



**DEPARTMENT OF THE ARMY  
US ARMY CORPS OF ENGINEERS  
JACOB K. JAVITS FEDERAL BUILDING  
26 FEDERAL PLAZA  
NEW YORK, NY 10278-0090**

CENAN-OC

18 December 2020

**The following is protected as attorney-client privileged, attorney work-product information; do not copy, forward, or release under the Freedom of Information Act (“FOIA”).**

MEMORANDUM THRU Division Counsel, North Atlantic Division, CENAD-OC (ATTN: Ms. Maureen McAndrew), 301 General Lee Avenue, Brooklyn, New York 11252

FOR HQUSACE, CECC-R (ATTN: Ms. Michael Mandulak), 441 G Street NW, Washington DC 20314

SUBJECT: Determination as to the Use of Federal Navigational Servitude, as to the Lake Montauk Harbor Feasibility Study of Navigational Improvements

1. References:

- a. Lake Montauk Harbor Navigation Improvements Final Feasibility Report, October 2019;
- b. Lake Montauk Harbor Feasibility Study of Navigational Improvements Real Estate Plan, November 2020;
- c. ER 405-1-12, Chapter 12, 1 May 1998;
- d. ER 1105-2-100, Appendix F, 31 January 2007

2. Purpose: This memo provides a legal opinion as to whether the doctrine of the Federal Navigational Servitude would apply to property subject to the Lake Montauk Harbor Feasibility Study of Navigational Improvements (hereinafter “the Study”).

3. Background and Summary:

Lake Montauk Harbor is on the northern shore of the south fork of Long Island, three miles west of Montauk Point, and approximately 125 miles east of New York City, and within the Town of East Hampton, Suffolk County, New York. The harbor is landlocked on the east, south and

west sides, and connected on the north side with Block Island Sound by an inlet. The Study area also consists of the Block Island Sound shorelines bounded by Fort Pond Bay on the west and Shagwong Point on the east.

The recommended plan for approval has a project footprint area consisting of 1) the channel to be improved along with a deposition basin and 2) the placement area for the dredged material. The first area consists of the currently authorized Federal channel in the Lake Montauk inlet and a deposition basin immediately east of it extending from the channel to the eastern inlet jetty (about 150 feet). The second area (for the placement of the dredged material) extends along the shoreline immediately west of the western inlet jetty to 3,000 feet west both above and below mean-high water. The first 1,200 feet is public land. The next 1,800 feet is private land above mean high water. Additionally, the project footprint area includes approximately 250 feet within the inlet along the entire length of the inlet as well as, for disposal of dredged material, the shoreline west of the inlet for an approximate distance of 3,000 feet and a width of 44 feet.

The submerged lands are owned by the State of New York. There are 16.325 acres of submerged lands west of the jetty required for the project and 1.795 acres of submerged lands adjacent to the existing deposition area next to the Federal channel. Long-term operations and maintenance will occur due to the long-term nature of the deposited dredge material and the possible continued use for operations and maintenance efforts.

The project was authorized by the River and Harbor Act of 2nd March 1945 (House Document 369, 76th Congress, 1st Session). But also, because the project has an estimated cost of \$4,165,000, it falls within the limit of the Continuing Authorities Program, Section 107 of the River and Harbor Act of 1960 (33 U.S.C. Section 577).

#### 4. Navigational Servitude Analysis:

The Federal Government's power to control navigable waters is based in the Commerce Clause, Article I, Section 8, Clause 3, of the U.S. Constitution. See *also*, Gibbons v. Ogden, 22 US 1, 1824.

Public rights in navigable waters stem from the common law, through concepts such as the public trust doctrine, and also from state constitutions, as applied. See *e.g.*, Scranton v. Wheeler, 179 U.S. 141 (1900); Shively v. Bowlby, 152 U.S. 1 (1894). Nevertheless, the Federal Government's power to regulate navigation is a dominant servitude, superior to any riparian rights conferred to a State under State law. FPC v. Niagara Mohawk Power Corp., 347 U.S. 239, 98 L. Ed. 686, 74 S. Ct.

487 (1954); United States v. Rands, 389 U.S. 121, 88 S. Ct. 265 (1967); See *also*, U.S. Constitution, Art. VI, Cl. 2. “The United States retains all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, but shall not be deemed to include, proprietary rights of ownership . . . which are specifically recognized, confirmed, established, and vested in and assigned to the respective States . . . .” See 43 U.S.C. 1314(a).

For the navigational servitude to apply, there must be a relationship or nexus to navigation. The determination of the availability of the navigation servitude is a two-step process. First, the Government must determine whether the project feature serves a purpose which is in the aid of commerce. For example, such purposes recognized by the courts include navigation, flood control and hydro-electric power. If it is so determined, then the second step is to determine whether the land at issue is located below the mean or ordinary high-water mark of a navigable watercourse.

The general purpose of the Study is to determine if there is an economically justified and environmentally compliant recommendation for Federal participation to provide more reliable navigation in Lake Montauk Harbor. In addition, along with the aforementioned, the project would enable a response to the erosion damages on the shoreline west of the inlet jetties, potentially by placement of dredged sand from the Federal channel on the beach. In summary, the overall purpose of the project would be to improve shallow draft navigation in the Federal navigation channel at Lake Montauk Harbor, while also achieving a better understanding of the littoral transport processes, the erosion problems of the shoreline down-drift of the inlet, and the sources and quantities of material contributing to channel shoaling.

Finally, it should be further emphasized that the Study is being presented under the Section 107 of the Continuing Authorities Program. Section 107 provides authority for USACE to improve navigation, including but not limited to, dredging of channels and related matters, occurring through partnerships with relevant non-Federal sponsors. It should be noted that though the navigational servitude can be exercised for construction, the non-Federal sponsor, if other than the State, would need to acquire the interests in the submerged lands, in order perform long-term operations and maintenance. However, in our present case, the aforementioned does not apply, given that USACE would be performing such long-term operations and maintenance.

5. Recommendation and Opinion:

It is the opinion herein that a nexus to navigation can be demonstrated, and also, that the Federal Navigational Servitude does apply to the measures outlined by the Study. The fact that the subject study is occurring relative to Section 107 of the Continuing Authorities Program, in and of itself, indicates a sufficient nexus to navigation.

Any questions may be directed to the undersigned at (917) 790-8155.

C. William Johnson  
Assistant District Counsel