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## 3rd Circuit OKs Project to Deepen the Delaware River

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*Special to the Legal*

On a hot summer weekend, Philadelphians rush across the Ben Franklin and Walt Whitman bridges to the Jersey Shore while paying scant attention to the water flowing below them. Because from a quick glance over the side of the bridges the Delaware River appears to some as a permanent fixture, it is easy to take the river for granted.

But on a more leisurely day, most Philadelphians appreciate at least some of the benefits that the Delaware River provides to the region. The river and its tributaries supply drinking water to 15 million people. They provide habitat for aquatic species, including endangered species such as the shortnose sturgeon. Riparian lands host parks and offer recreational opportunities. Imagine Philadelphia without tall ships, festivals at Penn's Landing, the greenway, duck boats or celebratory fireworks launched from vessels on the river.

In addition, the segment of the river from Trenton, N.J., to Delaware Bay, including the tidal reach near Philadelphia, is a cornerstone of the region's economy. The river provides cooling water for electric generating facilities, production waters for industrial facilities, an outlet for domestic and industrial waste waters, and a navigation channel for ships to access Philadelphia's ports, nearby refineries and other industrial facilities. It is estimated that 75,000 jobs and billions of dollars in revenue are dependent on Delaware River port operations.

Maintaining the navigability of the nation's rivers has historically been the purview of the federal government under its Commerce Clause powers. But at times federal decisions conflict with the economic or environmental interests of one or more states. This conflict underlies the recent decision by the U.S. Court of Appeals for the Third Circuit in *Delaware Department of Natural Resources and Environmental Control v. U.S. Army Corps of Engineers*, Nos. 11-1283 and 11-1421 (3rd Cir. July 3, 2012) (*DNREC*).

In *DNREC*, the Third Circuit examined whether a project to deepen the Delaware River's



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navigation channel violated environmental laws. The navigation channel provides vessels with access to ports and facilities in Wilmington, Del., Philadelphia, Camden, N.J., and other portions of the Delaware estuary. Constructing and maintaining a navigation channel requires frequent operations to remove sediment that the river continuously deposits throughout the estuary.

As the Third Circuit discussed, the river deepening project has a long and controversial history. Federal projects to promote navigation in

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the Delaware River commenced many years ago. In 1910, Congress authorized a project known as "Philadelphia to the Sea," through which the U.S. Army Corps of Engineers maintained a 40-foot-deep navigation channel from Philadelphia to a point in Delaware Bay near Ship John Light. Although this project met shipping needs in that era, over time, the channel proved insufficient to

fully accommodate modern ships, which require a channel depth of at least 45 feet when they are carrying a full load.

The Corps conducted extensive studies in the 1970s and 1980s to evaluate the feasibility and effects of a channel deepening project. As the Third Circuit emphasized, these studies included an environmental impact statement (EIS) performed pursuant to the National Environmental Policy Act of 1969 (NEPA). NEPA requires federal agencies to evaluate environmental risks, alternatives and mitigation measures, and to take a hard look at the environmental impact of a proposed project. NEPA does not dictate a substantive result, but rather it ensures that agency decisions are informed by knowledge of environmental consequences and made after full public input.

In 1992, the Corps published its EIS and feasibility report recommending deepening a 102-mile reach of the river from Delaware Bay to Philadelphia and Camden to a depth of 45 feet. The Corps concluded that the deepening would increase shipping efficiency and reduce costs by eliminating the need to lighten ships servicing Delaware River ports and facilities. The EIS evaluated whether dredging sediment contaminated by years of industrial discharges and placing it at a disposal location near the river posed environmental risks. After studying the potential environmental impacts from its deepening project, the Corps concluded that adverse effects to water quality, benthic organisms and fishery resources would be minimal.

Based on the Corps' studies concluding that the project would create large benefits and minimal environmental impairments, Congress authorized the project to proceed. The Corps then completed the necessary engineering and design work, and thereafter performed a further environmental review to determine whether any of its initial conclusions in the EIS required modification. The supplemental EIS issued in 1997 reaffirmed the Corps' decisions in the initial EIS.

The issuance of the supplemental EIS did not signify that the project would have smooth sailing. By 1997, New Jersey had decided to

oppose the deepening project on environmental grounds. At that time, the Delaware River Port Authority, a joint agency of New Jersey and Pennsylvania, withdrew as local sponsor of the project. Progress on the project stalled. After many years of delay, in June 2008, the Philadelphia Regional Port Authority (PRPA) became the local partner and the project seemed back on track.

In light of the passage of time since the supplemental EIS was issued, the Corps and PRPA faced the question of whether intervening changes in river conditions or modifications to the project created the need for further environmental review. Opponents of the project argued that changes to the location of the disposal sites, reductions in the amount of anticipated dredged spoils, a potential increase in sediment toxicity due to the spill of oil from the T/S Athos I, and an increase in the number and distribution of shortnose sturgeon required a supplemental EIS to be performed. Proponents of the project were anxious to commence the project promptly.

PRPA and the Corps found a path forward by invoking NEPA's environmental assessment (EA) process. An EA is less rigorous than an EIS, and is usually used to determine whether significant potential environmental impacts exist to warrant performing an EIS. An EA generally includes discussion of the need for the proposal, the alternatives to the proposal, and the environmental impacts. In this case, the Corps performed the EA to determine whether a supplemental EIS was necessary and concluded that no further review was warranted.

Dissatisfied with this result, New Jersey, Delaware and environmental groups filed or joined suits in federal district courts in New Jersey and Delaware contending that the Corps violated NEPA, the Clean Water Act (CWA), the Coastal Zone Management Act (CZMA) and other federal statutes. The NEPA challenges alleged, among other things, that the Corps had failed to provide adequate public notice and had not fully examined potential environmental impacts. The district courts rejected these claims and in *DNREC* the Third Circuit affirmed.

The Third Circuit held that the Corps met the public notice requirements of NEPA by publishing notice that it was undertaking an environmental review to update the environmental record and to determine whether further environmental analysis was needed. The Corps included supporting material with the notice and provided a 30-day public comment period. The Third Circuit found this process to be a reasonable exercise of the Corps' discretion under NEPA.

The court also held that the Corps took a "hard look" at the environmental consequences of the project and adequately addressed the

relevant environmental issues. The EA discussed sediment quality, water quality, air quality, biological resources and the impacts of the Athos Oil Spill. The court found that the Corps' evaluation of potential water contamination was based on a sufficient array of studies, surveys and sediment samples, notwithstanding New Jersey's contention that additional sampling of channel banks and slopes was needed. The EA characterized the potential environmental consequences as minimal and proposed mitigation measures to further lessen them. For example, potential impacts to the shortnose sturgeon would be reduced by restricting the times of year in which blasting would take place and by utilizing special construction techniques. The court concluded that the Corps' environmental review satisfied NEPA.

The Third Circuit also rejected other statutory challenges to the project. The Delaware Riverkeeper Network contended that Section 401(a) of the CWA required the Corps to obtain certifications from the states that the project would not violate state standards and that the Corps had failed to obtain these certifications from New Jersey and Delaware. The Riverkeeper Network noted that during dredging, dredge spoils are added to the river. Dredging therefore requires a federal permit and state certifications.

Although the court agreed that state certifications would ordinarily be required for a project of this nature, it rejected the Riverkeeper Network's claim on the ground that Section 404(r) of the CWA exempted this project from the certification requirement. This section allows construction projects specifically authorized by Congress to proceed without state certification where information on the effects of the discharge is included in an EIS submitted to Congress. The channel dredging project had been congressionally authorized. The EIS sufficiently informed Congress of the environmental consequences of the project before Congress authorized the project. The Third Circuit concluded that the Section 404(r) exemption had attached, and that the Corps was not required to seek congressional reauthorization after subsequent environmental studies were conducted.

The Riverkeeper Network also contended that the Corps violated Section 313 and 404 of the Clean Water Act, which allegedly required the Corps to comply with state environmental laws, including state permitting requirements, when undertaking dredging in the river. Dredging creates a discharge of dredged spoils to which the permitting provisions of Delaware's Wetlands Act and Subaqueous Lands Act may apply.

The court, however, concluded that the Corps need not secure these state permits because Section 404(t) preserves the authority of the secretary of the Army for civil works to maintain

navigation. To be sure, the Corps initially sought state permits. But when Delaware failed to act on the permit applications for eight years, the assistant secretary directed the project to proceed under the secretary's authority to maintain navigation. The Third Circuit deferred to this determination.

Finally, New Jersey asserted that the CZMA precluded the Corps from implementing the project. Under the CZMA, a federal agency must submit to the host state a determination that its proposed project is consistent to the maximum extent practicable with the enforcement policies of approved state management programs. The state must concur with or object to the federal agency's concurrence determination. The federal agency must abide by the state's decision unless the agency concludes that its proposed action is fully consistent with the management program's enforcement policies.

New Jersey contended that notwithstanding the Corps' prior determinations, changed circumstances required the Corps to make a supplemental consistency determination. Under CZMA regulations, the Corps must supplement its determination where substantial changes in the proposed activities occur that are relevant to enforcement policies or where significant new circumstances or information relevant to the effect on coastal use or resources arise.

The court upheld the Corps' conclusion that the EA, and a separate biological assessment performed under the Endangered Species Act, demonstrated that further supplementation was not required. The Corps had reviewed the change in disposal sites in the EA and determined that they would not cause serious impacts. The EA and biological assessment verified that the effects of the oil spill and increased range of the shortnose sturgeon were adequately analyzed in the supplemental EIS. On this basis, the court held that the Corps' decision not to supplement the consistency determination was not arbitrary and capricious and allowed the project to proceed.

As the dredging project progresses, we will learn whether the Corps' assessment of environmental risks was correct. Next time you drive over the Ben Franklin and Walt Whitman bridges, you may have a different perspective on the river flowing beneath your roadway. •