

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**  
**IN AND FOR NEW CASTLE COUNTY**

**DELAWARE RIVERKEEPER NETWORK, )  
THE DELAWARE RIVERKEEPER, )  
AMERICAN LITTORAL SOCIETY, INC., )  
DELAWARE AUDUBON SOCIETY, and )  
DELAWARE NATURE SOCIETY, )**

**Petitioners, )**

**v. )**

**STATE OF DELAWARE, DEPARTMENT OF )  
NATURAL RESOURCES AND )  
ENVIRONMENTAL CONTROL, )  
A DELAWARE AGENCY, and )  
JOHN HUGHES, IN HIS OFFICIAL )  
CAPACITY AS SECRETARY, STATE OF )  
DELAWARE, DEPARTMENT OF NATURAL )  
RESOURCES AND ENVIRONMENTAL )  
CONTROL, )**

**Respondents. )**

**C.A. No \_\_\_\_\_  
2008  
Mandamus**

**PETITION FOR WRIT OF MANDAMUS**

Pursuant to 10 *Del. C.* § 564, Petitioners Delaware Riverkeeper Network, The Delaware Riverkeeper, American Littoral Society, Delaware Audubon Society and Delaware Nature Society, (“Petitioners”) hereby seek a writ of mandamus directed to the Secretary of Delaware Department of Natural Resources and Environmental Control (“DNREC”), commanding him to issue a determination on a permit application from 2001. Petitioners support their position as follows:

## **PARTIES**

1. Petitioner Delaware Riverkeeper Network (“DRN”), an affiliate of the American Littoral Society, was established in 1988 to protect and restore the Delaware River, its tributaries and habitats. To achieve these goals, DRN organizes and implements streambank restoration, volunteer monitoring, educational programs, environmental advocacy initiatives, recreational activities, and environmental litigation throughout the entire Delaware River watershed, including the Delaware Estuary and Delaware Bay. The watershed includes portions of New York, New Jersey, Pennsylvania and Delaware. DRN is a membership organization with over 6,500 members throughout the watershed and approximately 700 members in the State of Delaware. DRN members live and recreate in the State of Delaware and throughout the watershed. DRN undertakes numerous activities and initiatives that take place in and/or directly impact State of Delaware waters, habitats, ecosystems and communities.

2. Petitioner The Delaware Riverkeeper, Maya K. van Rossum, is a full-time privately-funded ombudsman who is responsible for the protection of the waterways in the Delaware River Watershed. The Delaware Riverkeeper advocates for the protection and restoration of the ecological, recreational, commercial and aesthetic qualities of the Delaware River, its bay, tributaries and habitats. The Delaware Riverkeeper regularly visits the Delaware River for personal and professional reasons. The Delaware Riverkeeper is the Executive Director of the Delaware Riverkeeper Network.

3. Petitioner American Littoral Society (“ALS”) is a non-profit organization with offices in Monmouth, Ocean, and Cape May County, New Jersey. ALS was established to promote the study and conservation of marine life and its habitat, specifically in coastal zones. For over 40 years, ALS has served as a lead organization in

developing public support for the preservation of coastal habitat, including wetlands, uplands, dunes, seashore and other types of coastal lands.

4. Petitioner Delaware Audubon Society (“DAS”) was incorporated in Delaware as a non-profit organization in 1977 and is a statewide chapter of the National Audubon Society. DAS is dedicated to developing a better appreciation of our natural environment and working for species and habitat protection and conservation. DAS consists of almost 1,500 members throughout the state advocating on a wide range of environmental issues and sponsoring programs, field trips and school education. DAS focuses on the protection of the Delaware Bay and the Coastal Zone. The Delaware River and Bay ecosystem is considered an Important Bird Area (IBA) which warrants enhanced protection. DAS and its members have participated in this permitting process from the beginning and submitted comments for the public record.

5. Petitioner Delaware Nature Society (“DNS”) was incorporated in Delaware as a nonprofit organization in 1964 with a mission to foster understanding, appreciation, and enjoyment of the natural world through education; to preserve ecologically significant areas; and to advocate stewardship and conservation of natural resources. The organization provides environmental education programs that have reached more than 1.3 million people and has facilitated the preservation of more than 100,000 acres of open space and farmland. The Society is the state affiliate of the National Wildlife Federation and monitors over 50 environmental issues at the federal, state, and local level and comments as needed. The Delaware River, Bay, and vicinity are a central focus of Delaware Nature Society education programs and environmental protection efforts.

6. Petitioners bring this petition on behalf of their members, including those who live and/or recreate in the vicinity of the proposed project.

7. Defendant John A. Hughes is the duly-appointed Secretary of DNREC.

8. Defendant DNREC is an administrative agency of the state of Delaware. According to the Agency's website, DNREC's mission is "to ensure the wise management, conservation, and enhancement of the State's natural resources, protect public health and the environment, provide quality outdoor recreation, improve the quality of life and educate the public on historic, cultural, and natural resource use, requirements and issues."

### **JURISDICTION**

9. This Court is authorized by 10 *Del. C.* § 564 to grant the mandamus relief sought by Petitioners.

### **NATURE OF THE ACTION**

10. This action stems from the failure of the Secretary of the Delaware Department of Natural Resources and Environmental Control ("DNREC") to take action on a January 2001 application by the Army Corps of Engineers ("Corps" or "Army Corps") to DNREC for a subaqueous lands permit, wetlands permit, and water quality certification for the Delaware River Main Channel Deepening Project ("Deepening"), notwithstanding a public hearing process, a December 2003 administrative hearing officer report and recommendation, the subsequent passage of five years, and the abdication of a non-discretionary duty to act upon the permit.

**COUNT ONE**  
**FAILURE OF THE SECRETARY OF DNREC  
TO PERFORM A NON-DISCRETIONARY DUTY  
FOR WHICH PETITIONERS HAVE NO REMEDY AT LAW.**

11. In February 1992, the Army Corps recommended a plan to deepen the Delaware River main navigation channel from 40 to 45 feet for 102.5 miles from the Philadelphia Harbor, Pennsylvania and Becket Street Terminal, Camden, New Jersey to the mouth of Delaware Bay. The project would follow the existing channel, maintaining existing channel widths of 400 to 1,000 feet, but would include the widening of 12 of 16 existing bends, and include deepening the Marcus Hook Anchorage, an effort that requires blasting.

12. Reported cost estimates for the Deepening vary.

13. According to an Army Corps Project Factsheet for the Deepening, issued in October, 2008 (“2008 Project Factsheet”), the cost estimate for the Deepening construction is \$331,313,000 with \$248,485,000 to be paid by the federal government and \$82,828,000 to be paid by the project’s non-federal sponsor, Philadelphia Regional Port Authority.

14. Earlier economic estimates, including the Corps’ 2002 Comprehensive Economic Reanalysis Report (“2002 Reanalysis”), report other figures. The 2002 Reanalysis identifies the “Total Economic First Costs” at \$295,416,000 (computed in May 2002 price levels and escalated at a discount rate of 5 7/8 %) and “Total Project Cost” at \$229,471,730 with a Non-Federal Apportionment of \$76,456,355 (computed in May 2002 price levels).

15. According to the “Delaware River Main Channel Deepening Project” Project Link on the Army Corps website, (“Current Project Link”) approximately 26

million cubic yards of dredge spoils are currently estimated by the Army Corps to be removed during the construction phase; the Deepening will also result in an additional 860,000 cubic yards per year of additional dredge spoils from maintenance dredging associated with the deepened channel (The Current Project Link also reports that maintenance dredging is currently 3.5 million cubic yards per year; a deepening channel will result in 4.3 million cubic yards per year). Spoils will be disposed at sites in Delaware and New Jersey; no project spoils are planned for disposal in Pennsylvania.

16. The last environmental review of the Deepening pursuant to the National Environmental Policy Act (“NEPA”) was a Supplemental Environmental Impact Statement (“SEIS”), released by the Army Corps in July 1997.

17. On January 19, 2001, the Army Corps submitted an application to DNREC for a subaqueous lands permit, wetlands permit, and water quality certification for the Deepening.

18. The permit applied for by the Corps addresses requirements of Title 7 of the Delaware Code, including subaqueous lands, Chapter 72, wetlands, Chapter 66 and water quality, Chapter 60, and their respective regulations at 7 DNREC § 7502 for wetlands, 7 DNREC § 7504 for subaqueous lands, and 7 DNREC § 7401 for surface water quality standards.

19. A DNREC permit is required for any activity “which may cause or contribute to discharge of a pollutant into any surface or ground water (dredging and disposal process); or... which may cause... the collection, transportation,... or disposal of solid wastes (dredge material), regardless of ... source...” 7 *Del. C.* § 6003.

20. Provisions for public noticing a permit application and holding a public hearing, should one be requested or deemed in the best interest of the State, are found at 7 *Del. C.* § 6004.

21. Permitting authority over any activity in a wetland (dredge disposal, beach nourishment, marsh creation) is governed by The Wetlands Act, Chapter 66, specifically 7 *Del. C.* § 6604. Section 6609 provides for a Public Notice and provisions for a Public Hearing, as well as requiring in subsection (3) “A verbatim transcript of testimony at the hearing ... and shall, along with the exhibits and other documents introduced by the Secretary or other party, constitute the record.”

22. Permitting authority over submerged lands is governed by the Subaqueous Lands Act, Chapter 72, specifically 7 *Del. C.* § 7205, which states “no person shall ... remove or extract materials (dredging, blasting) from ... submerged lands ... without having first obtained a permit ...” Sections 7208 and 7209 contain provisions for hearing and notices, respectively.

23. A notice of public hearing for the application was published on October 21, 2001.

24. Members of the public may participate in DNREC’s permitting process, under 7 *Del. C.* §§ 6004, 6006, 6608, 6609, 7207, 7208.

25. The public hearing was conducted on December 4 and 5, 2001, at Delaware State University in Dover.

26. Petitioners Delaware Riverkeeper Network, The Delaware Riverkeeper, Delaware Audubon Society and Delaware Nature Society participated the public hearing.

27. The public comment period ended on December 20, 2001.

28. Petitioners Delaware Riverkeeper Network, The Delaware Riverkeeper, Delaware Audubon Society and Delaware Nature Society submitted comments during this period.

29. The Corps prepared a summary response document that was provided to DNREC on February 8, 2002 and made available to commenters in the public hearing process. Prior commenters were provided until March 18, 2002 to provide additional comments to the Army Corps.

30. On April 12, 2002, DNREC's "Main Channel Review Committee" provided a document to the hearing officer detailing the deficiencies of the Corps' application. The document was included as Exhibit 125 of the hearing record.

31. In April 2002, a report entitled "Proposed Delaware River Channel Deepening Project: Review and Critique of Economic Analyses" authored by Grigalunas and Opaluch of Economic Analysis, Inc., was prepared for DNREC's Wetlands and Subaqueous Lands Section. The document was included as Exhibit 124 of the hearing record.

32. On April 17, 2002, DNREC provided final comments and an economic evaluation to the permit hearing officer.

33. In June 2002, the United States Government Accountability Office (f/k/a United States General Accounting Office) ("GAO") released a report on the project, entitled "Delaware River Deepening Project Comprehensive Reanalysis Needed".

34. Following the GAO's recommendation, The Corps requested that DNREC suspend its review of the permit application until after the Corps had completed its 2002 Reanalysis of the project's economic justification. DNREC granted the request, but also

limited the scope of additional information that the Corps could submit, and the Corps acknowledged this limitation.

35. On July 3, 2002, DNREC informed the Corps that it was the Corps' responsibility to determine if the new analysis would require a revision to the existing application.

36. In December 2002, the Corps submitted additional economic information in the 2002 Reanalysis, and on May 14, 2003, DNREC published notice of new economic documents received from the Corps.

37. Administrative hearing officer Timothy Bureau, ("hearing officer") was charged with reviewing the final Record and submitting recommendations and report to the Secretary of DNREC.

38. In December 2003, the hearing officer issued his report. He recommended denial of the permit and stated that additional data/information was needed, finding, *inter alia*, that the Corps failed to provide "sufficient and necessary information to meet the regulatory burden to obtain a permit under the authority of Chapter 66, as potential adverse effects have not been proven to be minimized." Timothy Bureau, Hearing Officer, *Hearing Officer's Report Recommendation to the Secretary, U.S. Army Corps of Engineers Application for Permit, Delaware Main Channel Deepening Project, Under the Regulatory Authority of Title 7 of Delaware Codes: Chapter 60 – Environmental Control, Chapter 66 – Wetlands. Chapter 72 – Subaqueous Lands*, p. 58 (December, 2003).

39. The Secretary has a non-discretionary duty to act on permit applications.

40. The Secretary of DNREC is charged with making a permit determination under Delaware Law under *7 Del. C. § 6003(c)*, which states that “the Secretary shall grant or deny a permit required by subsection (a) or (b) of this section in accordance with duly promulgated regulations...”

41. The Environmental Control Act and The Wetlands Act outline the Secretary’s non-discretionary duty to act in detail, stating that, “A record from which a verbatim transcript can be prepared shall be made of all hearings and shall, also with the exhibits and other documents introduced by the Secretary or other party, constitute the record.” Following a public hearing and creation of the record, “The Secretary shall make findings of fact based on the record. The Secretary shall then enter such order that will best further the purpose of this Chapter, and the order shall include reasons. The Secretary shall promptly give written notice to the persons affected by such order.” *7 Del. C. §§ 6006, 6609.*

42. State wetlands regulations mirror the Wetlands Act in this regard. *7 DNREC 7500 § 11.4.4.*

43. According to *7 Del. C. §§ 6006, 6609*, “A record from which a verbatim transcript can be prepared shall be made of all hearings and shall, also with the exhibits and other documents introduced by the Secretary or other party, constitute the record.”

44. On October 7, 2008, The News Journal reported a meeting between DNREC Secretary and the Corps’ Philadelphia District Chief and staff, and the delivery of “a huge amount of information” to DNREC.

45. As of the date of this filing, DNREC’s Secretary has failed to enter an order on the 2001 permit application. This failure to act has now lasted five years, despite the

creation of an administrative record, and a clear duty to do so following public hearing and receipt of the hearing officer's report.

46. Petitioners are entitled to a permit determination.

47. The facts in this case undisputedly demonstrate that the Secretary of DNREC has a complete administrative record before him and that he has failed to discharge his duty to approve or deny the permit.

48. Petitioners have no adequate remedy at law for the Secretary's failure to make a determination.

49. Petitioners have a clear right to the relief requested.

50. A writ of mandamus, commanding the Secretary of DNREC to act forthwith, is necessary and appropriate.

**WHEREFORE**, Petitioners respectfully request that this Honorable Court:

1. Issue a writ compelling the Secretary of DNREC to decide on the Army Corps' subaqueous lands permit, wetlands permit, and water quality certification application based upon the administrative record and in accordance with Delaware law forthwith;

2. Order Defendants to pay all reasonable costs and expenses incurred by Petitioners in connection with this Petition; and

3. Provide such additional relief as the Court deems just and proper.

Respectfully Submitted,

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On Behalf of Delaware Riverkeeper  
Network, The Delaware Riverkeeper,  
American Littoral Society, Delaware  
Audubon Society and Delaware Nature  
Society

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