

**DEPARTMENT OF THE ARMY**

LOS ANGELES DISTRICT, CORPS OF ENGINEERS  
P.O. BOX 532711  
LOS ANGELES, CALIFORNIA 90053-2325

December 9, 2010



REPLY TO  
ATTENTION OF

Office of Counsel

Dr. Geraldine Knatz  
Executive Director  
Port of Los Angeles  
Administration Building  
425 S. Palos Verdes Street  
San Pedro, California 90731

RE: Berths 243-245 Confined Disposal Facility

Dear Dr. Knatz:

I understand that the Board of Harbor Commissioners will be again considering alternatives for the confined disposal facility ("CDF") at Berths 243-245 at a meeting to be held on December 16, 2010. This letter addresses issues raised during the Board's July 28, 2010 meeting concerning the sheet pile wall version 4.2 alternative confined disposal facility ("CDF") being considered at that location and the regulatory review requirements of the U.S. Army Corps of Engineers ("Corps") should the Port of Los Angeles ("POLA") wish to pursue such alternative CDF design. It describes the steps the Corps would take in processing a permit modification for this alternative.

Application in Support of Permit Modification

As you know, the Corps issued a Department of the Army ("DA") permit to POLA on November 19, 2009, which in pertinent part, authorized the placement of 270,000 tons of quarry rock and 20,000 tons of rock revetment to construct a containment dike for the 8-acre Berth 243-245 CDF, along with the placement of 368,000 cubic yards of dredged material, including 80,000 cubic yards of contaminated sediments, at the 8-acre CDF.

Should POLA wish to modify the CDF design to include a vertical sheet pile wall and fill a smaller area within Berths 243-245, POLA would need to obtain a modified permit from the Corps. Under the current project design and the terms of the DA permit authorizing it, the existing contaminated sediments in Berths 243-245 would be isolated from the marine environment. Thus, to obtain approval from the Corps, any proposed permit modification must also include removal or isolation of the existing contaminated sediments.

Pursuant to 33 C.F.R § 325.1(c), the POLA application requesting such a permit modification must contain the following information:

- a. A complete description of the proposed modification, including necessary drawings, sketches, or plans (detailed engineering plans and specifications are not required); the location, purpose and need for the proposed activity; scheduling of the activity; the names and addresses of adjoining property owners; the location and dimensions of adjacent structures; and a list of authorizations required by other federal, state, or local agencies for the work. The purpose and need statement must include the use of the fill for a ship repair facility because facilitating a possible ship repair facility has been stated to be a reason for the proposed change to the channel deepening project
- b. All activities that POLA plans to undertake which are reasonably related to this modification of the channel deepening project and for which a new or modified DA permit would be required should be included in the same permit application.
- c. A description of the type, composition and quantity of the material to be dredged at Berths 243-245, the method of dredging, and the site and plans for disposal of the dredged material.
- d. The source of the fill material; the purpose of the discharge, a description of the type, composition and quantity of the material; the method of transportation and disposal of the material; and the location of the disposal site.
- e. The use of, and specific structures to be erected on, the fill.

#### Permit Modification Process

Permit modifications are addressed in the Corps' regulations at 33 C.F.R. § 325.7, which allows the Corps to reevaluate the circumstances and conditions of any permit at the request of the permittee and to initiate action to modify a permit as may be made necessary by considerations of the public interest. Significant increases in scope of a permitted activity are to be processed as new applications for permits in accordance with 33 C.F.R. § 325.2, and not as modifications under 33 C.F.R. § 325.7.

If the Corps determines the modification is a "minor" modification, the Corps holds informal consultations with the permittee to ascertain whether the terms and conditions can be modified by mutual agreement. If a mutual agreement is reached on modification of the terms and conditions of the permit, the district engineer will give the permittee written notice of the modification, which will then become effective on such date as the district engineer may establish. Prior to permit issuance, the district engineer is required to consult with resource agencies before modifying any permit term, condition, or feature in which that agency has expressed a significant interest if the modification would result in greater impacts than the previously approved course of action. The resource agency consultations which are anticipated if POLA submits an

application to modify the CDF design are described more fully below. Further, according to the Corps' 2009 Standard Operating Procedures for the Regulatory Program, a brief supplemental decision document is required to support a minor permit modification.

If the Corps determines the permit modification is a "major"<sup>1</sup> modification, the request would be processed as a standard individual permit application in accordance with 33 C.F.R. § 325.2. Below is an overview of the various steps involved in reviewing, evaluating, and issuing standard individual permits.

1. Initial Determinations: Upon receipt of an application, the Corps must determine if the permit application is complete, and if it is not, the Corps would request additional information from the applicant. The Corps encourages pre-application meetings to address many of these issues.
2. Public Notice: When the Corps determines an application is complete, it must issue a public notice within 15 days that describes the proposed activity, its location, and the evaluation factors. The information that should be included in a public notice is set forth in 33 C.F.R. § 325.3. The notice invites the public to submit project-specific comments and other information within a specified time period. The notice is posted on the District's website, mailed to adjoining property owners, and emailed to other interested parties included on the District's mailing lists.
3. Comment Period: Interested federal, state and local government agencies, organizations, and individuals may submit written comments on the permit application during the specified time period, which is typically 30 days. Any commenter may request the Corps hold a public hearing. Upon completion of the comment period, the Corps will consider all comments received in response to the public notice on the permit application. If comments relate to matters within the special expertise of another federal agency, the district engineer may seek the advice of that agency. In addition, if the District Engineer determines, based on comments received, that he must have the views of the applicant on a particular issue to make a public interest determination, the applicant is given the opportunity to furnish his views on such issue to the District Engineer.
4. Public Hearing: The Corps may hold a public hearing on the proposed project if one is requested and if the Corps determines that the issues raised are substantial or there is other valid interest to be served by a hearing. The public hearing process is described in greater detail in 33 C.F.R. Part 327.
5. Evaluation: Prior to making a decision concerning any proposed modification to the existing Department of the Army permit, the Corps would need to prepare an environmental document pursuant to the National Environmental Policy Act (NEPA).

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<sup>1</sup> As used herein, major modifications are those modifications that result in significant increases in scope of a permitted activity warranting processing as a new application for a permit.

This evaluation also includes the Corps' analysis to determine whether the proposed activity complies with the U.S. Environmental Protection Agency's ("EPA") Clean Water Act ("CWA") section 404(b)(1) Guidelines (40 C.F.R. Part 230) and whether it is in the public's interest (33 C.F.R. § 320.4). As part of the public interest review, the Corps considers the probable impacts, including cumulative impacts, of the proposed activity on such factors, where applicable, as conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shoreline erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership and, in general, the needs and welfare of the people. 33 C.F.R. § 320.4.

Prior to issuing the DA permit in 2009 that authorized, among other things, the current plan to construct a CDF at Berths 243-245, the Corps and POLA jointly prepared a Supplemental Environmental Impact Statement/Supplemental Environmental Impact Report ("SEIS/SEIR") to address the need for additional disposal capacity to complete the Main Channel Deepening Project ("MCDP"). One of the disposal areas evaluated in the 2009 SES/SEIR was the 8-acre CDF at Berths 243-245. The Record of Decision was signed by the Corps in September 2009. Regulations promulgated by the Council on Environmental Quality requires a Federal agency to prepare an SEIS if: (1) the agency makes substantial changes in the proposed action that are relevant to environmental concerns; or (2) there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. 40 C.F.R. § 1502.9(c)(1).

There are two potential pathways for determining NEPA compliance. One path involves the Corps preparing a "supplemental analysis" for the purpose of determining whether an SEIS is required. This supplemental analysis would function similar to an environmental assessment, which is used to assist agency planning and decisionmaking. We anticipate it would take six months to complete this analysis. If a supplemental analysis reaches the conclusion that an SEIS is required, it will lengthen the permit processing time by most, if not all, of the time spent preparing it. Alternatively, the Corps may decide to go ahead and prepare an SEIS without preparing any supplemental analysis. Preparation of an SEIS includes a number of procedural steps, reviews, meetings, hearings, and other actions, including the scoping process, leading to a decision by the Corps. An SEIS generally requires 24 to 36 months to complete.

Our agency's normal practice is not to make any final decision regarding the type of environmental document to be prepared under NEPA without a concrete proposal having been submitted to the Corps by the permit applicant. However, Corps staff has participated in several pre-application meetings and conference calls to advise POLA of studies and other information foreseeably required for later Corps action, and provided our preliminary viewpoint that an SEIS would be required for the vertical sheet pile wall CDF design alternative.

Regardless of whether an SEIS is required or whether a permit modification is processed as major or minor, the reviews and consultations described below in paragraphs 6 through 9 must be completed before a permit decision could be made.

6. State Review: No Corps permit modification may be issued until POLA provides the Corps with a) a copy of the Regional Water Quality Control Board's modified CWA section 401 Water Quality Certification, or evidence that the prior certification remains valid, and b) a copy of the California Coastal Commission's concurrence that the proposed modification is consistent with the Coastal Zone Management Act of 1972. If either certification or concurrence is denied, the Corps could not grant the permit modification. In addition, the Corps may need to re-consult with the state historic preservation officer pursuant to section 106 of the National Historic Preservation Act and its implementing regulations.

7. Endangered Species Act ("ESA") Consultation: The Corps, as a federal agency considering a discretionary action, such as issuance of a permit modification, must make a determination as to whether reinitiation of section 7 consultation is warranted. Reinitiation of consultation is required if it is determined the proposed modification causes an effect to the listed species or critical habitat that was not considered previously.

8. Essential Fish Habitat ("EFH") Consultation: The 1996 amendments to the Magnuson-Stevens Fishery Management and Conservation Act (16 U.S.C. §§ 1801 et seq.) require federal agencies that fund, permit, or carry out activities that may adversely impact EFH to consult with National Marine Fisheries Service ("NMFS") regarding potential adverse effects of their actions on EFH and respond in writing to the recommendations of NMFS. The project site includes EFH, and re-initiation of consultation will clearly be required for the dredging of contaminated sediments at Berths 243-245 and may also be required with respect to the construction of the sheet pile wall.

9. Clean Air Act Compliance: The Corps will probably need to prepare a new conformity determination in accordance with section 176(c) of the Clean Air Act and its implementing regulations. Pursuant to EPA's implementing regulations at 40 C.F.R. § 93.155, the Corps must allow the South Coast Air Quality Management District, California Air Resources Board, Southern California Association of Governments, and the EPA 30 days to review a draft conformity determination before making a final conformity determination and permit decision to which the determination relates.

10. Permit Decision: The Corps' permit decision is based on the comments received in response to the public notice, the NEPA evaluation, the 404(b)(1) evaluation, the public interest review, and any state and federal consultations, review, and requirements. If the proposed modification does not comply with the CWA 404(b)(1) Guidelines or is found to be contrary to the public's interest, the Corps must deny the modification.

In addition to the above regulatory review process, an amendment to the Project Cooperation Agreement between POLA and the Corps for the MCDP may possibly be required. If so, the amendment could be approved by the Corps only after the NEPA compliance discussed above has been completed. We will need to discuss this issue with our Headquarters' Office once we receive a formal modification request.

Should you have any questions concerning the information presented in this letter, please do not hesitate to contact me at the address above or by phone at (213) 452-3946.

Sincerely,

A handwritten signature in cursive script that reads "Lawrence N. Minch". The signature is written in black ink and is positioned above the printed name and title.

Lawrence N. Minch  
District Counsel

cc: Steven Y. Otera  
Brian M. Moore  
Josephine R. Axt  
Aaron O. Allen  
Spencer D. McNeil  
James A. Field