

July 21, 2024

Via U.S. Mail and Email

US Army Corps of Engineers
Wilmington District
ATTN: Wilmington Harbor 403
69 Darlington Avenue
Wilmington, NC 28403
WilmingtonHarbor403@usace.army.mil

Re: Wilmington Harbor 403 Letter Report and Environmental Impact Statement,
Wilmington Harbor Navigation Project, North Carolina; Public Comments
Submitted Pursuant to June 7, 2024 Notice

Comments submitted on behalf of the Village of Bald Head Island:

This firm represents the Village of Bald Head Island (“**VBHI**”) in connection with the proposed Wilmington Harbor Navigation Project (“**Project**”). These comments are submitted on behalf of VBHI in response to the Notice of Intent (“**NOI**”) to prepare an Environmental Impact Statement (“**EIS**”) for the Project issued by the United States Army Corps of Engineers (“**USACE**” or “**Corps**”) issued June 7, 2024.

I. INTERESTS OF PARTY SUBMITTING COMMENTS

Bald Head Island sits at the mouth of the Cape Fear River and is immediately adjacent to the shipping channel (“**Channel**”) which is the subject of the Project. VBHI performs the responsibilities of a municipality in areas of public safety, utilities and public works for the Island and, representing the interests of its property owners, public, and the thousands of visitors to the Island, is vitally interested in, invested in, and affected by the health of the entire Cape Fear River (“**River**”) and the near-shore it directly affects. While VBHI property owners and visitors utilize vast stretches of the River, VBHI is also interested in the Channel’s impact on the sand transport systems at its mouth and near-shore. These systems impact the integrity and health of the adjacent beaches and their related aquatic and terrestrial habitats and on the infrastructure threatened by degradation of those beaches, which provide protection to habitats and infrastructure from extreme weather events. The last deepening¹ of the Channel, the 2000 Wilmington Harbor Project (“**2000**

¹ “Deepening” as used in this letter includes the former and planned widening of the channel.

WHP”) resulted in extreme, harmful effects to the Island’s beaches, roads, homes, infrastructure, and critical environmental habitat for endangered and threatened species of sea turtles, birds (including the Piping Plover and Wilson’s Plover), and other wildlife. Since 2000, VBHI has spent over \$48 million in public funds to address these direct impacts from the 2000 WHP. *See Attachment A: VBHI Mitigation Costs of [2000 WHP] Channel Impacts.* Based upon the experience of the 2000 WHP, as well as on consultation with experts, the harm to VBHI from the Project as proposed by either action alternative in the NOI will be at least comparable to that experienced since 2000. In addition, VBHI believes there will be other synergistic, harmful effects to the River and adjacent environs, habitats, residents, and visitors.

II. OBJECTION TO PREMATURE NOI

On June 12, 2018, the North Carolina State Ports Authority (“NCSPA”) issued a public notice of its initiation of a Section 203 Feasibility Study “of potential improvements to the federal channels that access the Port of Wilmington...to accommodate larger, more fully laden deep draft vessels and provide net positive local, state, and federal economic benefit, while protecting the nation’s environment.” (emphasis added). Contrary to the statute and regulations applicable to a 203 proposal,² NCSPA effectively excluded the public from any meaningful involvement in the process³ and consistently refused to divulge information about the process, including refusing to respond to public records requests (despite being under a statutory duty to do so). *See Attachment B.* After the final 203 Feasibility Study was completed in February 2020, the Assistant Secretary of the Army, Civil Works (the “ASA”) issued the May 2020 Review Assessment (“Assessment”), which contained critical comments, recommendations, and conditions for final approval. The Assessment was submitted to Congress, which conditionally authorized the Corps to proceed with the Project, “subject to such modifications or conditions as the Secretary considers appropriate and identifies in a final assessment that addresses the concerns, recommendations, and conditions identified by the Secretary in the applicable review assessment.” Water Resources and Development Act of 2020 (“WRDA”), § 403.

On September 26, 2022, the Corps and NCSPA agreed to a Work Plan for addressing the “unresolved comments” in the Assessment. The Work Plan addresses both the need to complete the environmental review and other, non-NEPA elements of the Assessment that remain unresolved or are required to be addressed. VBHI, in response to a June 2023 Notice soliciting public comment on “initial scoping” for the WH 403 process, pointed out, *inter alia*, the deficiencies in the 203 process and specifically requested that the 403 process be opened for public involvement to cure these defects. *See Attachment C.* Instead, the Corps has addressed the Assessment’s criticisms internally and through contractors.

² 33 U.S.C. § 2231(b) (203 report must be developed in compliance with “Federal laws and regulations applicable to feasibility studies of water resources development projects.”). The Secretary’s guidance for the preparation of such studies have numerous references to the requirement for public involvement. E.g., ER 1165-2-209 at B-4; ER 1105-2-100 at 2-11 and Appendix.

³ NCSPA held one public information session, consisting of several posters and reference to a website for submitting comments. **The NCSPA 203 comment website was never activated.**

Compounding these defects in the administrative process, the NEPA process has now begun without a complete and public resolution of those criticisms. In particular, this Project’s contribution to the national economic development (“**NED**”) (which was heavily criticized in the Assessment) and the required sea level rise (“**SLR**”) impact analysis have not been completed. Nor has the Real Estate Plan, which the Assessment characterized as a matter of “high” significance and concern because “it describes a fundamental problem with the project that could affect the recommendation, success, or justification of the project.” Assessment, Comment, E.5.

If the 203 process been conducted in accordance with the law, or if the Project had gone through the traditional Federal agency analysis, these steps would have been completed with public participation *before* the NEPA process. The public should have the benefit of these conclusions and their supporting analyses *before* being asked to comment on the NEPA process for this Project, especially since this is the last opportunity the public will (of right) have to comment before presentation to it of the completed draft DEIS.

The Wilmington Harbor 403 Work Plan, posted on the Wilmington District website as provided for in that Plan (¶ 6 A 7), was last updated March 17, 2024, at which time it still showed publication of the NOI on Oct. 25, 2024 (¶ 3). During the Public Information sessions June 4-7, 2024, there was no indication that the NOI publication had been moved up four months and would be issued later that day, June 7. Had the original schedule for NOI (October 2024) been maintained, it can be assumed the Assessment criticisms would have been addressed by that time. Accelerating the NOI has prevented the public from having this valuable information prior to being asked to comment on the NEPA process, after having been excluded from participation in the formulation of the original Project Feasibility Study.

The NOI should be withdrawn until the critical elements of the criticisms in the Assessment have been resolved and the public given full access to the analyses underlying the final conclusions. The public cannot be expected to meaningfully respond to the NED assumptions, the SLR impacts, or the Real Estate Plan before they have even been completed. Alternatively, VBHI requests that resolution of the 403 deficiencies being addressed be made public promptly upon completion (and not await preparation of the draft DEIS), along with the supporting analyses, and the public then be given an opportunity to comment.

III. COMMENTS ON SPECIFIC NOTICE ELEMENTS

A. PURPOSE AND NEED

As stated in the NOI:

The purpose of the proposed action is to contribute to national economic development (NED) by addressing transportation inefficiencies for the forecasted vessel fleet, consistent with protecting the Nation’s environment. The need for the proposed action is to address the constraints that contribute to inefficiencies in the existing navigation system’s ability to safely serve forecasted vessel fleet and cargo types and volumes.

In discussing the Purpose and Need, the ASA Assessment was expansive in its criticism of the Project’s NED analysis because of its lack of realistic or well-documented support. *See* Comments

A1-4, C3-9. While the public information session conducted by the Corps this summer prior to the issuance of the NOI stated that the NCSPA assumptions have been largely disregarded, and provided some outline of the new assumptions being used by the Corps, any new, final analysis of the NED is still not available. VBHI cannot therefore meaningfully offer comments on how the NED analysis is deficient or could be improved and can only offer comments on the prior analysis and on general observations about the economic factors.

1. The Purpose and Need are a Federal issue, not a local one.

If either action alternative listed in the NOI is approved, this will be a Federal project not a NCSPA project. The Feasibility Study, prepared privately by NCSPA, was entirely parochial. In contrast, Corps Planning Guidance Notebook (the “PGN”) Chapter 2, Section 2-2 stresses the importance of focusing on the Federal objective, problems, and opportunities related to this project.

The Federal problem is the emergence of larger container ships challenging the capacity of many ports (not just Wilmington) and limited Federal funds to assist all ports in the accommodation of the challenges these vessels present. The Federal opportunity is the coordination of a national maritime transportation strategy that makes the best and least environmentally damaging use of the facilities of all east coast ports, and targets Federal dollars for port enhancements in a way that advances that overall strategy in a rational manner. The relevant NED analysis is not the Wilmington Harbor impact on NED but the total impact on NED of the strategy that best addresses these new challenges. That is the alternatives analysis and the cost-benefit analysis that should be embraced as the first step of the scoping of this Project.

The Federal nature of the problem is further highlighted by the emergence of Supermax vessels, with drafts up to 66 feet, transiting the Suez Canal (which does not have the constraints of the Panama Canal). There will be few ports that can accommodate these vessels in the near future. Off-loading at major ports will either concentrate delivery channels further, reducing the flow of goods through secondary ports, or re-vitalize the need for inter-modal transportation to distribute this cargo to other points of distribution, or some combination. Any 50-year analysis of the need for deepening the River Channel to accommodate NeoPanamax vessels must include these impacts to future distribution needs.

2. NED New Assumptions

Even focusing exclusively on the Wilmington scene, the existence of transportation inefficiencies and constraints at the Wilmington Harbor has been assumed, apparently on generalized assumptions about large vessel efficiencies, but without local public input.⁴ Wilmington is a unique harbor, being the only major east coast harbor with a 28-mile river approach, which presents unique transit (tide influences on schedules) and service issues. Assumptions about shipping behavior cannot reliably be based on ports whose conditions are radically different. Actual experience in Wilmington since the preparation of the Feasibility Study belies the existence of at least some of the assumed inefficiencies. Partially laden Panamax vessels are regularly calling on Wilmington (contrary to the NCSPA prediction) and will continue to do

⁴ See comments above about the closed 203 and 403 process.

so even under the action alternatives, since NeoPanamax vessels draw 51 feet fully loaded and hence will still not be able to transit the Channel fully loaded. Ports other than Wilmington have, even before NeoPanamax vessels, been the traditional first and last East Coast ports of call, affecting the load levels in and out of Wilmington, and there is no reason to believe this service pattern will change. The presentation at recent public meetings includes another crucial “Assumption” which should be examined more critically: “Ability to move the same amount of cargo using larger ships = fewer trips.” This simplistic formulation obviously works when one shipper is moving a fixed amount of cargo between two points, but it does not address another key influence on the movement of cargo through Wilmington: competing shipping services, the number of which will grow as the total projected volume of cargo grows. The logistics of servicing the customers of these services, and the timing requirements of those customers, is not addressed by the generalized “bigger means fewer trips.” To what extent is the current “light load” service caused by: depth/width constraints, which would be ameliorated but not eliminated by the action alternatives (which still will not accommodate fully loaded NeoPanamax vessels drawing 51 feet); the length (28 miles) of the approach and the differential impact of tide (rising on ingress, falling on ingress, at different rates), which will remain constant across alternatives; and, the service requirements of the customers, which is indifferent to Channel depth? These questions need to be answered with data.

The assumptions and forecasts presented in that public meeting also include a 100% increase in TEUs in 2036. What is the basis for this dramatic increase, and what impact does this assumption have on the NED conclusion?

3. Definition of the Proposed Action

Any economic analysis must start with the cost of the action alternatives under consideration, which in turn requires a **clear definition of the Proposed Action**. In this regard, the NOI is deficient. To date, action alternatives have been described in terms of the depth and width of the Channel after initial construction. This is too narrow. The NCSPA Feasibility Study was for the purpose of addressing long-term needs of the Port of Wilmington to accommodate larger vessels and cannot be seen as a one-time dredging project: it would be a colossal (\$834 million) waste to deepen and widen the Channel, only to then ignore it and allow it to revert (through natural sloughing and siltation) to its natural condition. The Project must be defined as an on-going one, requiring a long-term commitment of re-dredging resources beyond initial construction.

In addition, deepening and widening are not being sought for their own sake: the NCSPA stated goal is “to accommodate larger, more fully laden deep draft vessels.” As was demonstrated after the 2000 WHP, the transit of such vessels has a continuing impact beyond the effect of the initial deepening work, but those impacts were not recognized as Project-induced.⁵ The Project must be defined to embrace this functional reality.

⁵ E.g., Brunswick Town/Fort Anderson, discussed below, has suffered extensive erosion from the passage of larger vessels, requiring millions of dollars in protective measures. The Corps concluded the accelerated erosion was not an impact of the 2000 Project because it was not caused by the process of deepening the Channel (dredging).

The framing of the definition of the Action being approved must include both of these issues (re-dredging and vessel transit impacts) as “Connected Actions”:

To determine the scope of environmental impact statements, **agencies shall consider:**

(1) Actions (other than unconnected single actions) that may be **connected actions**, which means that they are **closely related** and therefore should be discussed in the same impact statement. Actions are connected if they:

(i) **Automatically trigger other actions** that may require environmental impact statements;

(ii) **Cannot or will not proceed unless other actions are taken** previously or simultaneously; or

(iii) **Are interdependent parts of a larger action and depend on the larger action for their justification.**

(2) Alternatives, which include the no action alternative; other reasonable courses of action; **and mitigation measures** (not in the proposed action).

(3) Impacts.

40 C.F.R. § 1501.9(e) (emphasis added). This is re-enforced by the requirement to discuss in the environmental evaluation “any irreversible or irretrievable commitments of resources that would be involved in the proposal should it be implemented.” 40 C.F.R. § 1502.16(a)(4).

Both the act of transiting larger vessels and the periodic re-deepening and widening to accommodate their continued use of the Channel are thus Connected Actions. Accordingly, the long-term costs associated with these connected actions which must be included in the NED evaluation. Defining the Action any more narrowly will defeat the purpose of the Act and skew the NED analysis.

Equally important in identifying the cost of these connected actions as part of the definition of the Proposed Project is assessing the impacts of these connected actions and then accounting for the cost of mitigating them. 40 C.F.R. § 1501.9(e)(2) and (3). A WRDA project cannot be approved without adequate, up-front provision of mitigation. 33 U.S.C. § 2283(a)(1). *See* discussion of Mitigation Challenges, below. Without the full costs, present and future, of the required mitigation for the impacts of the connected actions the NED analysis cannot determine if the taxpayers are making a wise investment.

B. PRELIMINARY ACTION ALTERNATIVES

1. Project definition.

The NOI defines two preliminary action alternatives in terms of the construction objectives (depth and width) of the initial construction. As discussed above, the actions should be more fully defined to reflect the on-going commitment of resources (re-dredging) that will be necessary to accomplish the Purpose and Need and recognize the integrated actions (vessel transit) which are the reason for the Project. In addition, at various points in the Channel, even the current depths are not being maintained to the 2000 WHP specifications but are silting in almost immediately following dredging. The Project action alternatives should address how these problems will be addressed to achieve full realization of the Project to the design specifications.

2. Proposed use of dredged material must comply with Sand Management Plan.

The NOI's discussion of the initial construction also addresses the use of dredged materials:

Dredged material management for the preliminary action alternatives was proposed to be placed in the Wilmington Ocean Dredged Material Disposal Site; however, the USACE will also evaluate beneficial use of dredged material.

As it relates to dredged material at the mouth of the Channel, this proposal does not recognize the binding requirements of the provisions of the prior 2000 WHP's Environmental Assessment (EA), which incorporated the Sand Management Plan (SMP) that the State of North Carolina insisted on as a condition for its CZMA concurrence. The goal of the SMP was that the displaced "sand should be retained within the active coastal sand system." EA, §1.03, p. 3.

The sand management plan (Appendix A [to the EA]) for the deepened Wilmington Harbor project **requires** that **all** beach-quality maintenance material **be returned to the adjacent beaches**. This will result in enhancement of the regional sediment budget.

Id., §5.01, p. 27 (emphasis added). This requirement is the result of the fact that:

Natural supplies from rivers and streams are not replenishing littoral sediments, particularly on the East Coast of the United States. Thus, the **removal of a cubic yard** of littoral sediment from a tidal entrance or inlet with deposition outside the active littoral zone of the beach **will ultimately cause a cubic yard deficit** somewhere within the sand sharing system affected by that particular entrance or inlet.

SMP, ¶ 20, pp. 9-10 (emphasis added). Such removal has been identified by the Corps as "a major cause of man-induced erosion." *Id.*

From an engineering perspective, **the primary requirement** for the Wilmington Harbor maintenance program, apart from assuring that the channel remains open year-round, is to **prevent project induced erosion of the adjacent beaches** by conserving the limited resource, sand, **through deposition directly on the adjacent beaches**.

Id. (emphasis added). The SMP finds that 66% of the sediment shoaling at the Channel entrance—the very site of the IOB—comes from Bald Head Island, and 34% from Caswell Beach. *Id.*, ¶ 22, p. 10.

In order to maintain the sediment balance on both islands, littoral material removed from the entrance channel **will be placed back on the beach from whence it came**.

Id. (emphasis added).

These protections for the Bald Head Island-Caswell Beach littoral system did not happen accidentally. The Village had engaged a coastal and oceanographic engineering expert, Erik J. Olsen, to study the historical effects of Channel deepening projects and the potential impact of the 2000 WHP. His analyses, as well as the Corps's studies as part of the Environmental Assessment of the WHP, concluded there would be severe impacts to the beaches adjacent to the Channel.

In response to the concerns raised, the Corps Wilmington District Chief Engineer, Col., James DeLony, sent a letter assuring the local mayors that sand placement will be “according to the March 31, 2000 memorandum from Erik J. Olsen, consultant to [VHBI]....” DeLony Letter, June 9, 2000, p. 2. More specifically, he stated:

The disposal of **all beach quality dredged material** will be accomplished in **accordance with** the Environmental Assessment [...dated February 2000] and its **Sand Management Plan....”**

Id. p. 3. Because the WHP required the State of North Carolina to conduct its own consistency review under the Coastal Zone Management Act, the NC Department of Environment and Natural Resources (now, Environmental Quality), Division of Coastal Management, conducted that review and raised serious concerns about impacts to the sand systems. The final State determination states:

Based upon our review of **the EA** [Environmental Assessment] **and the Corps of Engineers' response to comments [the DeLony Letter]**, we do not disagree with your determination that the proposed construction and changes in harbor maintenance procedures are consistent with the North Carolina Coastal Management Program to the maximum extent practicable, **provided that the project is performed according to the EA (including the Sand Management Plan** and other appendices)...[and other conditions stated therein].

Letter from Donna Moffitt, Director, NCDENR/DCM, June 15, 2000 to Col. DeLony, USACE District Engineer, p. 2 (emphasis added).

The Corps then issued its Finding of No Significant Impact (FONSI), relying specifically on the Moffitt Letter and its incorporation of the assurances in the DeLony Letter: “We will comply with the indications in the [Moffitt] letter.” FONSI, § 3.00, p. 5.

Thus, the final North Carolina consistency determination, the EA, and the FONSI were *specifically conditioned* on the Corps complying with the SMP to maintain sand in the littoral system by placing it on the **adjacent** beaches—Bald Head Island and Caswell Beach—and not in the Ocean Dredge Disposal Site. The SMP is a 2000 WHP project “condition,” and violating its specific conditions and purpose would “remove...material composing such works” and impair “the ability of the project to function as authorized,” contrary to 33 USC § 408(a).

3. The beneficial use of dredge material should be separated into use that is in order to mitigate impacts from use that is merely the least cost alternative.

Different performance and funding assurances are necessary under WRDA for meeting mitigation requirements than are applicable to the Corps's disposal of dredge material under the least cost alternatives at the initial construction phase. Even as applied to maintenance dredging, the same distinction applies: if maintenance dredging, as a "connected action," has environmental impacts, the use of dredge material as mitigation must (under WRDA) be separately assured and not subject to discretionary budgeting and timing typically applicable to discretionary maintenance dredging. *See* discussion below of Mitigation Requirements.

C. ANALYSIS OF IMPACTS

The NOI states:

The USACE will evaluate potential effects to hydrology and hydraulics, groundwater, water quality (dissolved oxygen, temperature, and salinity), air quality, cultural and historical resources, wetlands, endangered species and habitat, and aquatic resources.

This list is incomplete.

1. Sand

Significantly absent from this list⁶ is the potential (VBHI asserts, in light of its experience, **actual and expected**) impacts to near-shore sand transport systems, adjacent beaches, and adjacent infrastructure. As noted above, VBHI has expended \$48 million since the last (2000) Channel deepening project. It has consulted with recognized experts who, while acknowledging the natural impacts on an island at the mouth of a river, also opine based on detailed scientific study that the Channel deepening projects are having, and will continue to have, major exacerbating effects driving the expenses VBHI is experiencing. The State of North Carolina agreed in 2000 when it conditioned its CZMA concurrence on the Corps agreeing to the Sand Management Plan to preserve sand in the littoral system: deposition of dredged sand on adjacent beaches is not merely the least cost method of disposing of dredged sand, it is necessary to mitigate the impact to those beaches and the adjacent infrastructure, and necessary to the health of the sand transport system being disrupted by the Channel and periodic re-dredging.

The Corps appeared to agree with this determination of the need for the SMP to address impacts from the 2000 WHP by incorporating it into the EA and FONSI. It now appears from public comments that the Corps may not agree that impacts to the beaches and near-shore are Project-induced. **A comprehensive study of the sand systems affected by the River and the proposed Project is essential.**

⁶ This omission is consistent with the comments made at the June 6, 2024 public information session that impacts to the adjacent beaches are "not anticipated" by the Corps, contrary to VBHI's documented experience.

2. Impacts from each Connected Action

The systems identified in the NOI to be studied, and the sand transport system and adjacent beaches and infrastructure, will each potentially be impacted not only by the initial construction but by the connected actions of the passage of larger vessels, the anticipated maintenance dredging activities, and erosion/sand movement during the interval between maintenance actions. The Project impacts cannot be viewed as a snapshot analysis, looking only at the initial construction.

Brunswick Town/Fort Anderson (“BT/FA”), a NC Historic Site located approximately midway between the mouth of the River and Wilmington, provides an object lesson. After initial construction of the 2000 WHP, BT/FA experienced dramatically accelerated erosion caused by the passage of larger displacement vessels. The destruction of pre-Revolutionary War structures was imminent, and BT/FA had to seek emergency permitting authorization from NCDENR to protect those relics. The Corps concluded the accelerated erosion was not an impact of the 2000 Project because the physical act of deepening the channel did not impact BT/FA. As a result, BT/FA has had to spend millions to construct long term solutions. Likewise, the Military Ocean Terminal Sunny Point (“MOTSU”) shoreline, immediately down-River from BT/FA, is also suffering the effects of large-displacement vessel induced accelerated erosion. Many others along the length of the River have almost certainly had similar experiences, and the extent and nature of those should be collected. A repeat of the narrow view of the Project as construction only cannot occur.

3. Impact on Climate Resilience.

The deepening of the Channel will likely impair the climate resilience of the immediately adjacent and indirectly connected areas. Eroding shorelines, beaches, and their adjacent infrastructure are more susceptible to damage from SLR and extreme storm events.⁷ This will be exacerbated by the increased tidal range accompanying further deepening up-river. The impact of increased salinity on the health of fringe and adjacent ecosystems could, in addition to being a direct Project impact requiring mitigation, degrade their ability to adapt to climate change and provide natural buffers to extreme events and SLR. Climate resilience is an ecosystem service which should be specifically addressed in each analysis.

D. PUBLIC PARTICIPATION

The NOI notes that the public will have the opportunity to comment on the draft EIS, as required by NEPA. The NOI does not forecast any opportunity for public involvement in developing that draft DEIS beyond submitting these comments. NOI ¶ 7. Several factors militate in favor of adopting some inter-active format (work groups, workshops) to allow additional engagement. First, the public was excluded from formulation of the original Project Feasibility Study and from the efforts to correct the errors identified in the Assessment. In addition, the extent and complexity of the studies necessary to address the requirements of NEPA (as indicated in C above) cannot realistically be fully reviewed, evaluated, and criticized in the 45-day comment period that will be available after publication of the draft DEIS. The NOI states that it will “be a

⁷ Because the accelerated erosion at BT/FA increased its exposure to severe storms, BT/FA sought and received \$2 million post-Florence funding to improve resilience. MOTSU is required by the Defense Authorization Act of 2018 and implementing Department of Defense guidance to incorporate resilience assessments and response strategies in its master plans.

mechanism to solicit full and open agency and public input on alternatives and identification of significant issues to be analyzed.” *Id.* Input is only effective if it is timely, and “input” after the fact (after preparation of the draft DEIS) will not improve the work; input before the work begins (these Comments) may be helpful, but as the work progresses, and the public sees how the work is planned and the preliminary study results, input would be more valuable than after the completion of the study. A workgroup model organized around specific focused studies to allow timely and meaningful involvement (especially by groups with expertise and local knowledge) could meet periodically to provide the participants: updates on the approaches being used and the interim findings; an opportunity to comment on those; and, an opportunity to provide substantive input, including technical expertise. This would have the additional benefit of strengthening the final product which will be subject to technical and independent expert peer review (“IEPR”)⁸ and thereby help satisfy the statutory requirements.⁹ Without “a mechanism to solicit full and open agency and public input on alternatives and identification of significant issues to be analyzed,” the process will create a DEIS, based on a comprehensive set of analyses and recommendations, and the public will have only 45 days to digest them and react.

IV. SPECIAL MITIGATION ISSUES

WRDA has stringent requirements concerning mitigation of Project impacts, particularly impacts to fish and wildlife and their habitats. Such mitigation must be provided prior to or concurrently with construction of the project, 33 U.S.C. § 2283(a)¹⁰, and must be pursuant to a **specific** mitigation plan that is submitted with the Secretary’s report seeking plan authorization. Under § 2283(d), even submission of a proposal to Congress for authorization of a project alternative without such an accompanying mitigation plan is prohibited. *Id.* The statute achieves the “balanced development” of projects, assuring mitigation and fiscal accountability, through four mechanisms: (1) the Secretary must assess potential impacts in advance, as part of a project proposal; (2) the Secretary must undertake the mitigation before (or concurrently with) construction of the project (*i.e.*, before the impacts occur); (3) the cost of mitigation is included in the project budget; and (4) the cost of mitigation is borne by the project sponsors. These elements together ensure that mitigation in fact occurs and that Corps water resource projects are fiscally and environmentally sound. *See* 33 U.S.C. § 2281(b)(1) (“Assessments. For all feasibility reports for water resources projects completed after December 31, 2007, the Secretary shall assess whether—(1) the water resources project and each separable element is cost-effective”).

⁸ According to the 403 Harbor Work Plan, the IEPR will begin simultaneously with the publication of the draft DEIS.

⁹ 42 U.S.C.A. § 4332(A) (“utilize a systematic, interdisciplinary approach which will ensure the integrated use of the natural and social sciences and the environmental design arts”), (D) (“ensure the scientific integrity of the discussion and analysis in an environmental document”); (E) (“make use of reliable data and resources”).

¹⁰ The Senate Report to the 1986 reauthorization of WRDA, which revamped the mitigation requirement, states: “Non-Federal interests often are reluctant to support fish and wildlife mitigation efforts once a project is in place and consequently this work is frequently not performed. To assure balanced development, this section seeks several basic goals.” S. Rep. No. 99-126, at 24 (1985), reprinted in 1986 U.S.C.C.A.N. 6639, 6661.

The definition of the Action as discussed above will directly affect the scope of mitigation required. The connected actions of continual vessel passage and the required re-dredging of the Channel must be included in the EIS impact analysis. 40 C.F.R. § 1501.9(e). The shoreline and cultural resource damages caused at BT/FA were ignored because the action—deepening the Channel—was not seen as the “cause” of the resulting erosion; the planned (indeed, the Project’s intended) transit of larger displacement deep-draft vessels was not seen as connected to the harm it caused. Likewise, the on-going destruction of beaches and associated fish, wildlife, and habitat impacts caused by the inevitable slough back into the Channel following re-dredging and the Corps’ failure to re-nourish the beaches to prevent damage were not recognized as Project impacts. Although the Sand Management Plan mandated periodic re-nourishment on a specific schedule, this “project maintenance” was found to be in the Corps’s discretion and thus not an enforceable requirement, despite being a condition of Project approval.¹¹ If seen as statutorily **required** Mitigation, the result might be different both on the beaches and along the estuarine shoreline.

Because the connected actions of continual vessel passage and the required re-dredging of the Channel must be included in the EIS impact analysis, mitigation for any impacts created by these connected actions must also be included in the WRDA-mandated mitigation plan. A plan that does not include an enforceable funding mechanism is not a plan, it is a hope. The mandate of WRDA that a project not be built unless the mitigation it will require is assured cannot be satisfied by a hope. The past practice of using maintenance dredge material to re-nourish beaches while permissible as a least cost disposal method is not a “plan” to assure mitigation damage caused by a WRDA project because it is discretionary and subject to future funding and shifting District priorities. A mechanism to assure the performance of future mitigation necessitated by future, but currently foreseeable, impacts is a necessary innovation for this Project to meet the spirit and letter of WRDA.

V. CONCLUSION

The defects in the 203 Feasibility Study noted by the ASA are significant and resolution of those will impact the scope and substance of the NEPA analysis. The complexity of this Project and the many analyses that will be necessary can hardly be digested by the public in 45 days after publication of the draft DEIS, so involvement of the public during the process will benefit both the public and the process through the opportunity to provide timely contributions of constructive criticism, local knowledge, and expertise. VBHI would like to be a part of that process.

Very truly yours,

William P. H. Cary
Counsel for Village of Bald Head Island

¹¹ *Village of Bald Head Island v. U.S. Army Corps of Engineers*, 7114 F.3d 186 (4th Cir. 2013).

Cc: Peter Quinn, Mayor, Village of Bald Head Island
Justin McCorkle, Wilmington District Counsel, U.S. Army Corps of Engineers
Tancred Miller, Director, Div. of Coastal Management, NC DEQ
Daniel Govoni, Federal Consistency Coordinator,
Div. of Coastal Management, NC DEQ
Reid Wilson, Secretary, N.C. Dep't of Natural and Cultural Resources
George Kassler, Mayor, Town of Caswell Beach
Mike McIntyre, Ward & Smith
The Honorable Thom Tillis
The Honorable Ted Budd
The Honorable David Rouzer