



STATE OF DELAWARE
DEPARTMENT OF NATURAL RESOURCES
AND ENVIRONMENTAL CONTROL

OFFICE OF THE
SECRETARY

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July 23, 2009

Lieutenant Colonel Thomas J. Tickner
District Commander
U.S. Army Corps of Engineers
Wannamaker Building
100 Penn Square East
Philadelphia, PA 19107-3390

Dear Lt. Colonel Tickner:

The purpose of this letter is to inform you that I am denying the U.S. Army Corps of Engineers' (USACOE) pending subaqueous lands and wetlands permit application, designed to allow the deepening of the Delaware River Federal Navigation Channel from 40 to 45 feet.

My decision is grounded, in part, in the report and recommendation issued by the Department's Hearing Officer in 2003. The report identified additional information needed in order to make a fully informed decision on the USACOE's 2001 Delaware subaqueous lands and wetlands permit application. In the absence of this information, and other information, the Hearing Officer recommended denial of the permit, stating:

The Corps has not met the regulatory standards and requirements necessary to approve the project as proposed. The application deficiencies are primarily related to the failure to demonstrate adverse effects have been minimized and avoided to the extent possible and practicable. Studies, opinions and documentation required to corroborate requests to modify protective environmental windows are not part of the Record.

It has been more than five years since the Department's Hearing Officer completed his report and accompanying recommendation of denial. In this time, the scale of the project has changed substantially from the project envisioned in the 2001 application, and there has been a great deal of new information developed in the intervening period about the Delaware River and Bay, including salinity studies and modeling and species-specific analyses. This information is not properly included in the record before the hearing officer.

Given the Hearing Officer's recommendations, the significant changes to the scale of the project, the outdated nature of the record, and the potential procedural flaws in making such an important decision based upon the existing record, I have no alternative than to deny the permits.

Delaware's Good Nature depends on you!

Please note that having reviewed the record, I take this action without prejudice to any future permit application. A copy of the Secretary's Order denying the permit is attached.

Another issue in need of resolution is Delaware's Federal Consistency determination. As you know, the Delaware Coastal Management Program (DCMP) previously issued a conditional concurrence over a decade ago in a letter dated May 1, 1997. Additional review is necessary, however, because even though the project construction has not begun, substantial project modifications have occurred, and new information has emerged relevant to natural resource impacts.

Federal Consistency regulations (15 CFR 930.46(a)) require federal agencies to initiate supplemental coordination with state coastal management programs when the following specific criteria are met: (1) The Federal agency makes substantial changes in the proposed activity that are relevant to management program enforceable policies; or (2) There are significant new circumstances or information relevant to the proposed activity and the proposed activity's effect on any coastal use or resource. The main channel deepening project meets both of these criteria. Therefore, the USACOE is required to submit a supplemental federal consistency determination to the DCMP. My agency fully supports the need for the supplemental process and believes that the review of any new applications for the necessary State permits can be conducted concurrently with the federal Coastal Zone Management supplemental coordination process.

Should the USACOE choose to submit a new permit application, I pledge that my agency will conduct a thorough scientific review and that the permitting process will be efficient, timely and transparent.

Sincerely



Collin P. O'Mara
Secretary

Enclosure

cc: The Honorable Jack A. Markell, Governor
The Honorable Jon S. Corzine, Governor
The Honorable Edward G. Rendell, Governor
The Honorable Thomas R. Carper, Congressman
The Honorable Edward E. Kaufman, Congressman
The Honorable Michael N. Castle, Congressman
The Honorable Anthony J. Deluca, Senator
The Honorable David B. McBride, Senator
The Honorable Robert F. Gilligan, Representative
The Honorable Michael P. Mulrooney, Representative
Roy E. Denmark, Jr. Deputy District Engineer, USACOE
Minas M. Arabatzis, Chief, Planning Division, USACOE
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