

**American Rivers ♦ Clean Water Action ♦ Earthjustice ♦ Friends of the Earth  
League of Conservation Voters ♦ National Audubon Society  
Natural Resources Defense Council ♦ National Wildlife Federation ♦ Sierra Club**

November 10, 2009

Nancy Sutley  
Chair  
Council on Environmental Quality  
722 Jackson Place, NW  
Washington, D.C. 20503

Dear Chairwoman Sutley:

On behalf of our millions of members and supporters, we write to urge you to review recent decisions by the U.S. Army Corps of Engineers (Corps) regarding the Delaware Main Channel Deepening project. The Corps has opted to begin constructing this project without required permits from the States of Delaware and New Jersey and without supplementing the project's environmental impact statement as required by the National Environmental Policy Act. These decisions are contrary to law and represent a deeply flawed approach to water resources planning.

The Delaware Channel Deepening project, which would expand and deepen 104 miles of the Delaware River's navigation channel, has been highly controversial since it was authorized in 1992. The project threatens endangered species, migratory shorebirds, oyster rehabilitation efforts, blue crab and horseshoe crab populations, municipal water supplies, and the health of the river ecosystem including the Delaware Bay wetlands that provide vital habitat and flood protection benefits. The project will also have wide-ranging risks to human health, including potential introduction of toxic materials into the river and aquifer. These risks have not been properly analyzed. The project's economic benefits are also highly questionable when compared with project costs. While the Corps concludes benefits will barely exceed costs, other credible analyses have shown that the costs will exceed the benefits.

The Corps seeks to proceed with the project even though it is not in compliance with the National Environmental Policy Act and a host of other federal laws, including the Clean Water Act, the Coastal Zone Management Act, the Clean Air Act, and the Endangered Species Act. The Corps has refused to supplement the project's environmental impact statement, even though the project has undergone numerous and substantial changes — many of which remain highly uncertain and poorly described — since the supplemental environmental impact statement was finalized in 1997. The current environmental impact statement and related planning documents are out of date, no longer reliable, and legally inadequate and deficient.

The project is also not in compliance with applicable State laws. On July 23, 2009 the State of Delaware denied a Subaqueous Lands Act permit, a Wetlands Act permit, and a Clean Water Act § 401 water quality certification for this project. By letter dated July 24, 2009, Delaware also advised the Corps that the project would require an updated Coastal Zone Management Act consistency determination. In 2002, New Jersey's Clean Water Act § 401 water quality

certification for this project expired, and New Jersey revoked the project's Coastal Zone Management Act consistency determination.

The Corps is nevertheless attempting to move forward with construction of the project and has indicated that it intends to start dredging the portion of the river that flows through the State of Delaware by December of this year. The Corps has taken two virtually unprecedented steps in this regard. First, it has invoked Clean Water Act Section 404(t) and Section 511(a) in an attempt to avoid state law permitting requirements. Second, the Corps has invoked Clean Water Act § 404(r) in an attempt to waive federal Clean Water Act requirements, including the need to obtain state water quality certifications under Clean Water Act § 401.

The Corps has acknowledged that § 404(t) and § 511(a) have been invoked only one time in the history of the Clean Water Act. These sections provide that nothing in the Clean Water Act shall be construed as affecting or impairing the authority of the Secretary of the Army to "maintain navigation." Since the Corps is currently maintaining the depth of the Delaware River at 40 feet, it is not clear how the Corps could properly determine that complying with state requirements for a new channel deepening project could be impairing its ability to maintain navigation on the Delaware River. Moreover, the Corps has told at least one court that the Corps' "obligation to 'maintain navigation' does not always trump the Clean Water Act. However, the Corps contends that when it is faced with what it calls an 'either-or-situation,' the Corps' ability to maintain navigation is not subject to state water quality standards" (*State of North Dakota v. Corps of Engineers*, 270 F. Supp. 2d 1115, 1122 (D.N.D. 2003)). This certainly is not the situation in the instant case.

Clean Water Act § 404(r) is equally little used, and cannot be properly invoked in this case. The legislative history of that section makes it clear that Congress intended that it must have access to full and adequate information on the siting, engineering and environmental impacts of a project before Congress could invoke that section. The Corps has attempted to utilize the § 404(r) exemption by sending Congress a copy of the 1997 supplemental environmental impact statement for the project. As noted above, however, this document does not provide the necessary information to Congress. Indeed, because the project has changed substantially since 1997, the environmental impact statement sent to Congress by definition cannot fully describe the project let alone the project's impacts.

We believe that the Secretary of the Army has vastly overstepped his authority under the Water Resources Development Act and the Clean Water Act in this attempt to waive applicability of State and federal law to this project. We also believe that the Corps' efforts set a dangerous precedent that threatens the roles and responsibilities of States and other federal agencies, and the basic integrity of the Corps' planning process.

We urge you to review the Corps' decision to proceed in this fashion, and to require the Corps to come into full compliance with State and federal laws before moving forward with this project.

Thank you for your consideration of our extremely serious concerns.

Sincerely,

Frances Beinecke  
President  
Natural Resources Defense Council

John DeCock  
President  
Clean Water Action

John Flicker  
President  
National Audubon Society

Gene Karpinski  
President  
League of Conservation Voters

Trip Van Noppen  
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Erich Pica  
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Carl Pope  
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Larry Schweiger  
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National Wildlife Federation

Rebecca Wooder  
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