

**APPENDIX A : Stipulation & Order of Settlement
& Dismissal with Appendix A**

ORIGINAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
NATURAL RESOURCES DEFENSE COUNCIL, :
INC.; RARITAN BAYKEEPER, INC.; ANDREW :
WILLNER; and GREENFAITH, :

ECF CASE

Plaintiffs,

-against-

05 Civ. 762 (SAS)

UNITED STATES ARMY CORPS OF :
ENGINEERS; and COL. ANIELLO L. :
TORTORA,¹ in his official capacity as Commander :
and District Engineer, United States Army Corps :
of Engineers, New York District, :

**STIPULATION AND ORDER OF
SETTLEMENT AND DISMISSAL**

Defendants,

and

DONJON MARINE INC., and NEW YORK :
CONTAINER TERMINAL, :

Intervenors. :
-----X

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: 10/19/07

WHEREAS, Congress has authorized the United States Army Corps of Engineers ("Army Corps" or "Corps") to deepen the navigational channels of the New York/New Jersey Harbor ("Harbor Deepening Project" or "HDP"); and

WHEREAS, the Army Corps issued environmental reviews and impact statements pursuant to the National Environmental Policy Act, ("NEPA"), 42 U.S.C. § 4321 et seq., addressing the environmental effects of the HDP, between 1986 and January 2004; and

WHEREAS, on February 13, 2004, the United States Environmental Protection

¹ Colonel Aniello L. Tortora has replaced Colonel Richard J. Polo, Jr. as Commander and District Engineer, United States Army Corps of Engineers, New York District.

Agency (“USEPA”) entered into an Administrative Order on Consent (“AOC”) under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 et seq. (“CERCLA”), that ordered a Remedial Investigation/Feasibility Study (“RI/FS”) in the portion of the New York/New Jersey Harbor lying within the Newark Bay Study Area of the Diamond Alkali Superfund Site (“NBSA”); and

WHEREAS, the AOC states that “conditions in the Newark Bay Study Area may present an imminent and substantial endangerment to public health, welfare or the environment,” due to the “presence of hazardous substances in the sediment at the Newark Bay Study Area, the subsequent migration of hazardous substances within the Newark Bay Study Area, and the potential migration of all such substances outside of the boundaries of the Newark Bay Study Area”; and

WHEREAS, the AOC states that the “actions required by this Order are necessary to protect the public health or welfare or the environment, are in the public interest, . . . are consistent with CERCLA and the [National Contingency Plan, 40 C.F.R. Part 300 et seq.], . . . and will expedite remedial action and minimize litigation” concerning the NBSA; and

WHEREAS, the purpose of the RI/FS in the NBSA is to “determine the nature and extent of contamination within the Newark Bay Study Area of the Diamond Alkali Superfund Site and to develop and evaluate remedial alternatives”; and

WHEREAS, pursuant to CERCLA, and following completion of the RI/FS, USEPA intends to propose and adopt a Record of Decision (“ROD”) and to select one of the alternative remedies evaluated in the RI/FS, which remedy shall be implemented pursuant to CERCLA; and

WHEREAS, Plaintiffs commenced this action on January 21, 2005, pursuant to NEPA and the Administrative Procedure Act, 5 U.S.C. § 706 (“APA”); and

WHEREAS, in their complaint, Plaintiffs alleged that Defendants violated NEPA and the APA by failing to prepare a supplemental Environmental Impact Statement to address the potential detrimental effects of the HDP dredging upon the effort to study, contain, and remediate the risk from contaminated sediments in the NBSA that USEPA instituted with the February 2004 AOC; and

WHEREAS, on August 5, 2005, the Court issued an Opinion and Order that, inter alia, remanded the matter to Defendants for further NEPA review; and

WHEREAS, on January 6, 2006, Defendants issued a revised Environmental Assessment; and

WHEREAS, on March 8, 2006, the Court issued an Opinion and Order that considered the January 6, 2006 Environmental Assessment and, inter alia, remanded the matter to Defendants for further NEPA review; and

WHEREAS, prior to the start of the HDP, the New Jersey Department of Environmental Protection (“NJDEP”) and the New York State Department of Environmental Conservation (“NYSDEC”) each issued to the Corps “umbrella” Federal Consistency Determination/Water Quality Certificates (“FCD/WQCs”) for the HDP, which require the Corps to apply for and obtain additional contract-specific FCD/WQCs before proceeding with each contract area of the HDP; and

WHEREAS, on September 8, 2006, NJDEP issued a FCD/WQC to the Corps for the S-NB-1 contract area of the HDP, which includes certain conditions and reservations,

including a requirement to apply for and obtain a supplemental FCD/WQC before proceeding to dredge in the side slopes of the S-NB-1 contract area; and

WHEREAS, on September 22, 2006, the Corps issued an Invitation for Bids for the S-NB-1 contract area of the HDP, which defines work in the outer side slopes as an option that may be exercised at the Corps' discretion within a set period of time following award of the contract, but within which work shall not proceed absent the Corps' exercise of that option; and

WHEREAS, the Corps published a draft Environmental Assessment (the "Draft EA") on April 4, 2007, for the purpose of addressing the issues raised by the March 8, 2006 Opinion and Order, and received comments on the Draft EA; and

WHEREAS, on or about June 21, 2007, the Corps published a Final Environmental Assessment (the "Final EA") and Finding of No Significant Impact ("FONSI"), which had been signed on June 19, 2007, for the purpose of addressing the issues raised by the March 8, 2006 Opinion and Order, as well as comments received on the Draft EA; and

WHEREAS, on or about June 21, 2007, the Corps made a formal award of the contract to dredge the S-NB-1 contract area of the HDP, but has not yet exercised the option under that contract to dredge the side slopes; and

WHEREAS, following the Court's Opinion and Order of March 8, 2006, the Parties have engaged in extensive negotiations concerning a resolution of this matter; and

WHEREAS, without any admission or adjudication of fact or law, other than as stated herein, the Parties have agreed and stipulated to a resolution of the claims in the action that they consider to be a just, fair, adequate, and equitable resolution thereof, given the unique circumstances presented, and which is in the public interest and in the interests of justice; and

NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED by and between Plaintiffs and Defendants, by and through their counsel, as follows:

I. DEFINITIONS

1. Whenever the terms set forth below are used in this Stipulation and Order, the following definitions shall apply:

a. "Complaint" shall mean the complaint filed by the Plaintiffs in this action on January 21, 2005;

b. "Day" shall mean a calendar day unless expressly stated to be a working day. In computing any period of time under this Stipulation and Order, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next working day;

c. "Defendants" shall mean the United States Army Corps of Engineers, and Colonel Aniello L. Tortora, in his official capacity as Commander and District Engineer, New York District;

d. "Effective Date" shall mean the date this Stipulation and Order is signed by the Court;

e. "Federal Natural Resource Trustee Agencies" shall mean the United States Fish and Wildlife Service, the National Oceanographic and Atmospheric Administration, as well as other agencies that may subsequently exercise their federal Natural Resource Trustee authority pursuant to Executive Order 12580, as amended by Executive Order 13016;

f. "Final EA" shall mean the Final Environmental Assessment published by the Defendants on or about June 21, 2007;

g. “Harbor Deepening Project” (“HDP”) shall mean the project to deepen the federal navigation channels of the New York/New Jersey Harbor to 50 feet as authorized by Congress in 2000, including the contract areas: KVK-5, S-E-1, S-NB-1, S-NB-2, S-AK-1, S-AK-2, S-AK-3, S-KVK-1, S-KVK-2, S-AN-1a, S-AN-1b, S-AN-2, S-AM-1, S-AM-2, S-PJ-3, S-BR-1, as well as any modifications to these contract areas, but shall not include maintenance dredging;

h. “Month” shall mean a calendar month, such that “one month from April 15, 2007” shall mean “May 15, 2007”;

i. “Newark Bay Study Area” (“NBSA”) shall mean the portion of the New York/New Jersey Harbor lying within the Newark Bay Study Area of the Diamond Alkali Superfund Site that is the subject of the AOC ordered by USEPA;

j. “Paragraph” shall mean a portion of this Stipulation and Order identified by an arabic numeral;

k. “Party” or “Parties” shall mean the Plaintiffs and/or Defendants;

l. “Plaintiffs” shall mean Natural Resources Defense Council, Inc., Raritan Baykeeper, Inc., Andrew Willner, and Greenfaith;

m. “Section” shall mean a portion of this Stipulation and Order identified by a roman numeral;

n. “Stipulation and Order” shall mean this document and all appendices and exhibits attached hereto; and

o. “USEPA” shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States.

II. DISMISSAL WITH PREJUDICE

2. This action is hereby dismissed with prejudice subject to the conditions set forth in the remainder of this Stipulation and Order.

3. In order to allow Plaintiffs a reasonable period of time to prepare an application for attorneys' fees, and notwithstanding paragraph 2, this Court shall not enter a final judgment pursuant to Rule 58(a)(1) of the Federal Rules of Civil Procedure until sixty (60) days after the Court signs this Stipulation and Order.

4. Nothing in this Stipulation and Order shall constitute an admission of liability or fault on the part of Defendants, or their agents, servants or employees, and this Stipulation and Order is entered into by the Parties for the sole purpose of compromising disputed claims and avoiding the expenses and risks of further litigation.

III. COMPLIANCE REQUIREMENTS

A. Compliance Requirements Applicable to the HDP in the NBSA

5. With respect to HDP dredging in the S-NB-1 contract area, Defendants shall comply with the following best management practices ("BMPs"):

a. conditions 2 through 14 as they appear in the September 8, 2006 FCD/WQC (attached hereto as Exhibit A); and

b. Section 2900 of specifications accompanying Invitation for Bids for Contract Area S-NB-1, sub-sections 4, 6.3.c, and 6.3.e (attached hereto as Exhibit B).

6. When applying for FCD/WQCs for any HDP contract within the NBSA subsequent to the Effective Date of this Stipulation and Order, Defendants shall inform the relevant state regulatory agency (or agencies) that they consent to the inclusion of the following

BMPs:

a. conditions 2 through 14 as they appear in the September 8, 2006 FCD/WQC, except as provided by paragraph 7, below; and

b. Section 2900 of specifications accompanying Invitation for Bids for Contract Area S-NB-1, sub-sections 4, 6.3.c, and 6.3.e ; except that: (i) if condition 3 from the September 8, 2006 FCD/WQC is omitted for any future contract, Defendants are not obligated to apply to such contract the requirements of Section 02900, ¶ 6.3.e of the Invitation for Bids for Contract Area S-NB-1; and (ii) if condition 4 from the September 8, 2006 FCD/WQC is omitted for any future contract, Defendants are not obligated to apply to such contract the requirements of Section 02900, ¶ 6.3.c of the Invitation for Bids for Contract Area S-NB-1.

7. When applying for WQCs for HDP contracts within the NBSA, Defendants shall not ask NJDEP to alter conditions 2 through 14 as they appear in the September 8, 2006 WQC unless: (a) such a request is accompanied by new data or information that demonstrates that a comparable level of environmental protection can be achieved without the application of one or more of those conditions, or that the level of protection is inappropriate for that area, or (b) such a request is made for the purpose of obtaining scientific data and/or information that would assist the Corps in evaluating whether a greater or equal level of environmental protection could be achieved through alternative BMPs.

8. When issuing Invitations for Bids for contract areas S-NB-2, AK-1, AK-2 and AK-3 of the HDP as defined in the Final EA, the Corps shall define work in:

- a. the side slopes of an existing channel;
- b. locations outside an existing channel into which such channel shall be

widened; and

- c. those portions of the S-NB-2 contract area that are identified as area #10 in Figure 78 of the report titled "Geomorphological/Geophysical Characterization of the Nature and Dynamics of Sedimentation and Sediment Transport in Newark Bay Focusing on the Effects Related to the Continued and Future Federal Navigation Channel Deepening and Maintenance," which is referred to in the April 4, 2007 Draft EA as "USACE 2007" (hereinafter "Geomorphological Report") (attached hereto as Exhibit C);

as one or more options that may be exercised at the Corps' discretion within a set period of time following award of the contract, but within which work shall not proceed absent the Corps' exercise of that/those option(s), and absent an area-specific amended FCD/WQC that covers that/those option area(s). These areas for which a separate contract option is required are hereinafter referred to as the "Contract Option Areas." However, if Defendants have completed the Reports described in paragraphs 14 and 15 and Appendices A and B of this Stipulation and Order prior to issuing an Invitation for Bids for contract area S-NB-2, AK-1, AK-2 or AK-3 of the HDP as defined in the Final EA, Defendants are not required to define work in the areas described in paragraph 8.a-c as separate options for that contract.

9. When applying for an FCD/WQC for contract areas S-NB-2, AK-1, AK-2 and AK-3 of the HDP as defined in the Final EA, the Corps shall notify NJDEP that it consents to the inclusion of a requirement to apply for and obtain an amended FCD/WQC before proceeding to dredge in the Contract Option Areas. However, if Defendants have completed the

Reports described in paragraphs 14 and 15 and Appendices A and B of this Stipulation and Order prior to applying for an FCD/WQC for contract area S-NB-2, AK-1, AK-2 or AK-3 of the HDP as defined in the Final EA, Defendants are not required to apply for an amended FCD/WQC before proceeding to dredge in the areas described in paragraph 8.a-c for that contract.

B. South Elizabeth Channel Silt Curtain Study and Report

10. Defendants shall, consistent with United States Army Corps of Engineers Safety and Health Regulations EM 385-1-1, and subject to any necessary approval by NJDEP, deploy a silt curtain in a portion of the South Elizabeth Channel (an element of the S-NB-2 contract area), subject to appropriate hydrodynamic conditions (i.e., at a minimum, a flow regime that is reasonably steady and is of sufficient velocity to disperse sediments), such that environmental protection, safety, and navigation are not compromised. While the Silt Curtain is deployed, Defendants shall monitor its effectiveness at limiting the transport of any dredging-induced resuspended sediment and evaluate the feasibility of its use in future HDP dredging within the NBSA.

11. Defendants shall document in a written report (“Silt Curtain Pilot Study Report”) their monitoring of the silt curtain’s effectiveness at reducing the transport of any dredging-induced resuspended sediment, and their assessment of the feasibility of its use for that purpose in future HDP dredging within the NBSA.

12. Defendants shall complete the final Silt Curtain Pilot Study Report within fifteen (15) months after the exercise of the side slope/channel widening option(s) within the S-NB-2 contract. Promptly upon completion, Defendants shall provide the final Silt Curtain Pilot Study Report to Plaintiffs, USEPA, NJDEP and NYSDEC, and shall publish a notice of

availability of the final Silt Curtain Pilot Study Report on its website.

13. Prior to finalizing the Silt Curtain Report, Defendants shall circulate a draft to Plaintiffs, NJDEP and NYSDEC for comment. Defendants shall consider in good faith any comments on the draft Silt Curtain Pilot Study Report that Plaintiffs, NJDEP and/or NYSDEC submit to Defendants, provided that such comments were received by Defendants within twenty-one (21) days of the commenter's receipt of the draft Silt Curtain Pilot Study Report (or within a longer period at the discretion of Defendants). Defendants shall retain ultimate discretion as to incorporation of any specific revisions proposed by the commenters into the final Silt Curtain Pilot Study Report. No later than two (2) months after completing the final Silt Curtain Pilot Study Report, Defendants shall provide a written response to any comments timely submitted by Plaintiffs on the draft Silt Curtain Pilot Study Report.

C. Pilot Project

14. Defendants shall perform a Near Field Turbidity/Total Suspended Sediments Pilot Study ("NFTTSS") Pilot Study in the "narrow channel" contract area of the S-NB-1 contract area (the "NFTTSS Pilot Study") as set forth in Appendix A.

D. Stratified Sampling

15. Defendants shall perform a Stratified Sampling Project for HDP contract areas in the NBSA subsequent to S-NB-1 ("Stratified Sampling"), as set forth in Appendix B.

IV. COORDINATION WITH OTHER AGENCIES

16. Defendants shall continue to coordinate their HDP dredging activities in the NBSA with USEPA, NJDEP, NYSDEC, and the Federal Natural Resource Trustee agencies, and shall solicit the advice of those agencies on any such activities that may have an effect upon

the effort to study, contain and remediate the risk from contaminated sediments in the NBSA. Such coordination shall be conducted through the existing, regular inter-agency meetings identified in the Newark Bay Study Area Coordination Plan, dated December 21, 2005 (attached hereto as Exhibit D). Except as expressly provided in this Stipulation and Order, nothing in this Stipulation and Order shall abrogate or enlarge the Defendants' obligations pursuant to the Newark Bay Study Area Coordination Plan.

17. Defendants shall provide members of the public an opportunity to meet with them to offer questions or comments on their inter-agency coordination pursuant to paragraph 16 on at least a quarterly basis. Such meetings shall be scheduled to occur immediately following the end of a regularly scheduled inter-agency coordination meeting held pursuant to paragraph 16, except that if no such inter-agency coordination meeting is scheduled within a given quarter, upon the request of one or more Plaintiffs, Defendants shall provide members of the public with an equivalent opportunity to meet with them to offer questions or comments, at a time mutually convenient to Plaintiffs and Defendants. Any meeting pursuant to this paragraph may be conducted in-person or by conference call. The time and date of such meetings, as well as a call-in number, shall be posted on the Corps' website, at www.nan.usace.army.mil. Defendants shall notify USEPA, NJDEP, NYSDEC, and the Federal Natural Resource Trustee agencies of the time and date of such meetings, and shall offer them the opportunity to participate. To the extent practicable, Defendants shall also provide Plaintiffs with other relevant written materials, including Memoranda for Record of any prior coordination meetings held pursuant to paragraph 16, before any meeting pursuant to this paragraph.

18. Defendants shall prepare Memoranda for Record ("MFRs") of the

coordination meetings held pursuant to paragraph 16, and shall post the MFRs, or a notice of availability, on the Corps' website, at www.nan.usace.army.mil.

19. The foregoing coordination obligations shall terminate upon completion of construction of the final HDP contract reach within the NBSA.

V. RELEASE AND COVENANT NOT TO SUE

20. Plaintiffs release and covenant not to sue or bring any action against the Defendants, the United States, or any department or agency or official thereof concerning the adequacy of the June 2007 Final EA or FONSI. Plaintiffs further release and covenant not to sue or bring any action against the Defendants, the United States, or any department or agency or official thereof, or any of the Defendants' funding partners for the HDP, for any claim that concerns any HDP contracts and/or activities and that:

a. accrued on or before the date on which Plaintiffs sign this Stipulation and Order; or

b. arises from any data or information resulting from Defendants' performance of the South Elizabeth Channel Silt Curtain Study, the NFFTSS Pilot Study, and/or Stratified Sampling required by this Stipulation and Order.

21. In the event of a future dispute regarding the HDP activities within the NBSA, the Parties shall undertake in good faith to resolve such dispute without resort to formal litigation.

VI. MODIFICATION

22. This Stipulation and Order may be modified by (a) a written stipulation signed by all Parties, or (b) the Court, pursuant to a motion on notice by any Party, for good

cause shown; provided, however, that this Stipulation and Order may not be modified to add new obligations for any Party or to accelerate any deadlines faster than the deadlines set forth above in this Stipulation and Order, except by written stipulation signed by all Parties.

23. If the modification is by written stipulation signed by all Parties, the modification will take effect upon the entry of the written stipulation by the Court.

24. Prior to bringing any motion to modify this Stipulation and Order, the Party seeking the modification shall first seek the other Parties' consent to the proposed modification.

25. If the modification is sought by motion and concerns a deadline set forth in this Stipulation and Order, the following procedures shall apply:

a. The motion shall be filed and served at least sixty (60) days before the applicable deadline; however, failure to meet that deadline shall not, standing alone, be cause to deny the motion. In the event the 60-day deadline is missed, the motion shall state the reasons why.

b. The motion shall be accompanied by a request for expedited consideration by the Court at the option of the movant, including (i) a request that the Court decide the motion no later than twenty (20) days prior to the applicable deadline; and (ii) a request for a briefing schedule that would afford the Court sufficient time to render such an expedited decision. All Parties to this Stipulation and Order shall join in any such request for expedited consideration regardless of whether they oppose the motion on the merits.

VII. RETENTION OF JURISDICTION, REMEDIES FOR BREACH, AND TERMINATION

26. Notwithstanding the dismissal of this action as set forth in paragraph 2,

this Court shall retain jurisdiction to determine, upon motion on notice by any Party, whether any other Party has materially violated the terms of this Stipulation and Order, and has not cured such violation promptly after receiving notice from the moving Party pursuant to the procedures regarding notice set forth in paragraph 27. In any motion pursuant to the terms of this paragraph and paragraph 27, the moving Party shall bear the burden of establishing a violation, and the non-moving Party shall bear the burden of establishing that any violation did not materially affect compliance with the terms and conditions of this Stipulation and Order. If this Court determines that any Party has materially violated this Stipulation and Order, and has not promptly cured such violation after receiving notice of such violation from the moving Party, this action shall be reinstated. Reinstatement of this action pursuant to this paragraph shall be the sole remedy under the Stipulation and Order, and no other remedies, including but not limited to contempt sanctions, may be requested by any Party or ordered by the Court for any alleged breach of this Stipulation and Order. If this action is reinstated, this Stipulation and Order shall be rendered null and void, all pending obligations pursuant to this Stipulation and Order are immediately suspended, and the Parties' legal claims and defenses shall be preserved in full as if the action had not previously been dismissed.

27. In the event there is a dispute over compliance with any term or provision of this Stipulation and Order, the Parties shall engage in informal dispute resolution procedures as set forth in this paragraph, prior to seeking judicial relief. The disputing Party shall notify the other Parties in writing, setting forth (a) the nature of the dispute, (b) the disputing Party's position with respect to the dispute, and (c) the information that the disputing Party is relying on to support its position. The Parties shall then meet and/or confer in good faith to attempt to

resolve the dispute. If the Parties are unable to resolve the dispute within thirty (30) days after the disputing Party has provided written notice of dispute to the other Parties, the disputing Party may file a motion before this Court under paragraph 26 of this Stipulation and Order for a determination that a Party has materially violated this Stipulation and Order and has not promptly cured such violation after receiving notice of such violation. The thirty (30) day dispute resolution period may be shortened by agreement of the Parties, or upon emergency motion by the disputing Party demonstrating by a preponderance of the evidence that the disputing Party will be irreparably injured unless the dispute resolution period is shortened. At least one (1) business day prior to bringing any such emergency motion, the disputing Party shall provide written notice of the dispute to other Parties. Any such emergency motion shall be on notice to all Parties.

28. This Court shall retain jurisdiction to hear any application for attorneys' and expert fees and/or costs. The fact that the Court retains jurisdiction over an application for fees and/or costs shall not indicate in any way that Plaintiffs are eligible for or entitled to recover any fees or costs. Defendants reserve and will assert any and all arguments and defenses in opposition to any application by Plaintiffs for fees and/or costs.

29. Defendants shall notify Plaintiffs in writing when they believe that they have completed all of their obligations pursuant to Sections III and IV of this Stipulation and Order, and that this Stipulation and Order should be terminated ("Notice of Completion"). If Plaintiffs disagree as to whether Defendants have completed all such obligations, Plaintiffs must invoke the dispute resolution procedures set forth in paragraph 27 within fifteen (15) days of receiving the Notice of Completion from Defendants. If the dispute resolution procedures cannot

resolve the dispute, Plaintiffs must file a motion pursuant to paragraph 26 alleging material noncompliance with the terms of this Stipulation and Order no later than fifteen (15) days after the conclusion of the dispute resolution period. This Stipulation and Order shall be terminated if (a) Plaintiffs do not invoke the dispute resolution procedures within fifteen (15) days after receiving the Notice of Completion from the Defendants; (b) Plaintiffs do not file a motion pursuant to paragraph 26 of this Stipulation and Order within fifteen (15) days after the conclusion of the dispute resolution period as set forth in paragraph 27; or (c) Plaintiffs file such a motion and it is denied by the Court.

VIII. ENTIRE AGREEMENT

30. This Stipulation and Order contains the entire agreement between the Parties, and no statements, representations, promises, agreements, or negotiations, oral or otherwise, between the Parties or their counsel that are not included herein shall be of any force or effect.

IX. NO CHANGE IN OTHER LEGAL REQUIREMENTS AND OBLIGATIONS

31. Nothing in this Stipulation and Order shall be interpreted as or constitute a commitment that the Defendants take action in contravention of the APA, the NEPA, or any other law or regulation, substantive or procedural.

32. Nothing in this Stipulation and Order shall be construed to require any of the Defendants to obligate or pay funds or in any other way take action in violation of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other applicable appropriation law.

33. Nothing in this Stipulation and Order shall be construed to restrict or modify any discretion Defendants may have under law, including without limitation, NEPA, or

any other matter not addressed by this Stipulation and Order.

34. Nothing in this Stipulation and Order shall be construed to create rights in, or grant any cause of action to, any person or entity not party to this Stipulation and Order.

X. NOTICES

35. Any notices required to be served under this Stipulation and Order shall be in writing and sent by (a) electronic mail or facsimile and (b) a form of mail or other delivery that includes confirmation of delivery. All notices shall be addressed to each Party at the address specified below, or to any address a Party subsequently designates by notice to all other Parties given in accordance with this paragraph.

36. Notices submitted pursuant to this Section shall be deemed submitted upon receipt, unless otherwise provided in a modification to this Stipulation and Order or by mutual agreement of the Parties in writing.

For Raritan Baykeeper, Inc. (d/b/a NY/NJ Baykeeper) and Andrew J. Willner:

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XI. EXECUTION BY THE PARTIES

37. The undersigned representatives of each Party certify that they are authorized by the Party to consent to the entry of this Stipulation and Order. This Stipulation and Order may be executed in counterparts.

XII. EFFECTIVE DATE

38. This Stipulation and Order shall become effective upon signature by the Court.

XIII. EXHIBITS

- Exhibit A: September 8, 2006 FCD/WQC
- Exhibit B: Section 2900 of specifications accompanying Invitation for Bids for Contract Area S-NB-1
- Exhibit C: Geomorphological/Geophysical Characterization of the Nature and Dynamics of Sedimentation and Sediment Transport in Newark Bay Focusing on the Effects Related to the Continued and Future Federal Navigation Channel Deepening and Maintenance, Figure 78
- Exhibit D: Newark Bay Study Area Coordination Plan, dated December 21, 2005

XIV. APPENDICES

Appendix A: Near Field Turbidity/Total Suspended Sediments Pilot Study

Appendix B: Stratified Sampling Project

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FOR PLAINTIFFS
NRDC and GREENFAITH:

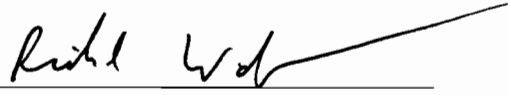
Date: Oct. 16, 2007



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FOR PLAINTIFFS
RARITAN BAYKEEPER, INC. and
ANDREW WILLNER:

Date: Oct 17, 2007



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Date: 10/17, 2007

By: *Sarah E. Light*
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SO ORDERED:

Shira A. Scheindlin
UNITED STATES DISTRICT JUDGE

Shira A. Scheindlin, USDJ

Date: Oct. 19, 2007

Appendix A: Near Field Turbidity/Total Suspended Sediments Pilot Study

1. The Defendants shall, consistent with United States Army Corps of Engineers Safety and Health Regulations EM 385-1-1, conduct a Near Field Turbidity/Total Suspended Sediments Pilot Study (“NFTTSS Pilot Study”) within the S-NB-1 “narrow channel” contract area as set forth below.
2. The NFTTSS Pilot Study will test the near-field use of both optical (OBS) and acoustic (ADCP) sensors to collect near-field optical and acoustic backscatter measurements, which will then be converted into Total Suspended Sediments (“TSS”) levels, by deploying OBS sensors mounted to the bucket, and OBS and ADCP sensors to the dredge platform. Specifically, the study will attempt to determine:
 - a. whether either type of sensor, mounted as set forth above, is sufficiently reliable and resilient to continuously record and/or transmit data from which quantitative backscatter measurements can be obtained continuously and in real time, within a turbulent near-field environment, over a time span routinely involved in navigational dredging; and
 - b. if either type of sensor were found to demand repair, maintenance, and/or recalibration, on a frequency that made continuous monitoring impractical, whether the sensor could be hardened to avoid the need for such repair, maintenance, and/or recalibration.
3. Defendants shall prepare and provide to Plaintiffs, NJDEP and NYSDEC a draft Scope of Work prior to commencing the NFTTSS Pilot Study. Prior to issuing a final Scope of

Work, Defendants shall consider in good faith any comments on the draft Scope of Work that Plaintiffs, NJDEP and/or NYSDEC submit to Defendants, provided such comments are submitted within fourteen (14) days of the commenter's receipt of the draft Scope of Work (or within a longer period of time at the discretion of Defendants). Defendants shall retain ultimate discretion as to incorporation of any specific revisions proposed by the commenters into the final Scope of Work. Defendants shall provide a copy of the final Scope of Work to Plaintiffs, NJDEP and NYSDEC prior to initiating the NFFTSS Pilot Study. No later than two (2) months after approving the final Scope of Work, Defendants shall provide to Plaintiffs a written response to any comments that Plaintiffs, NJDEP and/or NYSDEC timely submitted on the draft Scope of Work.

4. Defendants shall provide access to at least one qualified technical expert, as designated by Plaintiffs, to observe the field work for the NFFTSS Pilot Study. The number of additional personnel permitted to observe field work may be limited in the discretion of the Defendants due to health and safety conditions.
5. The NFFTSS Pilot Study shall take place during dredging of non-HARS suitable materials from an area within the S-NB-1 "narrow channel" contract area that is subject to moderate to high current velocities characteristic of tidal flows in the main Newark Bay channel reaches. Measurements shall be taken at a range of conditions in the tidal cycle.
6. Defendants shall request any FCD/WQCs from appropriate State regulatory agencies that may be necessary to conduct the NFFTSS Pilot Study.
7. Following the completion of the field work described in paragraphs 1 and 2 of this

Appendix, Defendants shall prepare a technical report (the “NFTTSS Pilot Study Report”) that:

- a. addresses each of the issues set forth in paragraphs 2.a and 2.b of this Appendix;
 - b. analyzes the feasibility of applying the pilot-tested configuration of optical and acoustic backscatter instrumentation and data collection capability or a refinement thereof to future HDP activities within the NBSA and the anticipated efficacy of such pilot-tested measures to assist in minimizing dredging-induced sediment resuspension during such dredging activities;
 - c. presents all measured optical and acoustic backscatter levels, with corresponding information describing, for each measurement, the location in the NBSA where it was taken, the date and time when it was taken, and the type of instrument used; and
 - d. presents all gravimetric water sample calibration data collected to generate the data set used to establish a relationship among optical backscatter measurements, acoustic backscatter measurements, and TSS concentrations. These calibration data are distinct from instrumentation calibration that are performed by the manufacturer.
8. Defendants shall complete the NFTTSS Pilot Study Report prior to submitting a request for an amendment to an FCD/WQC to support exercising of any of the Contract Option Areas defined in paragraph 8 of this Stipulation and Order. If Defendants complete the NFTTSS Pilot Study Report prior to applying for an FCD/WQC for contract area S-NB-2,

AK-1, AK-2 or AK-3 of the HDP as defined in the Final EA, then Defendants shall not be required to apply for an amendment to the FCD/WQC for that contract, as set forth in paragraphs 8 and 9 of this Stipulation and Order.

9. Prior to finalizing the NFTTSS Pilot Study Report, Defendants shall circulate a draft NFTTSS Pilot Study Report to Plaintiffs, NJDEP and NYSDEC for comment.

Defendants shall consider in good faith any comments on the draft submitted by Plaintiffs, NJDEP and/or NYSDEC, provided that such comments are submitted within twenty-one (21) days of the commenter's receipt of the draft NFTTSS Pilot Study Report (or within a longer period of time at the discretion of Defendants). Defendants shall retain ultimate discretion as to incorporation of any specific revisions proposed by the commenters into the final NFTTSS Pilot Study Report.
10. Defendants shall in good faith consider the results of the NFTTSS Pilot Study Report in the preparation of any specifications for and any determination to proceed with any HDP dredging contract or contract option for work within the NBSA that is awarded subsequent to completion of that Report.
11. Promptly upon completion of the final NFTTSS Pilot Study Report, Defendants shall provide a copy of that Report to Plaintiffs, NJDEP, NYSDEC, and USEPA, and shall make the Report available to members of the public upon request. No later than two months after completing the final NFTTSS Pilot Study Report, Defendants shall provide to Plaintiffs a written response to any comments that Plaintiffs, NJDEP and/or NYSDEC had timely submitted to Defendants on the draft NFTTSS Pilot Study Report.

APPENDIX B : TECHNICAL TEAM

USACE-NYD

Jenine Gallo - Chief, Estuary Section, Environmental Analysis Branch, Planning Division
Catherine Mulvey – Technical Team Co-Lead
Ronald Pinzon – Technical Team Co-Lead
Bryce Wisemiller – Technical Team Member

U.S. Army Engineer Research and Development Center Dredging Operations Technical Support Program

Dr. Douglas Clarke – Technical Team Lead
Kevin Reine – Technical Team
Chuck Dickerson – Technical Team

Consultant Technical Team

HDR

Sarah Zappala – Project Manager
David Davis – Technical Team Lead
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Battelle

Betsy Barrows – Project Manager
Amanda Maxemchuk – Technical Team

A special thanks to John Downing, technical advisor/OBS manufacturer, and Dr. Frank Bohlen, the Plaintiffs technical observer, for participating in this study.