

September 21, 2010

District Engineer
US Army Corps of Engineers
Philadelphia District
Wanamaker Building
100 Penn Square East
Philadelphia, PA 19107-3390



***Cooper River Watershed
Association***

Re: CENAP-OP-R-2009-0933-1

Dear District Engineer,

The Delaware Riverkeeper Network including our member Captain Robert V. Martin (U.S. Navy retired), Delaware River Shad Fishermen's Association, Delmarva Ornithological Society, Delaware Audubon Society, Cooper River Watershed Association, National Wildlife Federation, New Jersey Sierra Club, NJ Environmental Federation, South Jersey Land and Water Trust all oppose the Army Corps of Engineers issuing permits to the Southport Development project pursuant to either the Rivers and Harbors Act or the Clean Water Act. In addition, our organizations believe that the requirements and procedures of the National Environmental Policy Act are not being appropriately, defensibly or legally carried out with regards to this project or Public Notice No. CENAP-OP-R-2009-0933-1.

The Southport Development project involves the filling in of 12.28 acres of open water (.2 of which is emergent wetlands, 1.08 acres of which is shallow water habitat, and 3.62 of which is deep water habitat); 3.75 acres of nontidal wetlands; .73 acres of a tidal drainage area; filling in an unspecified amount of floodplain lands with 3 to 4 feet of fill in order to raise the area to above the 100-year floodplain (in fact to raise it to the 200 year floodplain); dredging a 35-acre area within the River to a 40+2 foot depth; impacts to approximately 4600 linear ft of existing shoreline; the permanent loss of 1.08 acres of submerged aquatic vegetation; and having a 116 acre development footprint which will necessarily be on riverside lands and result in the loss of potential terrestrial habitat.

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This is clearly no small project.

With the level of harm to the environment this project will inflict it is clear that any issuance of a permit to approve the Southport Project would constitute a “major federal action significantly affecting the human environment” and thus will require a full Environmental Impact Statement (EIS) pursuant to the National Environmental Policy Act (NEPA) before any federal action can be legally taken. Additionally, the project is highly controversial, highly questionable both environmentally and economically, and has the potential, in combination with other reasonably foreseeable actions already being planned or occurring within the Delaware River estuary to result in serious and unnecessary harm to the environment. The Army Corps has not fulfilled the requirements of NEPA as required by law. The Army Corps has not created an Environmental Assessment (EA) for the project, either draft or final, and has failed to issue any findings regarding a FONSI or need for an EIS based on such an EA. Therefore, it is highly inappropriate and not legally justified for the Army Corps to be considering issuance of any permit decisionmaking regarding this project. The Army Corps needs to withdraw the public notice and first fulfill the requirements of NEPA before further considering the Southport Project for permitting or offering any other federal resources for implementation of the project.

The Public Has Been Denied the Ability to Properly Comment on this Highly Controversial Project – It Has Been Provided Neither the Time Nor Information Necessary to do so.

It is unjust and unreasonable to expect the public to gain access to all the relevant documents, to review them, digest them, and be able to provide informed comment on the Southport Project in the mere 30 day time frame the Army Corps has provided. The Army Corps has been working with the State of Pennsylvania to press this project along for several years now, looking at documents, engaging in meetings, undertaking negotiations, and discussing issues related to this project with the project sponsors. Little information, other than the bare bones basics, about the project was made available as part of the public notice, nor was there provided any pathway by which one could access additional information about the project in a timely fashion.

Further, the public notice was released shortly before a national holiday, during a time frame when many, if not most, in our region are engaging in their final summer holidays with family. The holiday period further limits opportunity for the public to become informed and engaged on this issue of concern to the region. In fact, the public notice issued by the Army Corps on August 24 took place during high vacation time, the Labor Day weekend, and the start of school for many – facts the Army Corps is well aware of and a strategy they often avail themselves of to minimize public review and comment.

This 30-day comment period, over the holidays, is insufficient to allow interested individuals or organizations to secure and review Army Corps and other agency files so they can provide informed comment. Minimal information was provided with the public notice by which the public could become more informed about this project and upon which the public could base their comment. As a result, the process provided impedes the ability of the public to provide informed review and comment on the project and decisionmaking under consideration.

The Record Demonstrates that the Process Associated with Review of the Southport Project is Being Manipulated and Truncated Inappropriately And Calls Into Question the Validity of the Army Corps' Current Review.

The Army Corps has already demonstrated its active commitment to allowing Southport to move forward. At an October 29, 2009 meeting the Army Corps already offered to use spoils from an Army Corps Confined Disposal Facility for the project. This kind of pre-determined outcome, demonstrates an absolute bias for the project, and an inability to engage in objective review. We will also note that this offering of dredge spoils for the construction of the project is itself a federal action, a commitment of federal resources for the construction and completion of the project and as such is a violation of the National Environmental Policy Act. Prior to any commitment of any resources, or any federal decisionmaking or other federal action regarding this project the Army Corps needs to create and issue a draft Environmental Assessment for public comment, finalize and issue a final EA, and then based on that EA engage in either the FONSI or EIS process – and it is our considered opinion that the only legally defensible outcome would be the decision to undertake a full EIS review.

We also provide, for the record, a copy of a Feasibility Analysis demonstrating the intent of project sponsors to use spoils from the Delaware Deepening project for construction of Southport. This documented intent for the use of Deepening spoils further demonstrates the importance of the appropriate implementation of NEPA and for the conduct of a full EIS review of this project. The source of the spoils, the contaminant levels in those spoils, the activities undertaken to secure the spoils that will be used to construct the project are all elements of the Southport Development project in need of full EIS consideration and review.

The lack of objectivity and commitment to ensuring the forward movement of this project is further demonstrated by the record we have been able to review to date.

In the minutes of a September 23, 2009 regulators meeting about the Southport project it was explained that project backers were seeking a decision by the PADEP and the USACE that the project was “permissible” prior to submitting a permit application. Providing such a decision is highly inappropriate and legally questionable. Without permit application materials the agencies cannot answer the question of whether a project is permissible, and if they were to provide such advance assurances they would be undercutting the legal permitting process and inappropriately circumventing the requirements of law and public policy.

And yet, at this September 23, 2009 meeting, PADEP assured that a permit could be obtained based only on preliminary design materials that would/could later be modified. Such a commitment of review and approval based on only preliminary information that all agree can change undercuts the legal, permitting, agency and public process. A permit decision is to be based upon the project proposed, not some advance speculation about what the project might ultimately look like. In fact, the minutes from this meeting assert that this preliminary design could be a simply “15% design” – 15% is no where near completion and demonstrates the inappropriate advance commitment of permitting authority and final decisionmaking. The Army Corps was present at, and active in, this meeting and made no effort to contradict these conclusions and assurances.

The documents Delaware Riverkeeper Network has reviewed regarding this project demonstrates that review of National Environmental Policy Act Environmental Assessment materials will be done piecemeal. We would strenuously oppose such a review strategy. (See for example Oct 29 meeting minutes.) The importance and value of NEPA reviews, be they EA's or EIS', is in their comprehensive and complete nature thereby ensuring complete and informed analysis over every element of a project to be considered and reviewed. Providing piecemeal review and sign off robs the drafter, reviewer, and the public of the opportunity to allow later information identified or collected to inform earlier sections of review or drafting. An EA is intended to be a single, comprehensive document, reviewed and approved (or challenged) in its entirety – the same goes for an EIS. Allowing a piecemeal process for fulfilling the requirements of NEPA fails to fulfill the intent or substance of the NEPA review process.

The documentation we have received from the Army Corps states that there will be an “enhanced EA” conducted for the project. Based on the record that exists at this time, there is ample reason to believe that a full environmental impact statement will be needed for this project. Modified NEPA reviews in an effort to skirt such a requirement of full review is not appropriate. We also assert that there should be every expectation that a full EIS will be needed for this project. Delaware Riverkeeper Network's repeated requests for definition of an “enhanced EA” to the Army Corps have gone unresponded to. The law requires the preparation of an EA, not an enhanced EA or modified EA or piecemeal EA. It is important the law be honored and complied with. We would note, that according to Army Corps documents this decision to undertake an enhanced EA was “decided several years ago”. The basis for that decision, by whom it was made, when and for what reason is unknown and apparently undocumented as Delaware Riverkeeper Network has been submitting FOIA's to the Army Corps for several years now and never received any such information.

Furthermore, that the draft table of contents for an EA (a draft document that was prepared by project representatives for review and feedback from agency representatives) well before the creation of an Environmental Assessment documentation pre-identified Southport as the preferred alternative demonstrates that the spirit and substance of NEPA are not being fulfilled by this project, but are merely mandatory procedural hoops to be jumped. In fact, NEPA is a very helpful federal requirement that ensures projects are fully considered, both in terms of environmental and community impacts as well as alternatives (including a no action alternative), prior to the commitment of resources and final decisionmaking. Considering the volume of fill and associated harm that this project brings with it (to open waters, wetlands, river bottom and floodplains) it is unlikely that NEPA would not require a full EIS be prepared for the project before any federal support or action can take place. Asserting prior to EA analysis that only an EA would be needed and that the outcome of that EA would be the selection of Southport before the EA was even performed casts an advance shadow of illegality over this process.

Further, the suggestion that the Army Corps is going to be deciding upon the level of NEPA documentation required as a result of the permit application process (as asserted in the Public Notice at issue) is procedurally and legally inappropriate. The law mandates creation of an EA in order to determine the need for an EIS, that is the legal procedure that must be followed here. Furthermore, the EA and subsequent EIS are intended to inform the permit decisionmaking, not the other way around. To use the permitting process to inform creation of an EA gets it backwards and is not an appropriate implementation of NEPA. The EA should be completed first, then any

required EIS, and only after that has the Corps fulfilled the procedural requirements, and secured the substantive information, needed to inform the Clean Water Act and Rivers and Harbors Act permitting decisions and to allow it to consider and take any federal action on this project. An EA/EIS is what is supposed to support the permitting decision process as it is the issuance of the permit that raises the need for NEPA documentation – considering issuance of a permit without this documentation is a violation of the spirit and requirements of the NEPA law. The Army Corps is obliged to withdraw this public notice and to first fulfill the requirements of NEPA.

Further, multiple email communications, including the one attached dated February 11, 2008 from John Kennedy to Randy Brown as well as a memorandum drafted by “PADEP SERO” on the same date are clear that joint federal 404 and state 105 permitting for a project like Southport is not an option. And yet, July 2010 Weston Solutions submitted a Joint Application for Chapter 105 and Section 404. PADEP conversations on this subject have been consistent and clear – no joint permitting. And yet now we see joint permitting. A joint permit process is a changed review process that diminishes the opportunity for public and other agency input and review. It is inappropriate for the Army Corps or PA DEP to diverge from law, policy and/or practice for Southport. And it is another demonstration of how the Army Corps and Pennsylvania are making dramatic exceptions for this project that are truncating the level of agency and public review and comment and skirting (even evading) the appropriate substantive and procedural obligations of applicable state and federal laws.

Information Available Demonstrates Southport will Due Unjustified Harm to the River, including Fish and Wildlife and Other Natural Resources.

As a procedural matter, it is wholly inappropriate to be considering any permitting decisions without the benefit of a National Environmental Policy Act Environmental Assessment and subsequent Environmental Impact Statement, both of which are key documents for providing full consideration of the environmental affects of the project and alternative options available for reaching its identified goals. Without that information neither the Army Corps nor any other regulatory agency at the state or federal level can even begin to have the level of information necessary to consider this project.

This section of our letter/comment quotes and discusses environmental harms of concern raised by a variety of other resource agencies with regards to the Southport Project and related issues in this reach of the River. This collection of quotes and references to the concerns of others emphasizes the lack of information that has been available on this project and that from the information that has been made available it is clear the threats of environmental harm are real, numerous and potentially significant. It is clear from this available information that a decision granting any permitting for this project at this time is unsupportable.

Dredging Impacts on the Delaware Estuary Tides, a paper reprinted in 1993 documents that narrowing the Delaware River with fill projects increases the tides of the River. The ramification has been, and is, to flood marshlands, forcing them to move inland. This paper also discusses the ramifications of past and future dredging projects on the estuary. Currently there is a tremendous amount of development already existing along Delaware Estuary waters that prevents and/or inhibits the inland migration of many marshlands. The ramifications of over 12 acres of fill, individually and cumulatively with other fill that has happened and is proposed for the future, must be an important part of the consideration of the Southport Project. Note that the airport

recently selected an option in this same reach of river that also requires filling in part of the mainstem river. Also, in one of the attached emails to this comment there are discussed a variety of known development proposals for this reach of the River that need to be part of any cumulative impact analysis regarding the Southport project and the habitat and other ramifications of placing fill in this reach of the River. In addition, filling in the River, floodplains and wetlands must be considered in the context of flooding, and the affect on increasing flooding and flood damages in estuary communities.

The Southport project includes dredging 35 acres of River bottom. The attached letter for the Delaware Estuary program discusses the ramifications of dredging for Estuary marshlands – that historic dredging, and future dredging, has the ramification of increasing erosion of sensitive and ecologically important marshlands. Southport and its proposed dredging will contribute to this harmful dynamic. These kinds of ramifications have not been considered.

Of note, the National Marine Fisheries Service in a December 1, 2009 meeting with the PRPA about the Southport project specifically stated that “the effects on hydrodynamics and sediment accumulation or erosion would need to be evaluated.”

The reach of the River to be harmed by Southport (according to the US Fish & Wildlife Service, July 19, 2004) is used by a wide variety of fish species including (but not limited to):

- ✓ In the deeper inter-pier areas: spot, striped mullet, bay anchovy
- ✓ In the shallower inter-pier areas: hogchoker, channel catfish, largemouth bass, spottail shiner.
- ✓ In addition this reach of river is used by American shad, blueback herring and striped bass.

September 2, 2010 the National Marine Fisheries Service wrote about the Philadelphia International Airport Project and expressed concerns about the impact of that project on alewife and blueback herring. Blueback herring is a prey species for juvenile bluefish. Because the airport proposal includes filling in 25 acres of the freshwater portion of the River that is used by blueback herring and alewife NMFS has concerns for the effects to the essential fish habitat of the juvenile blue fish which is a federally managed species. In addition, their letter notes that “river herring are commercially and recreationally valuable species managed by the Atlantic States Marine Fisheries Commission.” And, NMFS notes, “Because landing statistics and the number of fish observed on annual spawning runs indicate a drastic decline in alewife and blueback herring populations throughout much of their range since the mid-1960’s, they have been designated as a species of concern by NMFS in a Federal Register Notice dated October 17, 2006.” Because the Southport project, according to the agency discussions we reference and have seen in various files (including Army Corps files), also impacts these same species and same reaches of the River, it seems clear that the concerns for the airport project are also applicable to Southport – individually but also cumulatively.

The Southport site has been found to be important striped bass spawning area. Because Big Timber Creek right across the river has been found to be one of the poorest sites (according to a 1994 study says NMFS) “it cannot be assumed that the surrounding areas are equally as important as this site. Striped bass return to the same areas over and over.”

The area, according to documents we have seen, is a nursery area for American Shad, themselves determined by ASMFC to be at depressed levels in the Delaware River. As a result, the ramifications for shad populations from the Southport Development Project need careful consideration – harms to habitat, juveniles or any element of the species is of heightened concern because of the depressed health of their populations already in the River, and also because of the economic, recreational and cultural significance of this species for the Delaware River and Delaware River communities.

According to US Fish and Wildlife the interpier area has particular ecological importance “because of the occurrence of fourspine stickleback, mudflats, and submerged and emergent vegetation.” “Furthermore, the area of the Delaware River downstream ... within the former Philadelphia shipyards is a significant spawning area for striped bass. In addition to the aquatic habitat values of this area, the shoreline around inter-pier 3B, although disturbed by concrete rip-rap, also supports shrubs and other vegetation that attract a variety of warblers and other songbirds.”

“...the Fish and Wildlife Service is concerned about the future development of these two sites.” [SouthPort and Piers 78-80-82] According to the Service Inter-pier areas 3A and 3B “should be left undisturbed, and every effort should be made to avoid or minimize adverse impacts to all of the other interpier areas.”

The PA Fish and Boat Commission has described the resident and anadromous fisheries located in this part of the River as “of considerable value both ecologically and recreationally.” (PA Fish and Boat Commission to the PRPA, Letter 6/1/04)

According to a 2004 Normandeau Associates report done for the project (Aquatic and Benthic Resources Study for Assessment and Improvements to Berthing Area South Port Project No. 03-149.S prepared by Normandeau Associates March 2004) aquatic vegetation found in the proposed project area “is important for its function as a substrate for macroinvertebrates and as cover for small fish as well as a source of dissolved oxygen for the water. Vegetated intertidal and shallow subtidal habitat is not common along the Delaware River Philadelphia waterfront and should be considered ecologically important along this shoreline.” The Philadelphia/Camden reach of the Delaware River is known to still suffer from an oxygen sag that can be affecting fish species, including their ability to reproduce and propagate. The oxygen sag is of such a concern that the Delaware River Basin Commission is considering revisiting their regulatory requirements as they pertain to oxygen levels in the Estuary. As a result, removal/destruction of an area of vegetation that is an important contributor of oxygen in this reach of the River is of heightened concern and should not be allowed. As our regulatory agencies and communities take steps to increase oxygen levels for the benefit of ecologically, recreationally and economically important fish and aquatic species, the Army Corps should not be issuing permits to a project that will do harm to habitats that are currently contributing needed oxygen to this reach of the River.

The Normandeau study notes the presence of water celery (*Vallisneria americana*) in the subtidal Interpier Area 3B portion of the Southport project. In other contexts, NJDEP has articulated the importance of rebounding wild celery species in the estuary and the importance of protecting this protected species. (NJDEP Briefing, Delaware River Main Channel Deepening Project, Supplemental Environmental Impact Statement (SEIS) Information, January 2007.) To the extent we are talking about the same species of emergent vegetation (while one calls it water celery and the other wild

celery they all seem to be discussing *Vallisneria americana*), it seems clearly important that there be careful consideration of the impacts of Southport on this species.

Further, in documents we have seen, NMFS has expressed particular concern about the presence of water celery (*Valisneria*) because it has high wildlife value and it is not clear how readily it can be established at mitigation sites. NMFS, in its 2010 letter regarding the airport project, also talks about the tremendous value of wild celery (*Vallisneria americana*) identifying it as valuable nursery, forage and refuge habitat for a variety of fish including striped bass, American shad, alewife, and blueback herring. As we are talking about reaches of the River in proximity to one another, these concerns need to also be considered in the context of Southport.

The site used to be on the National Priority List of contaminated sites, we are unclear as to its current status in this regard.

According to the National Marine Fisheries Service in a memo dated Nov 13, 2009,

- “Weston says that there are no shortnose sturgeon or Atlantic sturgeon on the site. The problem is the site was only sampled once in late October of 2003 by Normandeau Associates. NER’s PRD sent the PRPA a letter in 2004 disagreeing with their determination that shortnose were not on the site. The sampling was not done at the correct time of year and the[y] only looked in the pier areas.”
- Also according to this memo Weston did not evaluate whether a tidal ditch on the site provides habitat for glass eel. If this is the case then PA Fish and Boat will want the channel to remain tidal and that piping it and making it dark would be an issue of concern. Apparently the project plans to pipe the entrance of the channel. *(Note from DRN: Despite some discussion of this at a march 29 meeting recently seen, the outcome of this is not totally clear and does seem to include some culverting but not total piping and that the channel is in fact to be “realigned” but with little specifics given – without full access to the file or independent review we don’t really have full information.)*
- There is also a question about whether a portion of this tidal channel and the flooded embayment portion of the “ditch” might have been mitigation for something else. Apparently this “stormwater ditch” was part of a Norfolk Southern project, it was designed by Ken Anderson of PADEP to avoid impacting wetlands and it is being used by “hundreds of minnows” and yet its full usage by fish was not evaluated. The area is approximately 12 feet wide by 2000 feet long.
- As early as 2004 NMFS made clear to the PRPA that more than a single year of sampling would be required to characterize the habitat at the site and that they would have to be sure to sample at the right time of year. This sampling has not been done. Sturgeon and Asiatic clams are among the focused areas of sampling required.
- NMFS has also made clear that mapping of SAV, including eel grass, would be required and that June was the best month for this work.
- According to Fish and Boat representatives “the entire area from the interpier areas at the north end of the site all the way around to the south end of the site is valuable for young-of-year sturgeon, shad and striped bass.”

We have seen a new sampling plan discussed for the year 2010, but as noted in the bulleted list above, a single year data collection is not enough to characterize use and affects.

The Army Corps' public notice asserts that the project will have no effect on federally listed threatened or endangered species. This is an inappropriate finding in light of information and concerns expressed by other agencies during and at meetings of which the Army Corps was an organizer and/or part. For example,

- ✓ According to the National Marine Fisheries Service in a memo dated Nov 13, 2009, "Weston says that there are no shortnose sturgeon or Atlantic sturgeon on the site. The problem is the site was only sampled once in late October of 2003 by Normandeau Associates. NER's PRD sent the PRPA a letter in 2004 disagreeing with their determination that shortnose were not on the site. The sampling was not done at the correct time of year and the[y] only looked in the pier areas."
- ✓ According to meeting minutes dated Oct 29, 2009 attended by the various agencies, "Likely fish species of concern in the area could include the shortnose and Atlantic sturgeon. The fish habitat resource has been document in previous studies that have been done in support of other Southport Projects. Charlie stated that this type of habitat in the Delaware River is not common in southeast Pennsylvania."

Studies regarding Atlantic Sturgeon are demonstrating the precariousness of this species in the Delaware Estuary and documenting the importance of protecting the freshwater reaches of the river as necessary for Atlantic and Shortnose Sturgeon habitat and reproduction. The failure to find Sturgeon, either Atlantic or Shortnose, in the acreage planned to be filled by Southport is not surprising considering that there are presumed to be less than 1,000 Shortnose sturgeon throughout the Delaware estuary and less than 100 Atlantic sturgeon. (See Delaware River State of the Basin Report, 2008 – because the Army Corps is the federal representative on the DRBC which issue this report we ask that this document, in your possession, be considered part of the Southport public record.) It is the value of this reach of the River as habitat for the Sturgeon that should be controlling in terms of the need for careful study and review, not whether any were caught during limited sampling by Normandeau in support of the project.

There has been an assertion by project representatives that 6 year old fish data would/could be used to assess the affects of this project. With regards to Atlantic and Shortnose sturgeon affects alone there has been important new information that has come to light in recent years about these species, their habitats, migrations, their population numbers in the Delaware River and their genetic status vis-a-vis other sturgeon populations in the United States. The Atlantic Sturgeon is under consideration for federal listing, and has been identified as genetically unique -- these alone raise the bar for consideration of impacts to Sturgeon and mandates the need for use of up-to-date and complete fishery information which has apparently not been used by the applicant or the Corps.

While the Normandeau information discounts much of the habitat value of the area to be filled in by Southport due to bulkheading and other manmade harms, as well as the presence of macroinvertebrates tolerant of reduced dissolved oxygen conditions, the destruction that has been inflicted to date by manmade activities is not what should control the review of the value of this reach of the River. There are ongoing efforts at the Delaware River Basin Commission to address low Dissolved Oxygen levels in the Estuary. There are also many strategies for restoring damaged lengths of riverbank using proved, proven and available science and technology, including in the Philadelphia region. So the consideration of the habitat value of the acreage Southport proposes to fill should be driven by the environmental habitat and benefit this area

could provide under restored condition, as water quality restoration efforts are currently underway and physical habitat restoration is a viable and available opportunity if the site were to remain undestroyed by the Southport Project.

According to Barry Dubinski also at the Oct 29 meeting, “there are red-bellied turtles in the tidal area, state-listed plant species, and the bald eagle nest.” In fact, there has already been an effort to see the ability to remove the bald eagle nesting tree, a significant environmental harm.

In documents we have seen the US Fish and Wildlife Service has express concerns about the loss of shallow water habitats, the disposal of dredged material for this project and the potential contaminants it might contain, as well as migratory fish concerns.

Concerns about the introduction of invasive terrestrial and aquatic species from visiting container ships has been raised and as far as we know are not addressed.

NMFS has stated it “believes this project will have a very high impact to the fish and benthic environment and is skeptical an adequate mitigation plan can be crafted to compensate for the losses within the proposed project schedule.” (See notes from Dec 1, 2009 meeting with NMFS at Sandy Hook, NJ). From the notes it is unclear which version of the project NMFS was discussing with the PRPA at the time of this meeting (33 acres river fill or over 12 plus other changes) – but the fact that they speak so strongly to the Southport proposal at any point demonstrates the need for serious consideration of the project and its environmental impacts.

It was recommended by a Fisheries Biologist with the PA Fish & Boat Commission that the net design and gear described in “Efficacy of a Benthic Trawl for Sampling Small-Bodied Fishes in Large River Systems” by Herzog, et. al., North American Journal of Fisheries Management 25:594-603, 2005 should be used for the data collection associated with Southport. The gear and methods used in this paper apparently resulted in higher catch levels for fish and fish data, including sturgeon. Were these gear and methods used in the sampling for Southport?

The loss of the riverside lands to development, coupled with the loss of associated wetlands and water habitats will have an affect on birds that use the area either seasonally or year round. That areas surrounding the project site and ecosystems to be damaged are already developed does not diminish the affect to bird life, or other life as the project sponsors suggest in draft documents, in fact it enhances and magnifies the harm. The lesser the amount of habitat available in a reach of river for aquatic, land and bird life the more valuable that which is left behind. These left over havens of good habitat are sometimes the last vestiges available to support or sustain migratory, seasonal or permanent wildlife, bird life and/or aquatic life. Their value is not diminished by the loss of other available habitat nearby due to previous development; their value is instead magnified.

The project requires the removal of a bald eagle nesting tree. Attached is a letter submitted by the Delaware Riverkeeper Network on this matter. Bald Eagles are an important part of the Delaware River ecosystem. They are part of the River’s food chain and life cycle. They were nearly decimated by water pollution and loss of critical riverside habitat. Today they are returning because of the hard work of many to reduce pollution and increase habitat. Their return is ecologically important and is also fueling economic returns in communities who are benefitting

from the ecotourism associated with eagle watching and festivals. It is vital that the Bald Eagles of the Delaware River not again be cavalierly sacrificed for inappropriate development along our waterways. In fact, just recently, the National Park Service and local non-profit organizations kicked off the effort to have the tidal Delaware River become Congressionally-designated as a National Recreation Area that will elevate the River and its natural resources – of which this Bald eagles nest is a significant part – as a destination for eco-tourism that has been shown to provide substantial ecological and economic benefit to other rivers throughout North America, including the Golden Gate National Recreation Area and the Mississippi National and Recreation Area.

Other areas that need to be considered and so far have not been:

- The impact of noise and vibrations (hydro-acoustic affects) on fish from pile driving, it can be harmful and so analysis is needed.
- Contaminants from the site, oil spills, anti-fouling compounds, ballast water impacts.

Weston, a consultant working on this project, says that there are no options other than this project at this location. But it is clear from the record that consideration of other sites was given merely cursory review and were summarily dismissed for undemonstrated reasons. For example, pursuing a port project to the south of the Navy Yard was dismissed because while it would avoid filling in 33 acres (now over 12 acres) of the River it would require increasing the length of channel to be dredged from 200 ft to 800 ft. The level of comparative harm from filling over 12 acres vs dredging an additional 600 ft is not characterized or discussed in the materials we have had the opportunity to review to date.

Regarding Water Quality

With regards to surface water quality impacts we don't believe the appropriate documentation has yet been amassed to determine what affect there might be, although we do know that the shallower reaches of the Estuary often have higher contaminant levels than the main channel.

Spoils to be used for this project, based upon official documents we have seen, tell us the spoils will either be from the deepening project (if that is allowed to move forward) or from existing confined disposal facilities operated by the Army Corps – the source of those spoils, the level of contaminants contained therein, etc, are important questions, still unanswered, that speak directly to the issue of water quality and need to be thoroughly planned for, studied, analyzed and addressed before any permitting decisions can be defensibly made. Further, in both instances the source of the spoils is the Army Corps and therefore is itself a major federal action in need of NEPA review in order to ensure the proper level of consideration needed to inform any permit decisions.

February 17, 2010 DRBC staff questioned the proposed sediment sampling for the areas proposed to be dredged:

- ✓ “we do not support the applicant’s proposal to perform PCB congener (1668A) analysis on elutriate water. In aqueous matrices in particular, the disagreement between Aroclor and congener analyses has been substantial. Analysis of the elutriate and of the Delaware River water sample ... should be performed using method 1668A.”
- ✓ “The applicant proposes to allow for an extended 72 hour settling time for the elutriate testing. The Inland Testing Manual, however, allows quiescent settling ‘for a time period equal to the anticipated field mean retention time, up to a maximum of 24 hours.’ A test

settling time of 72 hours is not justified, and will yield results that do not correspond to the expected CDF return water.”

We have no information as to how these concerns have been addressed.

There has Not Been the Requisite Demonstration of Need. Southport is a Threat to River Jobs: the Claims of Creating them are Not Supported in the Record.

Project materials assert that the Southport project is needed for the ports of Philadelphia to “remain competitive” and that it will result in “thousands of new, family-sustaining jobs and inject substantial new business and tax revenue into the regional economy.” These assertions are not substantiated and in fact, when one looks at the record it can not at all be assumed accurate. In fact, projects like Southport put at risk jobs – present jobs and the potential for future jobs, associated with the fish and other life that will be harmed by the project.

The claims that Southport is needed for the Philadelphia ports to remain competitive is simply not true.

- Container vessel traffic to the Ports of Philadelphia, since 1990, have grown by 300%, this is a dramatic level of growth when one considers that in this same time frame the Port of Baltimore, a port at 50 feet, has only grown in container vessel traffic by 29%.
- Additionally, the need/desire for Southport has long been linked by the Philadelphia Regional Port Authority with the deepening of the Delaware River. The Army Corps has made clear on the record that deepening will not result in induced tonnage, in fact it will result in reduced vessel calls, and so assertions that Southport are needed to service a growing number of vessels that will be coming up because of Panama Canal expansion and deepening are not supported by the public record
- Furthermore, recall, the deepening, if it happens, is only to 45 feet, not the 50 plus feet that the mega container vessels aspire to.
- And finally, since the beginning of this year alone the Ports of Philadelphia have made a number of major port deals which demonstrate that port growth is happening regardless of there being no Southport project.

Southport is not needed to support, grow or keep the ports of Philadelphia competitive – the record and reality do not support such a claim. The Army Corps’ economic and EISs and 2009 EA documented created for the Delaware Deepening project are incorporated here by reference – we ask that the Army Corps make those documents part of the official Southport record. If the Army Corps is unwilling to do that the Delaware Riverkeeper Network can certainly copy and send in those documents for the Corps, but considering those are Army Corps documents we ask that in the interest of resources all of the economic reviews for the deepening project as well as the 1992 EIS, the 1997 SEIS and the 2009 EA be included in the Southport record of decisionmaking as they demonstrate the Army Corps’ conclusion that deepening will not increase vessel calls or tonnage coming to the Delaware River, and therefore the claims of need for Southport in order to accommodate increased vessel calls that will result from deepening is demonstrably flawed.

A failure to construct Southport is not going to imperil jobs as project materials assert. That is a scare tactic designed to pressure the response of a permit and is wholly inappropriate in this permitting context.

Southport is a major river fill project that threatens a wide array of aquatic species and habitat. As such, its construction actually may hurt already existing jobs, and/or prevent the rehabilitation of

lost fishery jobs. Consideration of the ramifications for jobs dependent on a healthy River and River species should be of equal value, import and priority in the decisionmaking process.

- By way of example, there are concerns about the ramifications of construction of Southport on Delaware River sturgeon. Shortnose sturgeon are federally endangered. Atlantic sturgeon are under consideration for listing and in fact the science is showing are in worse condition than the shortnose population of the River. There was a time when Delaware River sturgeon supported a \$16 million caviar industry; that figure adjusted for today's values is over \$400 million. Further harm to Delaware River sturgeon also means harm to the resurrection of this important industry. At one point our River was the Caviar Capital of the United States – only through restoration of sturgeon populations can we reclaim that title, those jobs, and that high level of income for the region.
- American Shad are an important source of economic revenue to Delaware River communities – commercially, recreationally, in terms of associated ecotourism – and so any harms Southport inflicts on this species inflicts economic and job harms.

These are but two species that are considered to be at potential risk of harm by the construction of Southport.

The River belongs to us all, not to the ports. And it is not okay to be sacrificing the River's health, its ecosystems or critters for port development projects to the detriment of the rest of us that are so dependent upon this River for every aspect of our local lives.

Mitigation Does Not Allay Concerns

The mitigation under consideration raises its own troubling set of issues. The mitigation is quite a distance from the reach of river and the habitats being harmed. The mitigation is all up in the Neshaminy tributary. But the harm is being done on the main stem river. There does not seem to be a correlation in the resources benefitting from the mitigation versus those harmed by the project. Further, the kinds of habitats being proposed don't seem comparable to those being lost. There is no discussion in the mitigation of the important water celery (Valisneria) discussed by agencies concerned about this project. Even further, some of the mitigation isn't mitigation at all, it is simply leaving in place fill and wetlands that already exist, in fact that is a major proportion of the primary mitigation option.

Jack's Marina seems to be the major mitigation option. This option is to create intertidal habitat (7.64 acres) and then to simply maintain existing fill to provide for red bellied turtles and to maintain already existing wetlands. Leaving in place fill and wetlands that already exist is not mitigation as these things exist and can continue to exist without intervention by the PRPA for Southport.

Areas B and C only add (if they were to be taken on in addition to Jack's Marina which it is not clear is being proposed, it seems maybe the proposal is for these areas in lieu of Jack's Marina) an additional 1.14 acres of nontidal wetlands, and 5.2 acres of tidal drainage area and .3 acres of subtidal wetlands respectively. In terms of open water and wetland habitats harmed by Southport the total is 16.76 acres. The mitigation options, all three, only provide for 14.28 acres of new habitat. And there is nothing comparable for the harm inflicted by the dredging or floodplain fill. It is not at all clear how, or if, these figures, with or without the maintaining portions of the proposed mitigation, meets the ratios for mitigation articulated by the National Marine Fisheries Service.

The National Marine Fisheries Service communicated that it was important that the “mitigation project provides habitat to the fish species impacted in the Southport project area.” (See notes from Dec 1, 2009 meeting with NMFS at Sandy Hook, NJ). It is not at all clear that this is the case.

In addition, NMFS expressed particular concern about the water celery (*Valisneria*) because of its high wildlife value. NMFS has said that “it is not clear how readily this can be established at mitigation sites.” (See notes from Dec 1, 2009 meeting with NMFS at Sandy Hook, NJ). There is no discussion of this issue in the materials presented about mitigation that we have seen.

Further, NMFS has made clear that “Equal or better habitat would need to be created in out-of-kind replacement. Characterization of existing conditions at potential mitigation sites would be necessary and would need to include some characterization of benthic invertebrates in addition to physical characterization of substrate types in aquatic (non-uplands) settings.” (See notes from Dec 1, 2009 meeting with NMFS at Sandy Hook, NJ). It is not at all clear that this level of analysis and/or the information necessary to determine it has either been gathered or provided.

With regards to changes in the project in recent weeks/months

That in response to public outcry and other resource agency concerns the project has been reduced in size in terms of the amount of River fill tells us nothing about the project except that it was obviously over-designed in terms of the level of fill and harm. A reduction in the volume of fill does not speak to the harms that will result from the project as it is being proposed today, whether there are better alternatives available, and whether there is further opportunity to avoid River, environmental and community harm from the project.

In Conclusion

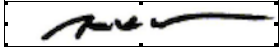
The Southport Development project involves the filling in of open waters, wetlands, floodplains, and dredging a vast area of the River for the ultimate benefit of private entities. The project will be undertaken by a private developer, and once complete the facilities will be leased to a private entity for their operations. As such this is a taking of public lands and a destruction of public natural resources for the purposes of serving private interests. Such damage to public interests to serve private gains is highly dubious, questionable and not acceptable. The use and abuse of our natural resources in this way should not be supported by regulatory agencies charged with protecting the public by in any way diminishing the rigor of the review, process and oversight that is provided.

The Army Corps needs to ensure its completion of the NEPA process before moving forward with any permit review, action or decisionmaking.

Based on the information available, permitting for this project is neither warranted nor defensible.

We urge the Army Corps to reject any Clean Water Act or Rivers and Harbors Act permitting for the Southport project. That to the extent it wants to continue to consider this project, it first fulfill the requirements of NEPA, which include the preparation and completion of an Environmental Impact Statement.

Submitted,



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Delaware Riverkeeper Network

Bill Stewart, Conservation Chair
Delmarva Ornithological Society

Roxane C. Shinn, Co-director
Cooper River Watershed Association

Mark Martell, President
Delaware Audubon

Ron Marks, President
Delaware River Shad Fishermen's Assoc.

David R. Conrad, Senior Water Resources Specialist
National Wildlife Federation

Amy Goldsmith, Director
NJ Environmental Federation

Jeff Tittel, Director
NJ Sierra Club

Christine Nolan, Executive Director
South Jersey Land & Water Trust

Captain Robert V. Martin
U.S. Navy Ret.

Attachments:

- ✓ Email dated February 11, 2008 from John Kennedy to Randy Brown.
- ✓ Memo by PADEP SERO dated February 11, 2008
- ✓ Minutes of September 23, 2009 regulators meeting
- ✓ Minutes of October 29, 2009 regulators meeting
- ✓ Notes from Meeting with NMFS at Sandy Hook, NJ, Dec. 1, 2009
- ✓ National Marine Fisheries Service memo dated Nov 13, 2009
- ✓ Delaware Riverkeeper Network Comment regarding Bald Eagle effects 6/11/10
- ✓ National Marine Fisheries Service correspondence dated Sept 2, 2010 from Peter D. Colosi to William Flanagan.
- ✓ Regulatory Agency Mtg Minutes dated March 24, 2010
- ✓ Email from Kimberly McLaughlin dated May 27, 2010 re CAA General Conformity Rule

- ✓ Email dated May 20, 2010, subject DRBC Regulatory Review – Proposed Southport Project, Philadelphia, PA
- ✓ Email from James Newbold to John Kennedy, dated April 21, 2010 re Southport
- ✓ Email from Joseph Feola to Domenic Rocco and James Newbold dated April 16, 2010 Re Southport.
- ✓ Email from James Newbold to Zahra Nucci dated April 15, 2010, Re FW Southport
- ✓ Email from John Kennedy to Newbold, Sneath and Nucci dated May 8, 2008, re Southport Concept Comments
- ✓ Email from Domenic Rocco to Newbold and Nucci dated 3/30/10 Re Southport Mtg f/up
- ✓ Email from Randall Brown to Zahra Nucci dated 2/11/08 Re Southport issues.
- ✓ Email from Deborah Fries to Rocco and Newbold dated 7/29/08 re Delaware Avenue Projects.
- ✓ Email plus attachment from Thomas Shervinskie to Young and others dated March 9, 2010 re Draft Technical Plan for 2010 Southport Aquatic Studies. Attachment is titled Efficacy of a Benthic Trawl for Sampling Small-Bodied Fishes in Large River Systems.
- ✓ Handwritten notes dated 3/8/10 titled Southport Call.
- ✓ Handwritten notes dated 5/5/10 titled Southport Conf. Call
- ✓ Urban Waterfront Action Group Minutes dated Feb 12, 2003.
- ✓ David Densmore, US Fish and Wildlife Service Letter to James McDermott of the Philadelphia Regional Port Authority, dated July 19, 2004.
- ✓ Email from Mohler to Gorski dated Oct 9, 2009.
- ✓ Email dated Dec 9, 2009 re Southport Environmental Assessment TOC
- ✓ Memorandum for Files from Karen Greene National Marine Fisheries Service dated Nov. 13, 2009
- ✓ Briefing: Delaware River Main Channel Deepening Project, Supplemental Environmental Impact Statement (SEIS) Information, January 2007.
- ✓ Correspondence from the Partnership for the Delaware Estuary: a National Estuary Program dated December 23, 2008.
- ✓ Draft Final Report, June 30, 2005, Feasibility Assessment for Placement of Dredged material at the Philadelphia Naval Business Center and Southport, and cover memorandum dated July 11, 2005.