



October 3, 2019

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

Re: Application No: WIIN ACT Section 1308 – File No: CENAP-OP-R-2019-0288-83 – Sept 3, 2019 Notice

To whom it may concern:

Delaware Riverkeeper Network (DRN) is writing in regard to inquiries and concerns pertaining to the Army Corps of Engineers (Corps) proposing to remove navigational servitude on a series of Philadelphia infill properties and piers within the Delaware River channel located on and within the Delaware River at:

(1) Piers 70 South through 38 South, encompassing an area bounded by the southern line of Moore Street extended to the northern line of Catherine Street extended, including the following piers: Piers 70, 68, 67, 64, 61–63, 60, 57, 55, 53, 48, 46, 40, and 38. (2) Piers 24 North through 72 North, encompassing an area bounded by the southern line of Callowhill Street extended to the northern line of East Fletcher Street extended, including the following piers: Piers 24, 25, 27–35, 35.5, 36, 37, 38, 39, 49, 51–52, 53–57, 58–65, 66, 67, 69, 70–72, and Rivercenter.

DRN has concerns that the Water Infrastructure Improvements for the Nation (WIIN) Act provision outlined in the September 3, 2019 Army Corps notice specifically honing in on Delaware River waterfront, will take away future power from the federal government from regulating Delaware River water quality, floodplain protection, or public trust river restoration that may be required in the future. These areas are already located within the main channel and floodplain of the main stem Delaware River (via piers) or in fact perhaps not “fully filled” or “developed” and as such should remain under navigational servitude to best protect the public trust and the Delaware River main stem and floodplain in the future. DRN does not believe that giving up the ability and power of the Corps to regulate and alter or remove fill conditions of the Delaware River and restore a water front in the future for the public trust and access should be taken away (takings or need for tax payer expenses), especially with climate change, sea level rise, and other

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anticipated environmental concerns and pressures for the Delaware River waterfront on multiple fronts by multiple private and industrial developers; DRN is in opposition to this proposed change.

DRN instead supports public access, natural native vegetative parks, temporary pop up parks, restoration of waterfront wetlands and healthy riparian forested areas and public spaces along the Delaware River being established for the good of the residents and visitors of Philadelphia. DRN believes removing this special condition is giving away much needed and anticipated rights of the public trust to the hands of private developers that seek to profit from waterfront development and likely more high rises and condos that are already line many locations along the Philadelphia waterfront and that often do not welcome or attract visitor access to the waterfront to fish and recreate.

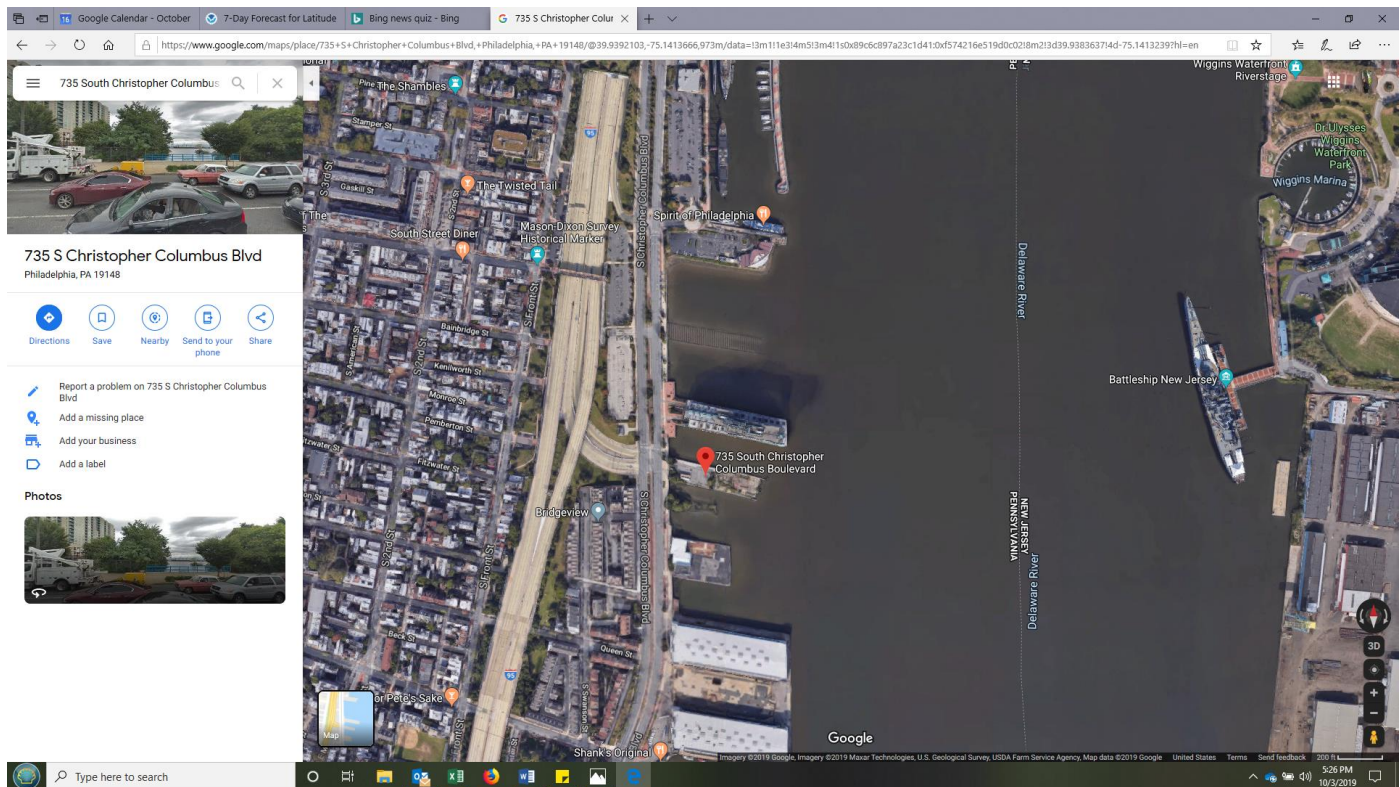
DRN highlights (in italics) the special condition below that the Corps is proposing to **remove under the WIIN Act**:

Special condition: The permittee understands and agrees that, if future operations by the United States require the removal, relocation, or other alteration, of the structure or work herein authorized, or if, in the opinion of the Secretary of the Army or his authorized representative, said structure or work shall cause unreasonable obstruction to the free navigation of the navigable waters, the permittee will be required, upon due notice from the Corps of Engineers, to remove, relocate, or alter the structural work or obstructions caused thereby, without expense to the United States. No claim shall be made against the United States on account of any such removal or alteration. (This special condition is applicable to Corps of Engineers permits that provide authorization under Section 10 of the Rivers and Harbors Act of 1899.).

In short, if a developer wants to inherit the risk of building or re-developing on waterfront property or historic piers located within the Delaware River main stem, floodplain and floodway, they must adhere to this special condition and clause and not be exempt of this special condition as the WIIN Act outlines. Giving up the ability of the public trust to alter fill conditions of the Delaware River into the future as is being proposed, is not in the public interest nor the Delaware River's interest. Therefore, this WIIN Act provision for the Philadelphia filled properties is NOT within the public interest and therefore should be denied.

Historically, title to the land underlying navigable waters is, as a rule, vested in the state in which the land is located, unless it has previously been conveyed to a municipality or to a private upland owner. These areas are impressed with a trust or servitude in favor of the general public of the state in which they are located, requiring them to be used for the purposes of navigation, fishing, commerce or other public water use. Although this trust authorizes the states and their political subdivisions to issue regulations controlling the use of these waters, in all instances these regulations are subject to the paramount right of the navigation servitude in the United States. Navigational servitude finds its legal basis in the United States Constitution and should be protected for the benefit of the public. The navigation servitude is the paramount right of the federal government, under the commerce clause of the United States Constitution, to compel the removal of any obstruction to navigation, without the necessity of paying "just compensation" ordinarily required by the fifth amendment of the Constitution.¹

In this specific special notice, the Corps is seeking to remove public trust rights pertaining to an application (CENAP-OP-R-2019-0288-83) that has been submitted by Desert Diamond 34, L.P., a Pennsylvania Limited Partnership, c/o Ensemble Investments, LLC, seeking to re-develop a portion of the existing Pier 34 and the and interpier area between Piers 34 and 35. The sites are located at 735 South Christopher Columbus Boulevard along the west bank of the Delaware River in Philadelphia, PA; [Latitude: 39.938403° North; Longitude: -75.141508° West at RM 99]. A public notice soliciting comments on that Department of the Army permit application was published on July 31, 2019. The review of that permit application, which also includes a public interest determination, will also include an evaluation of the proposed activity pursuant to Section 404 of the Clean Water Act and Section 10 of the Rivers and harbors Act of 1899.



Google earth image of 735 South Christopher Columbus Blvd pier in the main stem Delaware River, accessed Oct 3, 2019

DRN understands from a telephone conversation with Corps staff that, "It should be noted that the declaration of this portion of the Delaware River as non-navigable does not alter or restrict the applicability of the U.S. Army Corps of Engineers regulatory authority under Section 10 of the Rivers and Harbors Act or Section 404 of the Clean Water Act." DRN still believes that there should be no taking away the public's power for navigational servitude into the future at these infill properties located in the River or for future infill properties that may be proposed, especially in light of private developers plans to redevelop for real estate and profit in the Delaware River channel.

In addition, DRN would like to put on record that conversation with Corps staff conducted during this comment period has not been clear. DRN was unable to receive more detailed information from the Corps on the notice, and the information we did receive seems counter to the Sept 3, 2019 notice. We understand through conversation that this notice is under "Operations Branch" while there are similar notices under the "Regulatory Branch":

<https://www.nap.usace.army.mil/Portals/39/docs/regulatory/publicnotices/Public-Notice-2019-0288-38-002.pdf>.

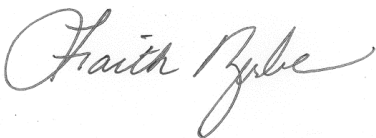
As such, if the Corps itself is not clear on the ramifications of this change via the WIIN Act, more time and perhaps a forum or public meeting is justified to understand and learn more before public trust rights of navigational servitude are removed for the Delaware River which serves as drinking water for over 15 million people for a larger area of the western bank of the River in Philadelphia.

DRN believes that the current regulations should stand to protect the public trust into the future. Before the WIIN Act, it is our understanding that properties within the ordinary high water mark of navigable waterways are subject to a navigational servitude. A navigational servitude allows the federal government to require the landowner to remove or alter any property improvements within the ordinary high water mark which inhibit navigation, without the requirement of paying just compensation. In addition, all permits issued by the Corps on navigable waters acknowledge the Corps' right to navigational servitude. Unless the government expressly waives the servitude (which is what is being proposed with this current notice), the servitude remains a risk on title to the property. Exemption from a navigational servitude is therefore valuable because the federal government cannot take waterfront property without paying just compensation.

Section 1308 of the Water Infrastructure Improvements for the Nation Act allows the Corps to declare certain areas non-navigable for the purposes of removing a navigational servitude. Therefore, if any of the properties included in Section 1308 have structures that are water ward of the ordinary high water mark, e.g., piers or filled areas originally navigable, then the property owners will be protected from a taking of their structures without just compensationⁱ. Again, DRN does not support the WIIN Act component of stripping navigational servitude to this stretch of the Delaware River and we believe the Corps should not be taking steps now to undermine its authority for the public good.

Thank you for your time and consideration in this matter.

Sincerely,



Faith Zerbe
Director of Monitoring
Delaware Riverkeeper Network

ⁱ Morris, Eugene J. (1970) "The Federal Navigation Servitude: Impediment to the Development of the Waterfront," St. John's LawReview: Vol. 45 : No. 2 , Article 1. Available at: <https://scholarship.law.stjohns.edu/lawreview/vol45/iss2/>, Accessed Oct 3, 2019

ⁱⁱ <https://www.mankogold.com/publications-articles-US-Army-Corps-Proposes-to-Remove-Navigational-Servitude-Affecting-Philadelphia-Properties.html>. Accessed Oct 3, 2019