



August 13, 2014

Mr. Peter R. Blum, P.E.
Attn: Environmental Resources Branch
US Army Corps of Engineers
Wanamaker Building
100 Penn Square East
Philadelphia, PA 19107-3390

Re: CENAP-PL-E-14-01

Dear Mr. Blum,

The Delaware Riverkeeper Network renews our request for a public hearing and that a 45 day extension of the public comment period be granted for **CENAP-PL-E-14-01, Environmental Assessment of the Proposed Land Exchange of Properties at Artificial Island, Salem County, NJ for Properties in Oldmans Township, Salem County and Logan Township, Gloucester County, NJ; Development of Confined Disposal Facility.**

The US Army Corps of Engineers (Army Corps) is proposing a land swap with PSEG Power, LLC (PSEG). In this proposed land swap:

- ☞ the Army Corps would be the recipient of 354 acres of land located in Oldmans Township, Salem County and Logan Township, Gloucester County, NJ; and
- ☞ PSEG would be the recipient of 631 acres (94 acres of Confined Disposal Facility (CDF) and 537 acres of coastal wetlands) on Artificial Island.

Ramifications of the land swap for the Delaware River in terms of how PSEG will utilize the lands they receive are severe. Additionally, the impacts for Logan Township and Oldmans Township residents and natural resources resulting from the proposed Confined Disposal Facility the Army Corps would reconstruct on the site it receives in the deal are also significant, and have not been fairly considered in the limited Environmental Assessment provided as evidenced by comments submitted by Oldmans Township.

The Environmental Assessment (EA) dated July 2014 is inadequate and cannot support the Finding of No Significant Impact the US Army Corps asserts as a result.

The EA fails to address the obvious foreseeable outcome from this deal – a new nuclear powerplant to be built on wetlands in the Delaware Estuary.

DELAWARE RIVERKEEPER NETWORK
925 Canal Street, Suite 3701
Bristol, PA 19007
Office: (215) 369-1188
fax: (215) 369-1181
drm@delawareriverkeeper.org
www.delawareriverkeeper.org

The expressly stated purpose of the Environmental Assessment is to “evaluate[] the potential effects of a Proposed Land Exchange (PLE), which would exchange properties suitable for constructing a new Confined Disposal Facility (CDF) in exchange for USACE properties on Artificial Island.” This statement makes clear that the “potential effects” that must be examined are not limited to one of the properties, but rather, include an examination of both properties. Any limitation of the environmental review of the PLE to only the impacts to Site 15G improperly and unlawfully runs afoul of the what is required to be examined pursuant to the National Environmental Policy Act (NEPA).

It is clear from Draft Environmental Assessment that impacts of the proposed land swap are, indeed, not limited to the effects of the construction and operation of a new CDF at site 15G in Logan Township and Oldmans Township, New Jersey. As the Army Corps is well aware, PSEG is seeking to secure title to the Artificial Island acreage for the purpose of constructing a new nuclear power plant (“Salem 4”). The Army Corps acknowledges in Section 5.4.1.1 of the Draft Environmental Assessment that PSEG has already submitted application materials to the Nuclear Regulatory Commission (NRC) demonstrating their intent to construct – and seeking permission to allow construction of – the new Salem 4 nuclear power plant at this location. As a result, the construction of a new nuclear power plant on the Artificial Island lands and the coastal areas that are a focus of this deal is a foreseeable and intended outcome of the land swap deal.

The National Environmental Policy Act (NEPA) and its implementing regulations, 40 C.F.R. §§ 1500–08, make clear that federal agencies must consider the direct and indirect effects and the cumulative impacts of reasonably foreseeable projects. 40 C.F.R. §§ 1508.8 & 1508.7.

- ☞ Direct impacts according to 40 C.F.R. §§ 1508.8 are those which “are caused by the action and occur at the same time and place.”
- ☞ Indirect effects according to 40 C.F.R. §§ 1508.8 are those which “are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. . . . Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.”
- ☞ NEPA regulations also mandate the consideration of cumulative impacts from a proposed project. According to NEPA regulations, 40 C.F.R. §§1508.7, an assessment of cumulative impacts includes consideration of reasonably foreseeable future actions.

Each of the aforementioned definitions provides a clear mandate to the Army Corps that the environmental harms and impacts resulting from the construction and operation of Salem 4 must be considered and analyzed in the Draft Environmental Assessment.

Additionally, “piecemealing” or “segmentation” is the unlawful practice whereby a project proponent avoids the NEPA requirement that an EIS be prepared for all major federal actions with significant environmental impacts by dividing an overall plan into component parts, each involving action with less significant environmental effects. *Taxpayers Watchdog v. Stanley*, 819 F.2d 294, 298 (D.C. Cir. 1987) (“Taxpayers”). Federal agencies may not evade their responsibilities under NEPA by “artificially dividing a major federal action into smaller components, each without a ‘significant’ impact.” *Coal. on Sensible Transp. v. Dole*, 826 F. 2d 60, 68 (D.C. Cir. 1987). *See also* 40 C.F.R. § 1508.27(b)(7). The general rule is that segmentation should be “avoided in order to insure that interrelated projects, the overall effect of which is environmentally significant, not be fractionalized into smaller, less significant actions.” *Town of Huntington v. Marsh*, 859 F.2d 1134, 1142 (2d Cir. 1988). Without this rule, developers and agencies could

“unreasonably restrict the scope of environmental review.” *Fund for Animals v. Clark*, 27 F. Supp. 2d 9, 16 (D.D.C. 1998) (“Fund”). Here, the Corps has clearly improperly attempted to segment review of the land swap from the development of Salem 4.

Because of the direct relationship between the construction of Salem 4 and the proposed land swap, because the land swap was proposed and is being pursued by PSEG in its pursuit of the Salem 4 project, because Salem 4 will be constructed at the Artificial Island location of the land swap, and because PSEG’s construction of Salem 4 is a reasonably foreseeable outcome of the land swap, the environmental and community impacts of construction and operation of Salem 4 must be considered in the draft Environmental Assessment and the subsequent Environmental Impact Statement we anticipate will follow. Failure to consider the impacts of construction and operation of Salem 4 is a failure to fulfill the mandates of NEPA.

For the Army Corps to take the position that it has fulfilled its NEPA obligation to consider this reasonably foreseeable outcome of the deal in three paragraphs of analysis is a clear abrogation of its NEPA duties. In fact, the Army Corps makes no effort to consider the implications of the new nuclear plant whatsoever. The Army Corps seeks to evade its obligation to undertake this review by asserting that while Early Site Plan approval for the new nuclear plant at this location is reasonably foreseeable, the actual construction of the nuclear plant is not.

The land swap was proposed and is being pursued because PSEG wants, intends, and needs the land for their proposed Salem 4 project and has already filed for approvals necessary to carry out the project – construction of the nuclear powerplant is clearly foreseeable – it is so foreseeable that the Army Corps does in fact spend three paragraphs seeking to evade their legal obligation to review its ramifications.

Construction of the new nuclear plant on Artificial Island which is being pursued and can only be made possible because of this land swap, is reasonably foreseeable under the terms of NEPA, and as such the ramifications of construction of Salem 4 must be reviewed as a part of any NEPA review.

It is also striking to note that while the Army Corps asserts construction of Salem 4 is not a reasonably foreseeable outcome of this land swap deal, it relies almost entirely on the Early Site Plan review process being pursued to allow construction of Salem 4 as the basis for fulfilling the Army Corps’ scoping obligation for the land swap NEPA process. The Army Corps did not itself engage in the necessary public outreach to fulfill its NEPA scoping obligations independently of the Early Site Permit process. It asserts it coordinated with other agencies, but it did not seek input from the public as NEPA regulations require. Instead, the Army Corps is seeking to rely upon the process associated with the Early Site Plan review for the construction of Salem 4 while at the same time it asserts that Salem 4 is not a reasonably foreseeable outcome of this land swap so much so that the Army Corps does not need to consider its ramifications. The Army Corps cannot have it both ways -- if it wants to rely upon the scoping process initiated in consideration of construction of Salem 4, which it clearly does, then it must also include all of the ramifications of the reasonably foreseeable construction of Salem 4 in its NEPA review of the land swap being proposed.

Furthermore, the Army Corps takes the understandable position that a reasonably foreseeable outcome of the Early Site Plan Approval is construction of Salem 4, and as a result, the NEPA process associated with the Early Site Plan Approval mandates consideration of Salem 4’s impacts, but then, in turn, asserts that in the context of the land swap, construction of Salem 4 is not reasonably foreseeable upon issuance of the Early Site Plan Approval and therefore does not require consideration -- the steps are too close to take this nuanced position. It is clear that the land swap is being pursued to accomplish Salem 4, at the same time as

and in conjunction with the Early Site Plan Approval for this same location because the two steps are integrally intertwined and interdependent.

The ramifications of construction of Salem 4 should include, but not be limited to:

- ☞ Water quality impacts from the construction and operation of the nuclear power plant;
- ☞ Impacts to fish populations from construction and operation of the nuclear power plant due to impingement and entrainment, high temperature discharges, loss of wetlands food and forage habitat, and pollution discharges;
- ☞ The threat of hazardous discharges during catastrophic failure including in the context of a major storm event and/or catastrophic flooding due to storm surge and/or sea level rise;
- ☞ The consumptive loss of water to the Delaware River from the operation of the nuclear power plant.

The EA is based on sorely outdated information that the Army Corps acknowledges was not revisited in the preparation of the National Environmental Policy Act (NEPA) review.

The EA references several old documents as having already reviewed the environmental and community ramifications of using site 15G as a CDF – most specifically reports prepared in 1992, 1994 and 1997. All of these documents are dated – they are 22 years, 20 years, and 17 years old respectively – in addition they do not consider in any way the use of Artificial Island for a land swap intended to support construction of a new nuclear power plant. To rely upon 17 to 22 year old reports that are themselves dependent upon data that is even older does not provide due consideration to current conditions and/or impacts. Since these reports were completed there have been a number of significant changes in and around the project areas, for example but not limited to: in 2012 the Atlantic Sturgeon which uses the reach of the river to be impacted by both the CDF and the construction of a new nuclear plant on Artificial Island was declared endangered¹; Oldmans Creek, the receiving stream for the CDF discharge, was declared a Category 1 Stream by the State of NJ² and therefore subject to a higher level of protection; oysters once thought extirpated have been found in estuary waters; there has been an increase in Submerged Aquatic Vegetation such as wild celery³ in the estuary.

In addition to the listing of Atlantic Sturgeon as endangered since the previous NEPA analyses the Army Corps is relying upon which also do not consider in any way the use of Artificial Island for a new nuclear powerplant, the Delaware River has been determined to have a genetically unique line of Atlantic Sturgeon,⁴ one that reproduces only in the Delaware River system, juvenile Atlantic Sturgeon from this line have been found in the Delaware River thus supporting its ongoing existence and survival, this genetically unique line is known to rely heavily on various parts of the estuary for various critical stages of its life cycle, and in fact in 2014 alone over a dozen Atlantic Sturgeon have been found dead, dying or seriously injured in PSEG's Salem Nuclear Generating Station cooling water intake structure located on Artificial Island⁵ – all of which

¹ http://www.nmfs.noaa.gov/stories/2012/01/31_atlantic_sturgeon.html

² <http://www.state.nj.us/dep/wms/bwqsa/maps/mauriceoldmanssalem.pdf>

³ According to a NJ Department of Environmental Protection Briefing, Delaware River Main Channel Deepening Project, Supplemental Environmental Impact Statement (SEIS) Information, dated January 2007, Wild Celery is rebounding in the freshwater areas of the River. An April 16 2009 letter from the National Marine Fisheries Service confirms the presence of wild celery (*Vallisneria Americana*) in the Delaware Estuary. And recognizes its importance as both refuge and forage habitat for fish.

⁴ Grunwald, Maceda, Waldman, Stabile, Wirgin. Conservation of Atlantic sturgeon *Acipenser oxyrinchus oxyrinchus*: delineation of stock structure and distinct population segments, Printed Springer Science+Business Media, B.V. 2007; Wirgin, Grunwald, Stabile, Waldman. Genetic Evidence for Relict Atlantic Sturgeon Stocks along the Mid-Atlantic Coast of the USA. North American Journal of Fisheries Management, 27:1214-1229, 2007.

⁵ Reports can be found on the Nuclear Regulatory Commission website, filed by PSEG.

is new and vitally important information with regards to how the Artificial Island swapped lands are to be used.

The dated and deficient nature of the previous reviews in and of themselves makes the draft EA deficient and unable to sustain the proposed Finding of No Significant Impact.

Viable alternative ignored.

The Army Corps identifies an existing railroad line near Site 15G as an added benefit that will extend the useful life of the 15G CDF. Why then has this railroad line not been used in that fashion to extend the life of the other neighboring CDFs, thereby negating the need for Site 15G? The use of the railroad line to extend the life of the Pedricktown CDFs, for example, should be given due consideration as an alternative to the proposed land swap.

Predetermined nature of the NEPA process is a violation.

It is concerning that the Army Corps in fact agreed to this deal (i.e. reached an agreement in principle) only contingent upon an assessment of net benefits to the Army; there was no contingency based upon the outcomes of NEPA review. As such, it is clear that the outcome of the NEPA analysis conducted for this project, including both the EA and the FONSI were already pre-determined and simply therefore pro-forma, and as such are an actual violation of NEPA itself.

Other outstanding concerns not addressed by the EA.

The EA needs more discussion of the use of rip rap by the outfall pipe and should provide consideration of removal of the historic 19 acres of fill placed in Oldmans Creek at/adjacent to the CDF site. The use of natural channel design protections around the outfall and consideration of the removal of the historic creek fill should be part of any environmental mitigation and impact avoidance that is considered as part of this proposal.

The EA discusses as part of the operation and maintenance of the proposed CDF that the site “will be allowed to naturally vegetate” as a way of helping with the dewatering process, soil erosion and sedimentation, and dust control. But the EA fails to consider the kind of vegetation that will be allowed to fill in. It is important that this CDF not be allowed to become inhabited by, and therefore a seed source for, invasive plants. If operation and maintenance of the site includes allowing the growth of invasive multi-flora rose, grapevine, kudzu, Japanese knotweed, and other harmful invasive species then its operation would contribute to enduring, invasive and growing environmental harm in the surrounding areas. The EA fails to consider or discuss this obvious environmental impact and to discuss possible options for preventing it.

The Army Corps repeatedly asserts that as part of the land swap PSEG will obtain “degraded coastal wetlands.” The fact that the wetland areas are dominated by Phragmites does not support a land swap that will result in their devastation through construction regardless of the perception of their value. The value of Phragmites is a topic of debate. In fact, PSEG-collected-data to consider just this issue has shown that Phragmites dominated sites in Delaware Estuary are equally, and sometimes more so, valuable to aquatic life for food and habitat.⁶ The EA itself briefly mentions that while the soils in the wetlands areas were originally dredge spoils dumped in the area that they appear to be functioning similar to the adjacent marshes “in their support of tidal, emergent wetland vegetation.” Regardless, the characterization that the lands to be exchanged to PSEG are “degraded” is not a sound basis for supporting the land swap -- if the

⁶ Discussion of this data and findings can be found at:
<http://www.delawareriverkeeper.org/resources/Reports/Salem%20EPA%20Report.pdf>

characterization is accepted, the logical outcome given the importance of wetlands for ecological health, water quality protection, and community storm protection would be a plan for the Army Corps to restore the wetlands in its ownership and care, not to give them away so they can be further damaged and degraded with construction.

Constructing a CDF at Site 15G is a bait and switch of the worst kind.

In the consideration and analysis surrounding the Delaware River deepening project the Army Corps removed construction of a CDF at Site 15G and other locations because environmental and community harms and opposition were becoming increasingly significant. That the Army Corps is now reinstating this plan after the deepening project has been authorized and begun is an inappropriate abuse of process. I think it is important that this bait and switch is on the record.

In Conclusion.

In order to ensure full opportunity for public review and comment, we ask that the Army Corps hold a public hearing on the proposal and the recently released Environmental Assessment in the month of September and that it provide a minimum 45-day extension for written comments.

Additionally, by way of this comment, it is the position of the Delaware Riverkeeper Network that the NEPA process has been violated, that the draft EA fails to support a Finding of No Significant Impact, that at a minimum a revised EA is needed to determine if an EIS will in fact be required, and it is the Delaware Riverkeeper Network's belief that upon completion of a full and fair EA that the need for an EIS to review this proposed deal will be inevitable.

Respectfully,



Maya K. van Rossum
the Delaware Riverkeeper