most affected by the oil spill. Twenty one of these samples exceed New Jersey residential and non-residential standards for benzo(a)pyrene, a polyaromatic hydrocarbon (PAH), a group of toxic compounds generated by sources that include oil spills, industrial processes, and automobile emissions. The ACOE has never considered these sample results in any analysis of the Project or Project impacts, even though the compounds can have toxic and bioaccumulative impacts. Pecchioli Declaration, ¶¶20, 22.

After the 1997 SEIS, the United States Environmental Protection Agency (USEPA) designated Camden and Gloucester Counties, New Jersey, as non-attainment areas for fine particulate matter and eight-hour ozone. Dietrick Declaration, ¶21. This triggered New Jersey's obligation under the Clean Air Act, 42 U.S.C. § 7401 *et seq.*, to adopt a SIP describing how the State would attain NAAQS for those pollutants, and required the ACOE to explain in a conformity determination how the Project would conform to that SIP. Salmi Declaration, ¶¶7, 15. Ozone has many significant health effects, including premature death, breathing difficulties during exercise, lung inflammation, aggravation of asthma, increased risk of respiratory illness, and permanent lung damage. Salmi Declaration, ¶4.

The ACOE issued a Final Draft Statement of Conformity for the Project in June 2004 and concluded that Project emissions would exceed emissions standards for various pollutants but would still conform with New Jersey's SIP if identified mitigation measures were undertaken. Salmi Declaration, ¶17. The Draft Statement was never finalized. In 2006, USEPA amended its

General Conformity rules to include de minimis emissions for fine particulate and its precursors. Dietrick Declaration, ¶21.

On June 23, 2008, the ACOE signed a project agreement with the Philadelphia Regional Port Authority to dredge the main channel of the Delaware River to a depth of 45 feet. Dietrick Declaration, ¶16. However, the project area within New Jersey and Delaware has undergone a significant, positive environmental transformation since the 1997 SEIS, and many significant species, including some threatened and endangered species, have started to rebound. Further, since 1997, federal and state authorities have adopted new measures to protect natural resources and obtained new information on federally-listed threatened and endangered species. Additionally, a new species, the atlantic sturgeon, has been listed as endangered by the States of Delaware and Pennsylvania and is under consideration for listing by New Jersey and the federal authorities. Dietrick Declaration, ¶¶17, 18.

The ACOE conducted some sediment sampling within the project area in the early 1990s but has never comprehensively sampled the millions of cubic yards of sediment it now proposes to dredge. The ACOE also has not analyzed the impacts on surface water quality and groundwater quality within New Jersey or Delaware of dredging and disposing millions of cubic yards of sediment. These failures conflict with the ACOE's own manuals for dredging and upland dredged material disposal, which preclude reliance on samples that are more than three years old, as well as with standards within NJDEP's dredging manual. The limited sampling that has occurred since the early 1990s, including sediment within the part of the Delaware River where project construction will start in October 2009 (Reach C), includes sediments that exceed New Jersey standards for compounds such as arsenic or benzo(a)pyrene (a polyaromatic

hydrocarbon (PAH)) and PCBs (polychlorinated biphenyls). Pecchioli Declaration, ¶¶9-11, 15, 35.

After defendants executed the project agreement in June 2008, New Jersey urged the ACOE to conduct supplemental coordination under the CZMA, obtain required approvals under the CWA, and update its environmental analyses. Dietrick Declaration, ¶22. However, the ACOE instead published a public notice on December 17, 2008, requesting comment on the Project and identification of new information since the 1997 SEIS. The ACOE's public notice provided only a two-week public comment period, from December 17 to December 31, 2008, which was then extended by two weeks in response to objections, including objections from New Jersey and USEPA, among others. In its objection, the USEPA identified the Athos I oil spill as a significant change in the Delaware River requiring consideration as part of the public process required by the National Environmental Policy Act. Dietrick Declaration, ¶¶23-25.

NJDEP timely commented on the public notice on January 14, 2009, calling to the ACOE's attention many additional studies and significant new information postdating the 1997 SEIS. Dietrick Declaration, ¶26. On April 6, 2009, however, the ACOE published a project Environmental Analysis (EA), which did not analyze much of the extensive new information and data, and concluded that the Project impacts remain as analyzed in the 1997 SEIS and that the Project could proceed without additional analyses or public comment. Dietrick Declaration, ¶¶27-29.

On June 23, 2009, NJDEP sent the ACOE detailed comments on the EA, highlighting numerous deficiencies. On July 1, 2009, the USEPA Air Protection Division sent a letter to ACOE stating that a new conformity determination for the Project is required and that "the dredging operation timeframes stated in the EA for [the Project] do not provide sufficient time

for your office to comply with the Clean Air Act conformity requirements.” Dietrick Declaration, ¶¶32, 33. The ACOE solicited bids on June 30, 2009 for commencement of project construction, without responding to these communications. Dietrick Declaration, ¶34, Salmi Declaration, ¶18.

On July 23, 2009, Delaware denied the ACOE’s applications for Delaware subaqueous lands and wetlands permits, finding that the Project and project area had changed but that the ACOE’s application did not address the changes and that the ACOE was required to submit a modified consistency determination under the CZMA. Pb at 14 – 15. Thereafter, on August 7 and 14, 2009, the ACOE issued a General Conformity and Mitigation Report for the Project and a Draft Conditional Statement of Conformity, purporting to comply with CAA requirements. In the Draft Statement, the ACOE concluded that the Project will produce annual emissions of nitrogen oxide (NOx), an ozone precursor, in excess of the threshold levels set by 40 C.F.R. § 93.153(b). Salmi Declaration, ¶18.

On September 15, 2009, the USEPA wrote the ACOE that these documents did not satisfy CAA requirements because, among other things, the Draft Conditional Statement of Conformity did not include 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 New Jersey’s SIP. In addition and in conflict with CAA requirements, the Statement provided for use of NOx or ozone emissions credits from a different non-attainment area than the Project’s non-attainment area. On September 15, 2009, New Jersey wrote ACOE that the documents did not satisfy CAA requirements because they did not include all project emissions; 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 mitigation plan

required to ensure all project emissions would conform to New Jersey's SIP; and did not demonstrate compliance with CAA public notice requirements. Dietrick Declaration, ¶¶43-44.

On October 6, 2009, USEPA and the ACOE met without representatives of either New Jersey or Delaware to discuss deficiencies in the ACOE's draft CAA conformity statements and methods to correct them. USEPA's summary of the meeting, dated November 5, 2009, states that specific mitigation measures to offset project emissions must be in place before the project emissions start, along with a binding, enforceable agreement identifying the offsets. The USEPA summary also indicates that USEPA advised the ACOE to reissue a draft conformity determination for public comment, pursuant to 40 C.F.R. § 93.160(e), and cautions the ACOE not to start the Project until it conforms to the SIP. The letter concludes that the ACOE should not "rush forward prior to meeting the federal requirements for a conformity determination and analysis," and that such an action would subject the ACOE to a citizen's suit or a state enforcement action. Dietrick Declaration, ¶45, Exhibit I.

Notwithstanding the Delaware denials and the ongoing failure to demonstrate that the Project will meet CAA requirements and conform to the SIPs of either Delaware or New Jersey, the ACOE now intends to award a notice to proceed for the first phase of the Project (Reach C) and to start project construction. Dietrick Declaration, ¶46.

The Project will affect coastal uses and resources substantially differently than as described in the 1997 SEIS, but the ACOE has not obtained a modified consistency determination from Delaware or conducted supplemental coordination with New Jersey, as required by the CZMA. The ACOE also has not obtained required Delaware permits or water quality certifications from Delaware and New Jersey for the Project as mandated by the CWA, even though the Project will dredge millions of cubic yards of likely contaminated sediment in

Delaware and New Jersey and result in dispersal of that sediment in the Delaware River in Delaware and New Jersey, disposal of the sediment in confined disposal facilities in Delaware and New Jersey, and discharge of effluent from those facilities to the Delaware River and in leachate to groundwater in Delaware and New Jersey. Further, despite project changes and significant new information regarding the Project's potential environmental impacts, the ACOE has concluded that the Project can proceed without any updated applications to Delaware. The ACOE also has not completed an updated conformity determination under the CAA for the Project as required by USEPA on July 1, 2009, September 15, 2009, and November 5, 2009, even though the project area does not meet the NAAQS for fine particulate or ozone, a pollutant associated with significant adverse health effects. This failure will undermine New Jersey's efforts to comply with NAAQS, exacerbate the risk to New Jersey residents and visitors posed by unhealthy air quality, and expose New Jersey to legal sanctions. Salmi Declaration, ¶¶8, 10. As set forth below, a preliminary injunction should be issued to prevent defendants from proceeding with project construction until all required approvals from Delaware are obtained as required by Delaware law and the Clean Water Act; Delaware concurs with an updated, supplemental coastal zone consistency determination as required by the CZMA; and defendants demonstrate that the Project will conform with Delaware's SIP to attain NAAQS as required by Delaware law and the CAA.



## ARGUMENT

- I. A PRELIMINARY INJUNCTION SHOULD ISSUE TO PREVENT PROJECT CONSTRUCTION UNTIL DEFENDANTS OBTAIN ALL APPROVALS, CERTIFICATIONS, AND DETERMINATIONS REQUIRED TO ENSURE THE PROJECT COMPLIES WITH DELAWARE AND FEDERAL LAW AND DOES NOT CAUSE ENVIRONMENTAL HARM.

A preliminary injunction preserves the relative positions of the parties until a trial on the merits can be held, and maintains the status quo or “last peaceable, noncontested status of the parties.” *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981); *KOS Pharmaceuticals, Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004); *see generally Anderson v. Davila*, 125 F.3d 148 (3d Cir. 1997). To obtain a preliminary injunction, the moving party must show a likelihood of success on the merits; that it will suffer irreparable harm if the injunction is denied; that granting preliminary relief will not result in even greater harm to the nonmoving party; and that the public interest favors such relief. *P.C. Yonkers, Inc. v. Celebrations the Party and Seasonal Superstore, LLC*, 428 F.3d 504 (3d Cir. 2005); *KOS, supra*, 369 F.3d at 708 (3d Cir. 2004). Here, a preliminary injunction is required to ensure protection of the Delaware River ecosystem and human health, by precluding the ACOE from proceeding with the Project until it obtains all permits required under Delaware law and all certifications and determinations required under the federal Clean Water Act, Clean Air Act, and Coastal Zone Management Act.

### A. Irreparable Injury

To show irreparable harm, a party must demonstrate potential harm that cannot be redressed by a legal or equitable remedy following a trial. *Acierno v. New Castle County*, 40 F.3d 645, 653 (3d Cir. 1994). The application for a preliminary injunction meets this standard.

Environmental injury can seldom be adequately remedied by money damages and is often permanent or at least of long duration. *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531,

545 (1987); see also *Natural Resource Defense Council v. Texaco Refining and Marketing, Inc.*, 906 F.2d 934, 941 (3d Cir. 1990); *South Camden Citizens v. Action v. New Jersey Department of Environmental Protection*, 145 F. Supp. 2d 446, 499 (D.N.J. 2001). Here, the project area includes fragile natural resources, including threatened and endangered species habitat and essential fish habitat, which have recently shown significant improvements but are at risk from dredging and disposal activities. The millions of cubic yards of sediment to be dredged likely contain contaminants such as PCBs, which can have toxic and bioaccumulative impacts. Moreover, the sediment has never been adequately sampled or analyzed to ascertain its impacts on surface or groundwater within Delaware and New Jersey or on the many fish species within the river, or to determine what management measures are required to protect persons working at the disposal sites. Further, sampling done for maintenance dredging within Reach C, where the ACOE proposes to commence project construction, exceeds New Jersey's Residential and Non-residential Soil Remediation Standards for arsenic or benzo(a)pyrene (a polycyclic aromatic hydrocarbon, PAH). PAHs are a group of toxic compounds generated by sources that include oil spills, industrial processes, and automobile emissions. Most of the samples from Reach C also potentially exceed New Jersey's Residential Soil Remediation Standards for PCBs (polychlorinated biphenyls), which can have toxic impacts and are specifically designated as toxic compounds in the Toxic Substances Control Act (TOSCA), 15 U.S.C. § 2601 *et seq.*

Despite these facts, defendants propose to start the Project without adequately sampling or analyzing the material to be dredged; without obtaining permits required by Delaware law and the federal Clean Water Act; without a modified determination of consistency with plaintiff's coastal zone management plan; and without a water quality certification. All of these approvals are necessary to help ensure that the Project is conducted in a manner that protects natural

resources and human health on the basis of current information, and includes appropriate management measures to minimize environmental risk.

In addition, plaintiff will suffer irreparable injury if the Project is permitted to commence without a conformity determination completed in accordance with 42 U.S.C. § 7506(c)(1). The Project will occur within parts of Delaware and New Jersey that already exceed NAAQS and therefore will expose residents to deteriorations in air quality that already does not meet CAA standards, including ozone standards. As explained in the Declaration of Chris N. Salmi, ozone has many significant adverse health effects, including premature death, breathing difficulties during exercise, aggravation of asthma, increased susceptibility to respiratory illness, and permanent lung damage. Salmi Declaration, ¶4. Thus, any failure to ensure that the ACOE's action conforms to the states' SIPs will irreparably harm state residents.

Plaintiff will suffer irreparable injury unless preliminary relief is granted and the ACOE is precluded from starting its Project without a conformity determination that satisfies 42 U.S.C. § 7506(c)(1). The CAA conformity determination has the important function of ensuring that a federal action will not impede a state's ability to timely attain and maintain the NAAQS. *Id.* If New Jersey fails to achieve ozone attainment under the eight-hour standard by the dates established under the Clean Air Act, it will be subject to reclassification as a severe area, which results in a postponement of the attainment date but the imposition of more stringent requirements to achieve attainment, and exposure to legal sanctions. 42 U.S.C. § 7511(b)(2)(A). Salmi Declaration, ¶¶8, 10, 22. Moreover and even more importantly, actual harm to human health will occur if attainment of the NAAQS is delayed. Attainment of the NAAQS represents attainment of the goal of clean air. Failure to ensure that the ACOE's action conforms to state SIPs will irreparably harm human health, safety, and welfare by delaying state efforts to achieve

healthy, clean air, and a continuation of the significant adverse health effects associated with poor air quality.

Without approvals ensuring that sediment dredging, disposal, and discharge activities are based on current information and will meet all required standards and management measures, the surface and groundwater quality, fragile resources, and numerous aquatic species within the Delaware River area, as well as persons handling the dredged material at the disposal sites, will be at risk. Without a determination that the Project will conform to Delaware's SIP and will not exacerbate existing air quality problems, Delaware and New Jersey residents will remain exposed to air pollutants that exceed the NAAQS adopted to protect human health. A preliminary injunction is required to prevent these injuries.

#### B. Likelihood of Success

The application for a preliminary injunction also demonstrates a substantial likelihood of success on the merits. The ACOE has not obtained permits required by Delaware law, has not obtained a water quality certification required by the CWA, has not completed conformity determinations required under the CAA, and has not obtained a modified consistency determination or conducted supplemental coastal zone consistency required by the CZMA. Nevertheless, the ACOE proposes to commence its Project without obtaining these required approvals or completing these required processes. Plaintiff is likely to succeed on the merits of its claim that this ACOE determination is arbitrary, capricious, and not in accordance with the law, in violation of the Administrative Procedure Act (APA), the Clean Air Act, the Coastal Zone Management Act, and the Clean Water Act.

## 1. Coastal Zone Consistency

The Coastal Zone Management Act, 16 U.S.C. § 1451 *et seq.*, was adopted to ensure consistency between federal, state, and local coastal management plans and coordination between federal and state governments. 16 U.S.C. § 1452. The Act requires the Project to conform to each affected state's coastal zone management plan to the maximum extent practicable. 16 U.S.C. § 1456(c); 15 C.F.R. §§ 930.41; 930.43. Based on this standard, a federal agency must comply with a state's plan, unless prohibited by legal requirements or if an emergency exists. 15 C.F.R. §§ 930.32(a); 930.32(b). Further, if a federal activity was determined to be consistent with a state's coastal zone management program but the federal activity has not yet begun, the federal agency must conduct supplemental coordination and obtain a modified consistency determination if the proposed federal activity will affect any coastal use or resource substantially differently than originally described. 15 C.F.R. § 930.46; 15 C.F.R. § 930.31(e); 15 C.F.R. § 930.34(a)(1).

Delaware issued a conditional federal consistency determination to the ACOE in 1997 and required the ACOE to obtain Delaware wetlands and subaqueous lands permits. The ACOE applied for those permits in 2001, but Delaware denied them in 2009 and required a modified consistency determination. In 2002, New Jersey revoked the Project's federal consistency determination and advised the ACOE that supplemental coordination was required. The ACOE agreed to supplemental coordination with New Jersey in October 2002 but now proposes to start project construction in December 2009 before conducting supplemental coordination with New Jersey or obtaining a modified determination of coastal zone consistency from Delaware.

The ACOE's decision to prematurely start project construction without completing supplemental coordination under the CZMA is likely to be found to be arbitrary, capricious, and

in violation of law under the Administrative Procedure Act and the Coastal Zone Management Act. The Project will affect coastal resources substantially differently than as described in the 1997 SEIS, triggering the need for supplemental coordination under 15 C.F.R. § 930.46 and a modified consistency determination under 15 C.F.R. §§ 930.31 and 930.34. The Delaware River and project area have undergone significant, positive environmental changes since 1997, and the project area includes essential fish habitat for many species, including endangered species that recently have been observed in parts of the project area where they were not previously located. In addition, the massive Athos I oil spill occurred in 2004, introducing over 263,000 gallons of crude oil into the Delaware River and project area. Contaminants with toxic and bioaccumulative impacts, including those generated by the oil spill, likely are embedded in the sediment to be dredged and will be dispersed into Delaware and New Jersey waters within the Delaware River and deposited at confined disposal facilities in New Jersey and Delaware. Further, in 2006, USEPA amended its CAA conformity regulations to require the Project to address ozone and fine particulate, two pollutants that already exceed NAAQS in parts of the project area.

The 1997 SEIS was based on limited sediment sampling from the early 1990s, and the ACOE has never comprehensively sampled sediment within the proposed dredging project area. This is at odds with standards set by the ACOE's own dredging manual, as well as the USEPA and NJDEP dredging manuals. The 1997 SEIS also did not consider the impacts on coastal resources from dredging, dispersing, and disposing contaminants generated by the Athos I oil spill, the new information on rare species, the recent improvements in the Delaware River environment, or the 2006 changes in CAA requirements. Moreover, the limited sediment sampling within the project area that has occurred since the early 1990s and the oil spill demonstrates that the millions of cubic yards of sediment defendants propose to dredge likely

contain contaminants with toxic and bioaccumulative impacts, but supplemental coordination to determine appropriate management measures has never occurred.

Based on these changes, new information, and circumstances, defendants' determination to start project construction without completing supplemental coordination pursuant to 15 C.F.R. § 930.46 or obtaining a modified consistency determination pursuant to 15 C.F.R. § 930.34 likely will be found to be arbitrary, capricious, an abuse of discretion, and not in accordance with law, in violation of the CZMA and the Administrative Procedure Act, 5 U.S.C. § 706(2)(A).

## 2. Clean Water Act

Similarly, plaintiff is likely to prevail on its claim that it is arbitrary, capricious, and not in accordance with law for defendants to proceed with project construction before receiving a Water Quality Certificate with conditions ensuring the Project will meet state standards to restore and maintain water quality, as required by the Clean Water Act. The Clean Water Act was adopted to restore and maintain the chemical, physical, and biological integrity of the nation's waters, 33 U.S.C. § 1251(a), so as to achieve water quality "which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water." 33 U.S.C. § 1251(a)(2). The CWA recognizes and preserves the states' vital role in those functions, 33 U.S.C. § 1251(b), and requires federal agencies and officers to be subject to and comply with all state requirements respecting control and abatement of water pollution. 33 U.S.C. § 1344(t); 33 U.S.C. § 1323(a). The CWA also requires state governments to adopt standards to ensure that waters are not degraded and that existing water uses are maintained and protected. 33 U.S.C. § 1313; 40 C.F.R. § 131.4; 40 C.F.R. § 131.12.

The ACOE currently conducts annual maintenance dredging of the main navigation channel of the Delaware River and disposes the dredged material at upland disposal facilities in

New Jersey and Delaware. Dewatering the dredged material at those facilities causes effluent discharges to the Delaware River and discharges of leachate to groundwater in New Jersey and Delaware. Consequently, the ACOE currently has a Water Quality Certificate from New Jersey for maintenance of the navigation channel at its current depth of 40 feet, pursuant to 33 U.S.C. § 1341, 33 C.F.R. § 336.1, 33 C.F.R. § 337.9, and 33 C.F.R. § 337.10. That Certificate includes conditions such as water quality monitoring to help ensure that effluent discharges and discharges to groundwater from the confined disposal facilities do not harm groundwater. Dietrick Declaration, ¶13.

The Project will dredge millions of cubic yards of likely contaminated sediment, which will be disposed in New Jersey and Delaware, and will increase annual maintenance dredging by 20 percent, to 4.31 million cubic yards. The ACOE has not comprehensively sampled the sediments it proposes to dredge and dispose of in New Jersey or Delaware, but the limited sampling done to date shows exceedances of New Jersey standards for contaminants such as PCBs and PAHs. These contaminants have toxic and bioaccumulative impacts, making appropriate management of sediment dredging and disposal, and compliance with all required standards, critical. Under these circumstances, defendants' decision to proceed with the Project without obtaining a Water Quality Certification demonstrating that the Project complies with state water quality standards and containing appropriate conditions to prevent degradation of surface and groundwaters is likely to be found to be arbitrary, capricious, an abuse of discretion, and not in accordance with law, in violation of the Administrative Procedure Act and Clean Water Act.



### 3. Clean Air Act

The Clean Air Act establishes health-based standards for air pollution called the National Ambient Air Quality Standards, 42 U.S.C. § 7408 and 42 U.S.C. § 7409, and requires states to achieve emissions reductions so that air quality is consistent with the NAAQS. 42 U.S.C. § 7410. Each state must adopt a State Implementation Plan, demonstrating how the state will attain NAAQS, *id.*, which is codified once it receives USEPA approval. 42 U.S.C. § 7410. To ensure that the federal government does not take major action that will undermine these state efforts, the CAA prohibits federal emission-causing actions unless the agency first makes a determination that its action will be consistent with the applicable SIP. 42 U.S.C. § 7506(c)(1). Because the ACOE proposes to start project construction without a general conformity determination that satisfies CAA general conformity regulations, 40 C.F.R. § 93.150 *et seq.*, Delaware is likely to succeed on the merits of its contention that commencement of the Project by the ACOE's planned start date will violate the Clean Air Act, 42 U.S.C. § 7506(c)(1).

By the ACOE's own admission, the Project will produce emissions of NO<sub>x</sub>, an ozone precursor, at annual levels mandating a general conformity determination. 40 C.F.R. § 93.153(b). The ACOE circulated a Draft Conformity Statement for comment in 2004 but never properly adopted it. On July 1, 2009, the USEPA advised the ACOE of the requirement for a new, updated Conformity Determination. The ACOE then issued a Draft Conditional Statement of Conformity on August 14, 2009, which both USEPA and New Jersey determined did not comply with the CAA. On November 5, 2009, the USEPA specifically cautioned the ACOE not to start the Project until it had demonstrated the Project will conform to the applicable SIPs, through, among other things, a binding, enforceable agreement identifying specific emission

offsets. The USEPA also warned the ACOE that starting the Project before it conformed to the applicable SIPs would subject the ACOE to citizen or state legal action.

The Clean Air Act measures consistency in terms of the federal action's impact on a state's ability to attain the NAAQS – that is, an action is consistent with the state's SIP if it will not cause, contribute to, or increase the frequency or severity of any violation of any air standards, and will not “delay timely attainment of any standard or any required interim emission reductions or other milestones in any area.” 40 C.F.R. § 7506(c)(1)(B)(i) to (iii). The Draft Conditional Statement of Conformity that the ACOE provides here does not satisfy this standard because it fails to adequately identify mitigation measures to reduce the Project emissions to zero for all Project years. Indeed, the ACOE characterizes its draft conformity statement as a “Draft Conditional Statement of Conformity” because it identifies emissions and mitigation measures for the first contract stage of the Project only, leaving further mitigation measures to be identified on an ongoing basis as subsequent stages of the Project commence.

The CAA general conformity rules do not permit the Project to be segmented in this way or to start before conformity is demonstrated. A valid conformity determination must address “the total of direct and indirect emissions of the criteria pollutant or precursor where the total of direct and indirect emissions in a non-attainment or maintenance area caused by a Federal action,” measured on an annual basis, would equal or exceed de minimis levels. 40 C.F.R. § 93.153(b). “Indirect emissions” are broadly defined to include those emissions that are caused by the federal action but that “may occur later in time and/or may be further removed in distance from the action itself but are still reasonably foreseeable....” 40 C.F.R. § 93.152. A conformity determination that segments the Project to postpone the consideration of mitigation measures for emissions that will occur in later stages of the Project thus does not meet the requirements for

conformity determinations, which require a binding commitment that specifies how all emissions will be fully and specifically addressed before the Project starts. *See also* letters of USEPA September 15, 2009 and November 6, 2009 (Dietrick Declaration, Exhibit G, I); *City of Alexandria v. Slater*, 46 F. Supp. 2d 35, 41 (D.D.C. 1999), *rev'd*, *City of Alexandria v. Slater*, 198 F.3d 862 (D.C. Cir. 1999), *citing* 40 C.F.R. § 93.101 (concluding, in the related context of a transportation conformity determination, that the Department of Transportation was required to address the entirety of a highway project, despite the fact that some lanes would not open immediately, because “EPA regulations define a project *in toto*, not as only that part of a project that it constructed and used initially.”).

Further, some of the mitigation measures that the ACOE does specifically identify do not comply with the general conformity rules. For example, the Draft Conditional Statement of Conformity proposes to use offsets from the New York Channel Deepening project, which is located in a different ozone non-attainment area. However, the general conformity rule applicable to ozone non-attainment areas requires that emissions from the action be offset within the same non-attainment area. 40 C.F.R. § 93.158(a)(2).

Despite the above objections repeatedly raised by both the USEPA and New Jersey, as most recently as this month, the ACOE has indicated its intent to proceed with the Project. This course of action is prohibited by 42 U.S.C. § 7506(c) and is likely to be found arbitrary, capricious, and not in accordance with law, in violation of the APA and CAA.

### C. Relative Harm to the Parties

A preliminary injunction delaying project construction until the ACOE obtains all required Delaware permits, properly completes supplemental coordination and obtains a modified consistency determination under the CZMA, obtains a water quality certification

pursuant to the CWA, and completes a valid CAA conformity determination will not result in greater harm to defendants than to plaintiff. Plaintiff has demonstrated that the Project is likely to cause environmental injury, tipping the balance of harms in favor of an injunction unless the ACOE will be irreparably harmed. *Interfaith Cmty. Org. v. Honeywell*, 263 F. Supp. 2d 796, 873 (D.N.J. 2003); *Marsellis-Warner Corp. v. Rabens*, 51 F. Supp. 2d 508, 532 (D.N.J. 1999). The time delays and increased expense that will occur if a preliminary injunction is granted do not constitute irreparable injury. *Sampson v. Murray*, 415 U.S. 61, 90 (1974).

Plaintiff does not seek to permanently enjoin the Project, but rather, to delay its commencement to ensure it complies with all applicable laws. Such delay will not constitute irreparable injury. The Project has been under consideration for many years, during which the channel has been maintained at 40 feet, and navigation has remained unimpeded. In contrast, however, proceeding with the Project before obtaining all required approvals and completing all federally-required determinations likely will cause degradation of the Delaware River, potentially reverse water quality improvements in the river that have occurred since 1977, potentially cause degradation of surface and groundwater within New Jersey and Delaware, increase emissions in an area where air quality already does not meet NAAQS, present a safety risk to persons working at the facilities where dredged material will be disposed, and exacerbate the efforts of Delaware and New Jersey to comply with NAAQS and protect air quality within their states. Under these circumstances, the balance of harms favors granting the relief requested.

#### D. Public Interest

The public interest favors granting the application for preliminary injunctive relief. Proceeding with the Project now will violate state and federal laws enacted to protect the public

from environmental harm and to ensure improvements in water and air quality. Project construction now, without compliance with those laws, has the potential to nullify recent environmental improvements in the project area, cause degradation of surface and groundwaters, and impair public health by exacerbating plaintiff's ongoing efforts to achieve clean air through the attainment of NAAQS.

It is in the public interest to delay project construction until the required approvals are obtained on the basis of the current status of natural resources in the project area, rather than conducting the Project on the basis of outdated and inadequate information. Delaying the Project until the ACOE obtains a Water Quality Certification is in the public interest, as it will help ensure that the Project meets water quality standards and that dredging disposal is conducted in a manner that fully protects surface and groundwater quality, the environment, and human health. Such assurances are crucial, in light of the likelihood that the dredged material will contain contaminants with bioaccumulative or toxic impacts.

It is also in the public interest to delay Project commencement until the ACOE has conducted supplemental coordination and obtained a modified consistency determination under the CZMA. The ACOE has ignored significant changes in the coastal zones of Delaware and New Jersey that the Project will affect, has not adequately sampled or analyzed the sediment, and has not analyzed the surface water quality and groundwater quality impacts that dredging and disposing of the millions of cubic yards of sediment within New Jersey and Delaware will cause. However, the limited sampling previously conducted shows the sediment likely contains contaminants with potential bioaccumulative or toxic impacts. The public interest requires a Project delay until supplemental coordination addresses these shortfalls.

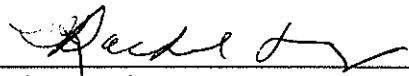
The public interest also requires the ACOE to complete a conformity determination under the CAA that demonstrates Project emissions will comply with the SIP, before proceeding. Enjoining the Project until this conformity determination is adequately completed is a clear legal requirement, necessary to ensure that the Project will not further degrade air quality and impair human health within an area that already does not meet NAAQS. It is in the public interest to ensure that the Project does not impede attainment of Clean Air Act standards, which New Jersey and Delaware must achieve to comply with the law and to protect the health, safety, and welfare of their residents.

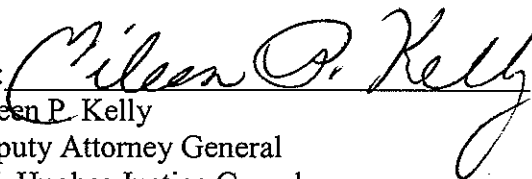
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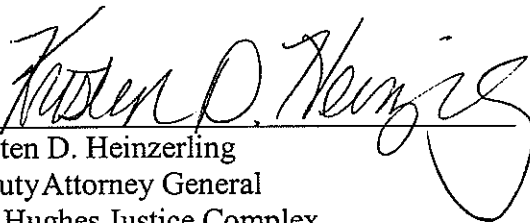
For all these reasons, the motion for a preliminary injunction should be granted, and defendants should be enjoined from commencing project construction until they obtain Delaware subaqueous lands and wetlands permits; demonstrate conformity with Delaware's State Implementation Plan as required by Section 176 of the Clean Air Act; and obtain Delaware's concurrence with a modified federal consistency determination as required by the federal Coastal Zone Management Act.


Respectfully submitted,

ANNE MILGRAM  
Attorney General of New Jersey

By:   
Rachel Horowitz  
Deputy Attorney General  
R.J. Hughes Justice Complex  
25 Market Street  
P.O. Box 093  
Trenton, NJ 08625-0093  
(609)984-5612  
rachel.horowitz@dol.lps.state.nj.us

By:   
Eileen P. Kelly  
Deputy Attorney General  
R.J. Hughes Justice Complex  
25 Market Street  
P.O. Box 093  
Trenton, NJ 08625-0093  
(609)633-0651  
eileen.kelly@dol.lps.state.nj.us

By:   
Kristen D. Heinzerling  
Deputy Attorney General  
R.J. Hughes Justice Complex  
25 Market Street  
P.O. Box 093  
Trenton, NJ 08625-0093  
(609)633-2038  
kristen.heinzerling@dol.lps.state.nj.us

By:   
Lauren J. Trasferini  
Deputy Attorney General  
R.J. Hughes Justice Complex  
25 Market Street  
P.O. Box 093  
Trenton, NJ 08625-0093  
(609)984-5065  
lauren.trasferini@dol.lps.state.nj.us

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