



Public Employees for Environmental Responsibility

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May 17, 2010

U. S. Army Corps of Engineers
North Atlantic Division
Philadelphia District Office
Regulatory Branch
100 Penn Square East
Philadelphia, PA 19107-3390

TO: USACE North Atlantic Division, Philadelphia District Office
FROM: Christine Erickson, Staff Counsel, Public Employees for Environmental Responsibility (PEER)

RE: Complaint for Potential Violation of the Clean Water Act

This is a formal request for an investigation of apparent violations of the Clean Water Act by the Delaware Department of Natural Resources and Environmental Control (DNREC). DNREC has commenced a project on jurisdictional wetlands without the necessary and required permits. What makes these actions especially egregious is that they are occurring on lands within the Prime Hook National Wildlife Refuge in Milton, Delaware.

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 May 3, DNREC transported 2 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 TV coverage reports. This wetland area is considered “jurisdictional wetlands” per the US Army Corps of Engineers and Clean Water Act definition.

In addition, the wetland area in which DNREC is working is also directly beneath an active Osprey nest with a pair of adult osprey and young. DNREC’s activities are also occurring during peak spawning of horseshoe crabs with hundreds of crabs currently in the area and also 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.

Violation of the Clean Water Act

Section 404 of the Clean Water Act regulates the discharge of dredged, excavated, or fill material in wetlands, streams, rivers, and other U.S. waters. The U.S. Army Corps of Engineers is the federal agency authorized to issue Section 404 Permits for certain activities conducted in wetlands or other U.S. waters.

The area in which DNREC is working is considered jurisdictional wetlands and therefore falls under the jurisdiction of the Army Corps of Engineers. As such, both the state and federal dune work and plugging up of inlets requires ACOE review and a Section 404 permit under the Clean Water Act from the Philadelphia Office. To our knowledge, DNREC did not obtain such permits. If DNREC did in fact apply or obtain such permits, they failed to put out a formal "public notice" about the project which began on May 3, 2010.

DNREC's actions have 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 the wetlands.

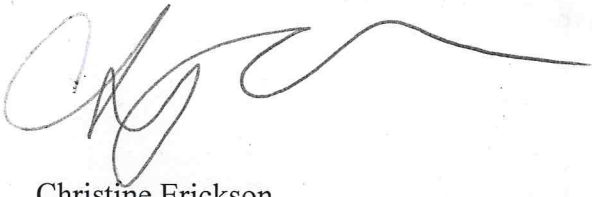
The Corps should investigate this complaint by examining if any permit applications were made by DNREC for this project, or whether a state-wide permit has been given which would cover this project. Moreover, the Corps should investigate whether the Refuge has applied for an ACOE permit as well as state wetland section permit for new refuge work on jurisdictional wetlands.

Conclusion

For the reasons described above, we believe that DNREC may be in violation of the wetlands provisions of the Clean Water Act which would require a permit for their activities. These provisions of the Clean Water Act are enforced by the US Army Corps of Engineers and should be investigated by the Philadelphia Office of the US ACOE.

Please let me know whether your office intends to pursue this matter. Thank you in advance for your time and consideration.

Sincerely,



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