

June 2, 2010

Hon. Collin O'Mara
Secretary Delaware Natural Resources
And Environmental Control Department
89 Kings Highway
Dover, DE 19901

RE: Request for Investigation

Dear Secretary O'Mara:

I am writing on behalf of Public Employees for Environmental Responsibility (PEER) to request that you investigate apparent violations of state and federal law by the Delaware Department of Natural Resources and Environmental Control (DNREC).

Background

On May 3, 2010, DNREC began a project on Prime Hook National Wildlife Refuge ("the Refuge"), in order to fix "breaches" that were created by recent storms in the dunes north of Prime Hook Beach in Sussex County. Currently, the area is experiencing daily flooding by direct tidal flow from the Delaware Bay via several new mini-inlets (or breaches) into back-barrier wetland areas.

On that date, DNREC transported two state bulldozers onto the Refuge wetlands and began scraping the sand from a wetland area to fill in the tidal inlet south of Fowler Beach Road, according to local television news reports. There was no formal "Public Notice", as required, before the initiation of this beach work.

This wetland area is considered "jurisdictional wetlands" under the U.S. Army Corps of Engineers and Clean Water Act definition. The Corps is currently investigating DNREC actions for purposes of assessing criminal or penalties for destruction of wetlands without a required Corps Section 404 Permit.

Beyond violations of federal law, these actions appear to also require a state Subaqueous Lands Act (SLA) Permit and a Beach Preservation Act (BPA) coastal construction permit, since the beach and wetland work was being done on a National Wildlife Refuge. In January 2010, you denied the Prime Hook Beach Organization, Inc. a similar permit for sand scraping to rebuild dunes that your own agency is now undertaking approximately one mile from the same Prime Hook Beach community (see attached).

Would not scraping sand from a wetland environment be similar scraping sand from a subaqueous environment?

In that Secretary's Order, DNREC experts state that "merely shifting sand from one location to another on the same beach" does little to provide long-term protection from beach erosion, and that hauling in sand from outside sources to reconstruct beach dunes is the better environmental solution. So why would DNREC, four months later do the very thing that it admonished the Prime Hook Beach Organization, Inc. from doing, near the same location on "the Refuge?"

How does DNREC justify scraping overwash sand deposited in wetland environments on a National Wildlife Refuge to rebuild dunes instead of hauling in sand from other sources as the preferred environmental alternative as described to the local beach community just 4 months ago? Why did DNREC not provide adequate public notice of this project and public hearing as required by state law and the Department regulations?

Furthermore, these wetland and beach areas of the Refuge may contain cultural and pre-historical resources that would require Section 106 compliance of the National Historic Preservation Act and also review by the State Historic Preservation Officer, as required by state regulations, to mitigate any negative impacts to the historic or prehistoric resources that could or would be disturbed by the project. Yet, there is no record of a consultation between DNREC and the State Historic Preservation Officer.

Since the work is being done on federal lands, compliance with the National Historic Preservation Act of 1966 (16 USC 470) is also required. That statute defines an undertaking on federal lands as "a project is funded in whole or part under the direct or indirect jurisdiction of a Federal Agency including those carried out by or on behalf of a Federal agency [or] those requiring a Federal permit, license or approval."

In addition, the wetland area in which DNREC is working happened to be directly beneath an active osprey nest with a pair of adult osprey and young. As shown during the local TV coverage, DNREC bulldozers were scraping sand all around this nest. These activities also started during peak spawning of horseshoe crabs with hundreds of crabs in the area. In addition, the bulldozers were disturbing and negatively impacting peak migrating and nesting shorebirds in the area.

DNREC and the Refuge have characterized the damage caused by the storms as "breaches", and have therefore determined that reconstruction of the dunes is necessary to protect the surrounding communities. In fact, what the storms have created are natural inlets, which allow barrier beach island habitats to evolve and roll-over towards land to adjust to sea-level rise and climate change. These inlets act as safety valves for the sandy beach ecosystem to adjust to storm dynamics and conditions for the benefit of the entire barrier beach island and back barrier marshes and a whole host of sandy beach-dependent and wetland dependent wildlife species.

DNREC's actions have thus had direct negative impacts on wildlife and indirect and long-term negative impacts on beach and wetland habitats, dependent on storm surge breach and overwash sand formations to adjust to climate change and sea-level rise. This sand accretion to back-barrier island wetlands is crucial to assure the resiliency and sustainability of wetland habitats during the current climate change environment and accelerated sea level rise rates.

The DNREC mission statement says that the agency is supposed "to protect and manage the state's vital natural resources" but we are concerned that recent actions have contravened that mission.

Conclusion

For the reasons described above, we request that you review this project in order to verify whether –

1. DNREC violated the federal Clean Water Act;
2. DNREC violated the state Subaqueous Lands Act (as inlet areas have become subaqueous areas that you will artificially fill-in with sand);
3. DNREC violated the state Beach Preservation Act;
4. DNREC violated the National Historic Preservation Act;
5. The Department failed to hold a public hearing in the manner required by state law and its regulations and consider all timely and relevant public comments before proceeding with this project on a National Wildlife Refuge.

In addition, PEER requests that you review the extent to which this beach work damaged natural resources and wildlife, as we have outlined.

Thank you in advance for your attention to this matter.

Sincerely,

Jeff Ruch
Executive Director