W

Spears, Courtney

From: Kerri Allen <kerria@nccoast.org>
Sent: Tuesday, January 08, 2019 10:59 AM
To: Robert Clark; Mickey Sugg; Liz Hair; Huggett, Doug; Wilson, Debra; Spears, Courtney; Davis, Braxton C
Cc: Todd Miller; Tracy Skrabal
Subject: [External] State Ports Turning Basin Expansion

Good morning all,

I am writing on behalf of the North Carolina Coastal Federation regarding the North Carolina State Ports Authority's application to modify an existing authorization in order to conduct new dredging within the existing turning basin as part of a master terminal modernization investment, associated with the Port of Wilmington, in New Hanover County, North Carolina (SAW-2015-02235; CAMA Permit 47-87).

We are in the process of reviewing both the state and federal permit applications, and intend to forward formal comments as soon as we complete the review of the application and associated resource agency comments have been submitted and provided for public review. Based on our initial review, however, we have concerns about the ecosystem impacts of the project as proposed, and concerns about the regulatory review process for this proposed project. As initial comments, we offer the following:

1) The proposed work includes new dredging within Primary Nursery Areas (PNAs) and shallow and deep habitat, and is occurring on both the east and west sides of the river. New dredging is disallowed by CAMA regulations. Although this is a significant aspect of the proposal, this information is not readily available in the completed permit modification applications, but is found only in the Essential Fish Habitat (EFH) assessment attachment provided by the project consultants. In fact, the EFH assessment states that a variance is needed and has been requested for this project due to the impacts to PNAs. This statement is incorrect, as a variance request cannot be submitted prior to a decision to deny by the Division of Coastal Management, and no such decision has been issued.

2) As proposed, several discrepancies exist in the applications and attachments regarding statement of exact acreage impacts to jurisdictional state and federal wetlands, making it difficult to understand the total and cumulative impacts of this project, and to properly evaluate the avoidance, minimization and compensation requirements for the current proposal.

3) We are concerned about the lack of transparency and public involvement in the review of this project. Specifically, the regulatory timelines, coordination between the state and federal review processes and opportunities for public involvement are not readily apparent. We specifically question the decision by the U.S. Army Corps of Engineers to review a project of this magnitude and potential impact through an informal agency consultation process. Similarly, the determination to not require an EIS through the NEPA process is surprising, and we did not receive a FONSI to support this decision through our initial FOIA request. We would also like to understand the affect of the current federal government shut-down on the agency review process and timeline, given that the federal resource agencies are indefinitely unable to engage in the review, Section 7 consultation, comment and public engagement phases of the regulatory review process.

4) As proposed, the Applicant proposed compensatory mitigation for the project, however, the compensation is tied to a deadline for permit approvals for the project, as follows: "Conservation/mitigation measures have

been proposed which includes the creation of 3.0 acres of tidal marsh in the lower CFR and the donation of $650,000 to the North Carolina Department of Environmental Quality for use in completing construction of the Lock and Dam #1 fish passage modification project. The latter is only offered if all permits and agency approvals can be completed in less than 120 days from the date of application (permitted by 1 April 2019)."

Compensatory mitigation offered only with a guarantee of an approval in a given timeline is inconsistent with the state and federal laws and regulations governing these activities, and we object strongly to this aspect of the proposal.

Given the relative complexity, scope and potential for direct, secondary and cumulative impacts to the natural and water resources of the Cape Fear River, we request the development of a public engagement/stakeholder process to ensure a thorough and rigorous public involvement/interaction with your agencies throughout the duration of this project. We work to provide opportunities and guidance to partners, communities and individuals who seek to preserve the quality of our coast and strengthen our coastal economies; we believe every informed opinion matters.

Thank you for your consideration of our comments, and we look forward to further engagement and guidance for increased transparency, public involvement and coordinated agency review on this proposed project.

Sincerely,

Kerri Allen, Coastal Advocate
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North Carolina
Coastal Federation
Working Together for a Healthy Coast

February 8, 2019

N.C. Division of Coastal Management
400 Commerce Avenue
Morehead City, NC 28557

Re: Port of Wilmington Turning Basin Expansion Project – Modification to Permit #47-87

Dear Sir or Madam:

On behalf of the North Carolina Coastal Federation (federation), please accept the following comments on the North Carolina State Ports Authority's application to modify an existing authorization in order to conduct new dredging within the existing turning basin as part of a master terminal modernization investment, associated with the Port of Wilmington, in New Hanover County, North Carolina (Permit #47-87). As proposed, this project poses impacts that are not compatible with the letter and intent of state and federal statute and rules governing these activities, and diminishes the public's ability to participate in the regulatory review process. Consequently, we object to dredging within state-designated Primary Nursery Area habitat and further seek clarification of the formalized process of agency review.

The federation is a non-profit organization dedicated to protecting and restoring the North Carolina coast. Our organization represents 16,000 supporters statewide and works with the public, agencies and local governments to communicate and collaborate wherever possible towards solutions that lead to the stewardship and resiliency of our coast. Since 1982, the federation has been working with coastal communities and other partners to improve and protect coastal water quality and natural habitats, which are intricately tied to our coastal economy. By focusing primarily, but not exclusively on natural and productive estuarine shorelines, oyster and marsh restoration, coastal management and cleaning the estuaries of marine debris, we strive to support and enhance the coastal natural environment.

In 2018, the federation adopted the *Lower Cape Fear River Blueprint*, which is a collaborative planning effort to protect, manage and restore the important estuarine and riverine natural resources of the lower Cape Fear River. Pressures from historic alterations, short-sighted development, unregulated industrial uses, conflicting water uses, and changes associated with climate alterations have affected drinking, surface and groundwater water supplies and quality, as well as ecosystem health. Through the unified approach outlined in the *Lower Cape Fear River Blueprint*, the federation aims to protect and restore the lower, coastal Cape Fear River to maintain a healthy, productive, and resilient coast and empower communities and partners to work together to improve the river and surrounding watershed's overall health and water quality. The proposed expansion of the turning basin at the Port of Wilmington is in direct conflict with these long-term restoration and preservation strategies.

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Specific concerns about the ecosystem impacts of the project as proposed, as well as concerns about the regulatory review process for this proposed project are as follows:

1) The proposed work includes new dredging within Primary Nursery Areas (PNAs) in both shallow and deep habitat, and is occurring on both the east and west sides of the river.

   Dredging is restricted in PNAs to protect water quality and fisheries, and limit stormwater runoff. As written in 15A NCAC 07H .0208(b)(1), "navigation channels, canals, and boat basins shall be aligned or located so as to avoid primary nursery areas, shellfish beds, beds of submerged aquatic vegetation as defined by the Marine Fisheries Commission." Per CAMA rules, new channels cannot be dredged within PNAs.

   Under Section 307 of the Coastal Zone Management Act, federal consistency authority exists requiring federal actions within the coastal zone to be consistent with the enforceable policies of DCM. Pending Clean Water Act Section 401 certification, the Corps may not issue a license or permit unless the state concurs with the applicant's consistency certification. We would like to know if DCM has denied the Section 401 request.

   The project proposal is in clear violation of state regulations regarding dredging within PNAs. Further, information detailing the intent to dredge within designated PNAs is not readily available in the completed permit modification applications, but is found only in the Essential Fish Habitat (EFH) assessment attachment provided by project consultants. The EFH assessment also states that a variance to dredge within PNA habitat has been requested for this project; however, a variance request cannot be submitted prior to a decision to deny by DCM.

   PNAs are those areas in the estuarine and ocean system where initial post-larval development of finfish and crustaceans takes place. The North Carolina Marine Fisheries Commission designates PNAs to protect habitat, particularly the bottom structure, including sea grasses, oyster rocks, sand and mud, as well as adjacent wetlands. In addition, the North Carolina Environmental Management Commission designates all PNAs as High Quality Waters, limiting point source discharges and stormwater runoff.

   As deemed necessary by the Coastal Resources Commission, PNAs serve to protect the resource values identified in the designation including, but not limited to, those values contributing to the continued productivity of estuarine and marine fisheries and thereby promoting the public health, safety and welfare.

2) Several discrepancies exist in the project proposal regarding statement of exact acreage impacts to jurisdictional state and federal wetlands:

a. On form *DCM MP-2* the Applicant states the area to be excavated includes 67,518 ft^2 (1.55 acres) of coastal wetlands and 127,195.2 ft^2 (2.92 acres) of other wetlands;
b. The ensuing *Wetland Exhibit Map* provided in the application package shows the project will disturb a total of 1.64 acres of coastal wetlands and 2.92 acres of Section 404 wetlands;
c. Within the *Compensatory Wetland Mitigation Plan*, project consultants state that "the proposed expansion of the existing turning basin via dredging would permanently impact a total of 1.4 acres of Section 404 jurisdictional salt/brackish marsh wetlands on the tidal floodplain of the CFR, including 1.01 acres of CAMA coastal wetlands (smooth cordgrass marsh) and 0.39 acre of non-coastal wetlands (common reed marsh)."

These inconsistencies within the application and attachments make it difficult to understand the total and cumulative impacts of this project, and to properly evaluate the avoidance, minimization and compensation requirements for the current proposal.

3) The lack of transparency and public involvement in the review of this project is concerning. Regulatory timelines, coordination between state and federal review processes and opportunities for public involvement are not readily apparent.

We specifically question the decision by the Corps to review a project of this magnitude and potential impact through an informal agency consultation process. Within Endangered Species Act (ESA) regulations (50 CFR 402.02), informal consultation is defined as a "process that includes all discussions, correspondence, etc., between the Service and the Federal agency or the designated non-Federal representative prior to formal consultation, if required." Informal consultation can only be initiated when the Corps determines that a project may, but is not likely, to adversely affect a Federally listed endangered and/or threatened species.

As stated in the EFH assessment, there are two anadromous fish species potentially found within the proposed dredging area that fall under ESA protections, the shortnose sturgeon and Atlantic sturgeon. Potential project effects on these protected species include incidental take from clamshell/bucket dredge, as well as the loss of shallow water mud bottom habitat due to deepening. Further, dredging activities would temporarily increase turbidity levels within the action area as well as result in the reduction of benthic epifaunal and infaunal prey in the immediate proposed dredging area.

Given the potential impacts on protected species within the project site, a "not likely to adversely affect" determination should only be made after sufficient input from state and federal agencies is received through a formal and public interagency review and coordination process.

Similarly, the determination to not require an Environmental Impact Statement through the National Environmental Policy Act process is surprising, and we disagree with this

Finding of No Significant Impact to support this decision through our initial Freedom of Information Act request.

We would also like to understand the effect of the recent federal government shut-down on the agency review process and timeline, given that the federal resource agencies were indefinitely unable to engage in the review, Section 7 consultation, comment and public engagement phases of the regulatory review process. CAMA §113A-118.2 requires public notice, opportunity for public comment, and agency review for all development within PNA or Outstanding Resource Waters areas of environmental concern. To ensure that sufficient measures are taken to protect vital habitat, protected and commercially important species and localized water quality, we seek clarification of the formalized process of agency review and coordination between state and federal agencies.

4) For unavoidable adverse impacts, compensatory mitigation is required to replace the loss of wetland and aquatic resource functions in the watershed. While the amount and quality of compensatory mitigation does not substitute for avoiding and minimizing impacts, the Applicants have proposed mitigation that is tied to a deadline for permit approvals, as follows:

   "Conservation/mitigation measures have been proposed which includes the creation of 3.0 acres of tidal marsh in the lower CFR and the donation of $650,000 to the North Carolina Department of Environmental Quality for use in completing construction of the Lock and Dam #1 fish passage modification project. The latter is only offered if all permits and agency approvals can be completed in less than 120 days from the date of application (permitted by 1 April 2019)."

   Compensatory mitigation offered only with a guarantee of an approval in a given timeline is inconsistent with state and federal laws and regulations governing these activities, and we object strongly to this aspect of the proposal. Appropriate and practicable compensatory mitigation should seek to restore, establish, and/or preserve wetlands, streams, and other aquatic resources to offset unavoidable adverse impacts that remain, not to leverage state and federal agencies into complying with the Applicant's given timeline.

Given the relative complexity, scope and potential for direct, secondary and cumulative impacts to the natural and water resources of the Cape Fear River, we request the development of a public engagement/stakeholder process to ensure thorough and rigorous public involvement and interaction with your agencies throughout the duration of this project. We work to provide opportunities and guidance to partners, communities and individuals who seek to preserve the quality of our coast and strengthen our coastal economies; we believe every informed opinion matters.

Thank you for your consideration of our comments, we look forward to further engagement and guidance for increased transparency, public involvement and coordinated agency review on this proposed project.

Sincerely,

Kerri Allen

Kerri Allen,
Coastal Advocate

Spears, Courtney

From: Kerri Allen <kerria@nccoast.org>
Sent: Wednesday, March 13, 2019 7:55 AM
To: Davis, Braxton C
Cc: Huggett, Doug; Spears, Courtney; Todd Miller; Tracy Skrabal
Subject: [External] Re: North Carolina Coastal Federation Comments on NCSPA Turning Basin Expansion - Port of Wilmington
Attachments: NCCF Comments on Turning Basin Expansion 3.12.19.pdf

[redacted]

Dr. Davis,

On behalf of the North Carolina Coastal Federation, please accept the attached comments regarding the Port of Wilmington Turning Basin Expansion Project – Modification to Permit #47-87.

These comments are in response to revised mitigation measures proposed by the Applicant, and are intended to supplement original comments submitted on February 8, 2019.

Thank you,

Kerri Allen, Coastal Advocate
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On Fri, Feb 8, 2019 at 2:21 PM Kerri Allen <kerria@nccoast.org> wrote:

Dr. Davis,

On behalf of the North Carolina Coastal Federation, please accept the attached comments regarding the Port of Wilmington Turning Basin Expansion Project – Modification to Permit #47-87.

Thank you,

Kerri Allen, Coastal Advocate
309 W. Salisbury St.
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North Carolina
Coastal Federation
Working Together for a Healthy Coast

March 12, 2019

Braxton Davis, PhD, Director
N.C. Division of Coastal Management
400 Commerce Avenue
Morehead City, NC 28557

Re: Port of Wilmington Turning Basin Expansion Project – Modification to Permit #47-87

Director Davis:

On behalf of the North Carolina Coastal Federation, please accept the following comments on the North Carolina State Ports Authority's application to modify an existing authorization in order to conduct new dredging within the existing turning basin as part of a master terminal modernization investment, associated with the Port of Wilmington, in New Hanover County, North Carolina (Permit #47-87). These comments are in response to revised mitigation measures proposed by the Applicant, and are intended to supplement original comments submitted on February 8, 2019.

As proposed, this project poses impacts that are not compatible with the letter and intent of state and federal statute and rules governing these activities, and diminishes the public's ability to participate in the regulatory review process. Consequently, we object to dredging within state-designated Primary Nursery Area habitat and further seek clarification of the formalized process of agency review.

Specific concerns about the ecosystem impacts of the project as proposed, as well as concerns about the regulatory review process and proposed mitigation measures for this project are as follows:

1) The proposed work includes new dredging within Primary Nursery Areas (PNAs) in both shallow and deep habitat, and would occur on both the east and west sides of the river.

   The project proposal is in clear violation of state regulations regarding dredging within PNAs. Dredging is restricted in PNAs to protect water quality and fisheries, and limit stormwater runoff. As written in 15A NCAC 07H .0208(b)(1), "navigation channels, canals, and boat basins shall be aligned or located so as to avoid primary nursery areas, shellfish beds, beds of submerged aquatic vegetation as defined by the Marine Fisheries Commission." Per CAMA rules, new channels cannot be dredged within PNAs.

   PNAs are those areas in the estuarine and ocean system where initial post-larval development of finfish and crustaceans takes place. The North Carolina Marine Fisheries Commission designates PNAs to protect habitat, particularly the bottom structure,

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including sea grasses, oyster rocks, sand and mud, as well as adjacent wetlands. In addition, the North Carolina Environmental Management Commission designates all PNAs as High Quality Waters, limiting point source discharges and stormwater runoff.

As deemed necessary by the Coastal Resources Commission, PNAs serve to protect the resource values identified in the designation including, but not limited to, those values contributing to the continued productivity of estuarine and marine fisheries and thereby promoting the public health, safety and welfare.

2) The lack of transparency and public involvement in the review of this project is concerning. Regulatory timelines, coordination between state and federal review processes and opportunities for public involvement are not readily apparent.

We specifically question the decision by the Corps to review a project of this magnitude and potential impact through an informal agency consultation process. Within Endangered Species Act (ESA) regulations (50 CFR 402.02), informal consultation is defined as a "process that includes all discussions, correspondence, etc., between the Service and the Federal agency or the designated non-Federal representative prior to formal consultation, if required." Informal consultation can only be initiated when the Corps determines that a project may, but is not likely, to adversely affect a Federally listed endangered and/or threatened species.

As noted in a November 29, 2018 letter generated by the Wilmington District Corps of Engineers and addressed to the Protected Resources Division of the National Marine Fisheries Service (NMFS), the Wilmington Regulatory Field Office has determined that this project **"may affect, and is likely to adversely affect or modify"** the shortnose and Atlantic sturgeons, both of which fall under ESA protections. As stated in the EFH assessment, potential project effects on these protected species include incidental take from clamshell/bucket dredge, as well as the loss of shallow water mud bottom habitat due to deepening. Further, dredging activities would temporarily increase turbidity levels within the action area as well as result in the reduction of benthic epifaunal and infaunal prey in the immediate proposed dredging area.

Given the potential impacts on protected species within the project site, and the Corps' determination that this project is likely to adversely affect the aforementioned protected species, we ask why the Corps has requested a concurrence from NMFS in lieu of entering the formal consultation process, and what measures DCM has taken to coordinate with the Corps to assure all appropriate measures are taken to safeguard protected species within the Cape Fear River.

Similarly, the determination to not require an Environmental Impact Statement through the National Environmental Policy Act process is surprising, and we did not receive a Finding of No Significant Impact to support this decision through our initial or subsequent Freedom of Information Act requests.

To ensure that sufficient measures are taken to protect vital habitat, protected and commercially important species and localized water quality, we request a formal and public interagency review and coordination process.

3) If the proposed dredging project is approved, there will be unavoidable adverse impacts. As is required by state and federal rules and statutes, compensatory mitigation is required to replace the loss of wetland and aquatic resource functions in the watershed. Any compensatory mitigation cannot be approved prior to satisfying the regulatory requirements for avoiding and minimizing impacts.

The Applicants have proposed mitigation measures that could potentially damage the fragile ecosystems and water quality found within the Cape Fear River basin. The revised compensatory mitigation plan submitted on February 11, 2019 includes wetland enhancement of *Phragmites* dominated habitat. Per the revised plan, the Applicants state that "site work would include herbicide treatment, burning of *Phragmites* if needed, followed by grading and planting."

Once established, *Phragmites* is very difficult to eradicate, even when treated with repeated doses of chemical herbicides, such as the widely used *Roundup* product. *Roundup*'s dominant compound constituent is glyphosate, a broad-spectrum systemic herbicide and crop desiccant. To complicate the issue, this organophosphorus compound is currently under intense worldwide scrutiny and research to determine the extent of its relative toxicity to coastal ecosystems and human health.

To ensure a high likelihood of success for a method that by research has highly mixed results, an enhancement strategy complete with chemical application measures, including how to best minimize leaching of glyphosate to ground and surface waters, should be required before the issuance of any permits. In short, the Applicants should be required to demonstrate that proposed eradication measures are environmentally safe and do not constitute a health risk for humans and wildlife.

The revised plan includes monitoring requirements and success criteria for wetlands enhancement:

"...a detailed design and specifications document including a proposed eradication plan, grading plan, and planting plan would be submitted after permit issuance to the regulatory agencies for review and approval within 60 days...monitoring would be performed for five years or more as needed, with annual reporting to the agencies and would include supplemental planting and maintenance where and when needed on an annual basis."

In order to fully understand the total and cumulative impacts of this project, and to properly evaluate the avoidance, minimization and compensation requirements for the current proposal, we seek confirmation that the aforementioned plans will be subject to public review, that the mitigation work will be inspected annually to ensure success, and that remedial and/or punitive actions are in place if mitigation is unsuccessful.

Given the relative complexity, scope and potential for direct, secondary and cumulative impacts to the natural and water resources of the Cape Fear River, we request the development of a public engagement/stakeholder process to ensure thorough and rigorous public involvement and interaction with your agencies throughout the duration of this project. We work to provide opportunities and guidance to partners, communities and individuals who seek to preserve the quality of our coast and strengthen our coastal economies; we believe every informed opinion matters.

Thank you for your consideration of our comments, we look forward to further engagement and guidance for increased transparency, public involvement and coordinated agency review on this proposed project.

Sincerely,

Kerri Allen

Kerri Allen,
Coastal Advocate