



Judge: Delaware ‘sat on its hands’ regarding Corps of Engineers’ dredging proposal

Attorney General Beau Biden watched the proceedings from the audience Tuesday, but did not argue the case.

By Lee Williams

The State of Delaware asked District Court Judge Sue Robinson Tuesday for an injunction that would halt the Army Corps of Engineers’ controversial plan to deepen the Delaware River from 40 to 45 feet.

Delaware Deputy Attorney General Jennifer Oliva presented the state’s case before a packed courtroom, which included several longshoremen from the Port of Wilmington who had ball caps that said “Dredge Now!”

Oliva castigated the Corps of Engineers for its decision to move forward with the plan without obtaining Department of Natural Resources and Environmental Control (DNREC) permits, calling it a “surprise” and a “unilateral decision,” until Judge Robinson interrupted.

“I am taken aback by the State of Delaware’s constant use of ‘surprise’ and ‘unilateral decision,’” Robinson said. “The process has been going on for years, and it’s striking to me that the State of Delaware has sat on its hands for years. Am I supposed to set that aside and start my history in 2009?”

Congress authorized the dredging plan in 1992. The Corps first applied for state permits in 2001. Two years later, a DNREC hearing officer recommended rejecting the plan. It wasn’t until July 2009 that DNREC Secretary Colin O’Mara formally denied the Corps’ dredging proposal.

After the denial, the Corps took steps to move the plan forward until Attorney General Biden’s office filed suit to stop the plan. The State of New Jersey and five environmental groups quickly joined the suit.

“It is true that from 2003 until the secretary ruled recently in July, Delaware didn’t formally address the permits,” Oliva said.

This delay by the state was noted by Judge Robinson and Kent Hanson, a U.S. Justice Department attorney representing the Corps of Engineers.

“The Corps has never said that the hurdle to comply with state law is way too high,” Hanson said. “In this case it’s way too long.”

Robinson peppered Oliva with questions about the steps needed to implement the dredging plan.

“It’s obvious Congress wants this proposal to go forward, and whenever you dredge a riverbed you have consequences. The question is, what obstacles does the Corps need to get through to implement Congress’ directive?” the judge asked Oliva. “My real question is how do we move this project forward? What is left to be done?”

Oliva pointed out that both the federal Clean Water Act and the Clean Air Act require the Corps to coordinate with the states involved.

“The Corps hasn’t said one reason which precludes them from complying with state law,” Oliva said.

During his presentation, Hanson acknowledged the legal requirement to comply with state water quality regulations.

“But there is a ‘but’ which Delaware wants to leave out of the statute: unless the state action effects or impairs the Army’s authority to maintain navigation.”

Oliva added that the Corps’ responsibility to maintain a navigable waterway also did not apply, as the river hosts much traffic already, at the 40 feet depth.

“The Secretary of the Army has a duty to maintain navigation, not enhance,” Oliva said. “Navigation on this river up to the Port of Philadelphia is robust. They’ve bragged about it.”

Hanson said the Corps has the authority to move forward without the permits. However, he said, they will still seek DNREC permits, even though they do not feel bound to obtain them.

He chided the state for claiming the dredging would stir loose harmful contaminants without offering any proof.

“The evidence, in terms of data and expert testimony, is all on this side, and there will be no irreparable harm,” he said, adding that the state’s claims had neither evidence nor causal links.

“It is a kind of fear mongering,” he said.

Oliva did not fully address the economic impact that could occur if the channel is not deepened, and larger vessels bypass the local ports in favor of those with deeper shipping channels.

Hanson said delaying or denying the proposal would produce harm.

“We’re not talking about economic harm to the government. We’re talking about economic harm to people,” he said. “In the public interest, we can’t ignore the environment, but we have to look at much more.”

Robinson will entertain additional written briefs for two weeks before ruling on the state’s request.

Contact investigative reporter Lee Williams at (302) 242-9272 or lee@caesarrodney.org

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