

WHY THE DELAWARE RIVER DEEPENING PROJECT IS GOOD FOR DELAWARE

ECONOMIC ASPECTS

PORT OF WILMINGTON

- Modernizes the ship channel servicing the Port of Wilmington allowing it to compete for new investment and increased container trade and other cargoes.
- Provides potential for public private partnership to expand out on to the Delaware River.
- Reduces the Port of Wilmington's dredging costs by moving out onto the Delaware River where maintenance dredging would not be required.

BROADKILL BEACH AND RESTORATION OF KELLEY ISLAND

- Provides up to 2.0 million cubic yards of sand for the Broadkill Beach for erosion and storm damage prevention valued at over \$35.0 million.
- Provides about 2.2 million cubic yards of sand to stabilize and recreate wetlands at Kelly Island valued at over \$45.0 million.
- No financial commitment on the part of the State of Delaware.

ENVIRONMENTAL ASPECTS

- Provides protection to the oyster beds from the ongoing erosion at Kelly Island.
- Provides horseshoe crab and shorebird habitat as part of the Broadkill Beach and Kelly Island restoration.
- Creates and protects valuable wetlands at Kelly Island.
- Reduces oil lightering in the Delaware Bay thereby, reducing air quality impacts and the potential for oil spills.
- Environmental concerns raised during project review included:
 - The quality of the sediment to be dredged
 - The impact of dredging and placement on the water quality in the Delaware River and Bay
 - Salinity changes as a result of the project with particular concern regarding the impact on the oysters
 - The impact on several other species such as horseshoe crab, blue crab, shorebirds, and *Sabellaria vulgaris* (sandbuilder worm).
- All environmental analyses conducted to date concluded that the above concerns have no basis and the project is environmentally sound.
- At the request of DNREC, environmental safeguards have been built-into the project including an environmental monitoring program designed to insure any unanticipated impacts are identified and that all practical means to avoid and/or minimize these effects are taken.
- This program was coordinated with the appropriate DNREC staff includes monitoring of:
 - Sediment and water quality
 - Shorebirds
 - Horseshoe crabs
 - Sabellaria vulgaris* (sandbuilder worms)

- ❑ Oysters
 - ❑ Blue crabs
- The Corps of Engineers has budgeted over \$10.0 million for the above monitoring program.

PERMITTING PROCEDURE

The fact of recent meetings between DNREC and the Corps (or the local sponsors) in no way disables DNREC from granting this permit application. DNREC may properly hold meetings with a permit applicant and may accept supplementary material in support of (or, for that matter, in opposition to) a permit application without prior public notice.

- Any regulatory program would have to operate that way. Permit applicants regularly confer with permit writers and DNREC officials including the Secretary. So too for every other approval given by the State: driver's licenses, teaching certificates, licenses to practice medicine, and so forth. A position to the contrary would be impractical and would impede the normal functions of government.
- Chapter 101 of title 29 of the Delaware Code is not to the contrary.
 - a. 29 Del. Code § 10129 prohibits *ex parte* communications between an administrative agency and a "party" **but only** when the agency is subject to those rules and only with respect to "case decisions."
 - b. DNREC is not subject to section 10129 because it is not listed in section 10161(a). *In re 244.5 Acres of Land the Village, L.L.C. v. Del. Agric. Lands Found.*, 2001 Del. Super. LEXIS 499 at *22 (Del. Super. Ct. Aug. 22, 2001), *rev'd on other grounds*, 808 A.2d 753 (Del. 2002).
 - c. A subaqueous land permit is not a "case decision" as defined in 29 Del. Code § 10102, which have to do with enforcement matters. It is a "license." Section 10129 does not apply. Section 10129 only applies to formal proceedings, like permit appeals, and, in the case of DNREC, perhaps only when communications are *ex parte* of the **permittee** not some as yet unknown opponent. *Cf. Collins v. Tulou*, 1998 Del. Super. LEXIS 62 (1998).
- Refusing to grant this permit application because the Corps met with DNREC would be arbitrary and capricious. DNREC agreed to meet. It cannot now claim that the meeting to discuss an application disqualifies DNREC from considering the application.
- Any information transmitted by the Corps (or anyone else) forms part of the permit application record. It would be reviewed on appeal. If DNREC feels the need to request additional public input concerning new information, surely DNREC could craft a means to invite further comment on a short timeframe without starting the whole application process all over again.