

October 11, 2019

Via U.S. Mail and Email

Environmental Resources Section
USACE Wilmington District
69 Darlington Avenue
Wilmington, NC 28403
WHNIP203@usace.army.mil

Re: Proposed Section 203 Wilmington Harbor Navigation Improvement Project (“WHNIP 203”): Comments Submitted Pursuant to September 13, 2019 Notice

This firm represents the Village of Bald Head Island (“VBHI”) in connection with the WHNIP 203 proposed by the North Carolina State Ports Authority (“Authority”). These comments are submitted on behalf of VBHI in accordance with the Notice soliciting public comment on the WHNIP 203, dated September 13, 2019, from the Planning and Environmental Branch of the Wilmington District for the United States Army Corps of Engineers (“USACE” or “Corps”).

I. INTERESTS OF PARTY SUBMITTING COMMENTS

Bald Head Island sits at the mouth of the Cape Fear River and is immediately adjacent to the shipping channel which is the subject of the WHNIP 203. The deepening in the year 2000 of that shipping channel from 40 to 44 feet in the vicinity of Bald Head Island resulted in harmful effects on the Island’s beaches, roads, homes, infrastructure and critical environmental habitat for endangered and threatened species of sea turtles, birds (including the Piping Plover and Wilson’s Plover), and other wildlife. Since 2000, VBHI has spent over \$47.0 million in public funds to address beach erosion by a terminal groin, sand placement projects, and other measures. The Draft Section 203 Report (“Draft Report”) proposes to deepen the shipping channel from 44 to 48 feet, and VBHI believes, based upon experience, as well as on consultation with experts, that this project’s impacts will be comparable to those experienced since 2000. In addition, VBHI believes there will be other synergistic, harmful effects to the Cape Fear River and adjacent environs, habitats, residents, and visitors.

II. PRELIMINARY COMMENTS REGARDING PROCESS

A. Draft Report Should be Disregarded *en toto*.

We urge the Corps not to rely on the Draft Report or any of its Appendices. The process involved in the development of that Report was fatally flawed: the Authority failed to follow any of the significant Corps guidance concerning the preparation of a 203 study, it excluded the

public from meaningful participation, and it thereby produced a document that is narrowly focused on only the Authority's interest. Attached as Appendix A to these comments is a letter submitted to the Authority outlining our objections concerning its development of the Draft Report. The Authority has not responded to this letter.

The recent comments of the Assistant Secretary of the Army (Civil Works) (ASA(CW)) made after its review of the Draft Report, attached as Appendix B, provide further evidence of the substantive deficiencies in and unreliability of the Draft Report's underlying data, analytical methods, and conclusions. These comments (and VBHI concurs with them in large part), include:

1. "[T]he objectives are not linked to a method to analyze beneficial contributions to national economic development." Comments, A.1.
2. "Many of the criteria listed are unnecessary and could potentially eliminate solutions for the identified problems." Comments, A.2.
3. "The screening of measures for the study is flawed." Comments, A.3.
4. Lack of proper documentation concerning fundamental assumptions: "the project assumptions/future without project conditions significantly affect the plan formulation and selection of a plan." Comments, A.4.
5. Lack of consideration of more than one alternative. "Reasonable alternatives other than channel depth increments with less significant environmental effects, such as relocating facilities should be considered in the report in greater detail to compare the economic and environmental advantages and disadvantages. Decision makers need sufficient information to identify the recommended plan." Comments, B.2.
6. "The report...understates environmental effects in summary statements without fully and objectively relating impacts to the resource characterizations and analysis that preceded it. [Comments then give specific examples]" Comments, B.2.
7. "The mitigation recommendations are not linked to an explicit consideration of the level of significance of the resource and impacts and may imply a greater commitment to mitigation than is justified." Comments, B.4.
8. Overestimated commodity forecast "[d]irectly impacts both plan selection and justification." Comments, C.3.
9. "[F]aulty assumption" that all USEC-Asia TEUs will be diverted to alternate ports "has direct impact on all economic benefits claimed." Comments C.4."[I]t is not realistic to assume that 100% of the fleet for USEC-Asia will transition to the largest containership vessel classes....This comment has direct impact on all of the economic benefits claimed." Comments, C.5.
10. Even assuming transition to alternative ports absent the project, the project benefits "are significantly overstated" for additional reasons specified in the Comments. Again; "This comment has direct impact on all economic benefits claimed." Comments, C.6.

11. Other examples of key assumptions without evidence are cited. Again: “This comment has direct impact on all economic benefits claimed.” Comments, C.7.
12. The Comment’s Summary concerning economic analysis: “[T]here is a high likelihood that neither the -47FT nor -48Ft are the NED plan....Directly calls into question the NED plan and demonstrating economic feasibility as required for Sec 203 reports.” Comments, C.8. See also Comments, C.9.
13. The absence of the required independent peer review “has direct impact on all the economic benefits claimed.” Comments, C.10.
14. “The report lacks a discussion [of] relevant information about observed and expected climate change impacts in hydrologic analyses developed for the study.” Comments, D.1.
15. “The report and discussion are not fully compliant with USACE policy on S[ea] L[evel] R[ise].” As a result, “[t]hese projections are understating the changes in future water levels....Future changes in water levels, salinity intrusion due to RSLR and further channel alteration are likely understated. The section listing constraints does not include increases in water levels or induced flooding....[M]odeling is likely underestimating impacts since the RSLR rates are low by a significant amount.[¹] Changes in flood risk for the project condition were not investigated.” Comment D.2.
16. The study does not cite proper authority for the report. Comments, E.1.
17. “No reference is made to the mitigation required for this project.” Comments, E.3.
18. “There is no Real Estate Plan (REP)....The significance of this concern is high because it describes a fundamental problem with the project that could affect the recommendation, success, or justification of the project.” Comment, E.5.
19. **Most significant for the DEIS process are the ASA(CW) Comments about NEPA/Impacts:** “The CFRE is a funnel shaped estuary, which has an increasing tidal range due to incremental deepening and channel maintenance over the last 150 years. Further deepening will increase these changes and create additional flood risk from coastal storms due to storm surge amplification (Familkhalili and Talke, 2016). Nuisance flooding frequency will likely increase as a result of the project. As the tide range expands, some stormwater drainage outfalls to Wilmington harbor will be impacted, resulting in decreased gravity drainage performance. Future salinity changes in the estuary have been underestimated. Future freshwater inputs from the watersheds may trend upward under climate change ameliorating the impacts of the deepening slightly” Comments D.2.

¹ It appears [Draft Report, Appendix A,p.8-3] that for all shoreline and entrance modeling, only the lowest RSLR scenario was used (34FT), which is equivalent to *no increase* in sea level rise rates over those experienced historically, contrary to national Corps guidance and directives.

In addition, VBHI points out the following Draft Report deficiencies that directly impact the proper scoping of the NEPA issues:

1. Failure to consider the historical experience of the last widening/deepening project, which encountered significant unanticipated logistical problems in removal of unexpected materials, impacting cost and schedules; these same materials can be anticipated in the same Reaches projected to be widened and deepened and must therefore be considered in alternative selection.
2. The efficacy of the last channel re-alignment. Part of that re-alignment has failed (cannot be maintained to current design) in the area of BHI Reach 1, and any further project modifications in that Reach must account for this in considering alternates.
3. The analysis of the operation of the relevant sand transport systems (discussed further below) is deeply flawed. *E.g.*, littoral transport rates cited are to a large degree based on a 1999 ERDC Report (CHL-99-18) which has proven to be grossly inaccurate. Proper understanding of these systems and the potential impact on them of each possible project alternative is necessary to a proper alternatives and cost-benefit analysis.

The Draft Report should not be relied on or form the basis for any part of the NEPA review. The proper scoping of this project should start afresh.

B. Report Preparation Questions.

We are also deeply concerned that the Draft Report may have been prepared in part by or in consultation with Tracey Jordan Sellers. On September 30, 2019, Ms. Sellers was sentenced in the United States District Court for the Southern District of Florida for making false official statements. The Joint Factual Statement for that guilty plea states that Ms. Sellers, while working for the Corps, also did work for an environmental consulting company (the “Company”) that worked on major Corps dredging projects in South Florida and other projects in North Carolina. More particularly, Ms. Sellers:

1. “participated substantially in USACE’s management of coastal dredging projects in the Southern District of Florida,” while also “perform[ing] technical reviews of [the] Company’s involvement in dredging projects in the Southern District of Florida and in Miami, Florida;”
2. reviewed and made edits on a Company project involving a state agency in North Carolina in November of 2014 and the winter and spring of 2015, which project was subject to review by the USACE Wilmington District Office, without Corps Ethics Office approval;
3. worked on and was paid for another North Carolina project for the Company, starting in October 2018, that would be subject to USACE review by the

- USACE Wilmington District Office without Corps Ethics Office approval—a project for which she was ultimately paid up to \$9,000.00;
4. “received project materials from, forwarded materials to, scheduled phone calls with, and participated in tele-conferences with Company related to the project;” and
 5. “falsely stated” to federal agents that “she had not ‘written or done anything or participated in any meetings’” about the North Carolina project.

See Joint Factual Statement, attached hereto as Appendix C. The Joint Factual Statement also states that Ms. Sellers violated federal ethics laws and regulations by, *inter alia*, (1) sharing confidential USACE documents with the Company, and (b) assisting the Company in contract negotiations and sharing sensitive internal government estimates in an effort to benefit the Company. *See id.*

Ms. Sellers entered into a plea agreement with the Government as part of the Government’s prosecution of her. *See* Plea Agreement, attached hereto as Appendix D. In that Plea Agreement, Ms. Sellers agreed to fully cooperate with the Government, including providing truthful and complete information and testimony before a grand jury, if called upon. *Id.* Further, a news report regarding the Port Miami dredging project that mentions the plea agreement states, “When asked if the agency was re-examining the work, a spokeswoman said officials were cooperating with the U.S. Attorney’s office, which did not respond to a request for comment.”

While none of the Plea Agreement, Joint Factual Statement, or news report say that Dial Cordy & Associates was the environmental consulting company for whom Ms. Sellers worked, given that Dial Cordy was involved in Florida and has offices in Wilmington, North Carolina, and may have been involved in the North Carolina projects (especially in light of the dates of the referenced projects), we believe these questions merit further investigation.

The Draft Report does not identify Ms. Sellers in the List of Prepares and reviewers, nor is she identified in the References section. If in fact she worked on this project, this omission in the Draft Report disclosures should also be investigated and explained.

All of the foregoing issues potentially bear on the reliability and credibility of the materials being submitted to the Corps for consideration in its evaluation of this project.

III. THE CORPS SHOULD CONDUCT THE CORRECT PROJECT ANALYSIS.

The notice dated September 13, 2019 invited comments which “will be **considered during preparation of the integrated study report** and the Draft Environmental Impact Statement (DEIS).” (emphasis added). We therefore submit these comments for use in addressing the many deficiencies pointed out above (and in Appendices A and B) in the preparation methodology of the Draft Report as well as in applying the NEPA processes, including proper scoping and alternatives analysis, in analyzing the proposed project. The first

step is public involvement and a proper determination of the Federal interest, both discussed below.

A. Create Active Stakeholder Groups.

We urge public involvement in both scoping and all other phases of the analysis of this project and its environmental impacts, as required by the rules and guidelines implementing NEPA. “As part of the scoping process the lead agency shall: (1) invite the participation of affected Federal, State, and local agencies, any affected Indian tribe, the proponent of the action, and other interested persons (including those who might not be in accord with the action on environmental grounds)....” 41 CFR §1501.7(a). Agencies must “[m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures.” 40 CFR §1506.6. See also Corps Planning Guidance Notebook ER 1105-2-100 (22 April 2000) (“PGN”) Appendix B.

In addition to being held early, scoping meetings should focus on specific issues and have multiple meetings if necessary to target specific issues and audiences. PGN B-5 c (2) (c). Public meetings “can serve five basic functions: information giving; information receiving; interaction; consensus forming/negotiation; and, summarizing.” PGN B-5 c (2) (e)(3). The public meeting held September 26, 2019 in Wilmington was useful for the first purpose—information giving. In light of the complexity of the issues already identified by the Corps, including the lengthy list of environmental and cultural resources to be assessed and the large geographic area impacted by the proposed project, and considering the lack of opportunity for public involvement heretofore, it is important to form stakeholder groups to formulate the exchange of information from interested constituents consistent with this guidance and to participate in one or more future public meetings for the other purposes described in the guidance for public meeting and workshops. In addition to stakeholders specifically interested in environmental consequences of the proposed project, and in light of the technical complexity of the alternatives, VBHI suggests that a technical advisory committee also be formed.

B. Make the Extant Data Easily Available to the Public.

We support the Corps’ decision to post the Draft Report on its website and can think of no justification for the Authority’s own failure to do so. It is critical that there be full disclosure of all data, reports relied on, studies conducted, and other information related to this project, and that the Authority disclose this information promptly and in a way easily accessible to the public so that the public can be informed about, and provide feedback on, the many and complex issues this project presents.

C. Substantive Issues to be Addressed in Scoping.

1) Federal interest (“purpose and need”).

If approved, this will be a Federal project not the Authority’s project. Therefore, the non-Federal interest (the Authority) is not free, as it has done in the Draft Report, to draft the “purpose and need” as it sees fit. PGN Chapter 2, Section 2-2 stresses the importance of focusing on the Federal objective, the Federal problems, and the Federal opportunities related to this project. To date, the analysis has been entirely parochial.² Indeed, the alternative identified in the Draft Report is in fact a local preferred alternative which when properly analyzed results in a dramatic shift in cost sharing under Federal guidelines. The DEIS process should not start from the purpose and need analysis contained in the Draft Report.

The Federal problem is the emergence of larger ships challenging the capacity of many ports (not just Wilmington) and limited Federal funds to assist ports in the accommodation of the same. The Federal opportunity is the coordination of a national maritime transportation strategy that makes the best and least environmentally damaging use of the facilities of all east coast ports, and targets Federal dollars for port enhancements in a way that advances that overall strategy in a rational manner. That is the alternatives analysis and the cost-benefit analysis that should be embraced as the first step of the scoping of this project. As the ASA(CW) Comments suggest, the economics analysis necessary to justify this as a Federal project has not been established, and the assumption that the Authority must expand to survive is unsupported by empirical data. For example, most Panamax vessels will have partially off-loaded prior to arriving at this Port (implicitly acknowledged by the project’s deepening proposal which, even if implemented, would not accommodate a fully loaded Panamax vessel drawing 51FT).

2) Impacts

Scoping also requires the consideration of at least five significant areas of impact which require consideration at the scoping stage.

i) *Sand Management and Beach Erosion*

The sand transport systems on the coast of North Carolina are a critical part of both its Coastal Protection and Future Resiliency Plans. The Draft Report makes no commitment to retaining beach quality sand in the coastal sand transport system or placing it strategically on the beaches that will be directly affected by this project.³

² The Report itself undercuts a finding of a Federal, rather than a purely State, interest when it reveals that 87% of the Wilmington container cargo is either from or bound to a destination in North Carolina. Draft Report, p. 111, Figure 2-18.

³ The Draft Report, p. 58, states that hopper dredges will be used in the construction of the project, which are incompatible with economically efficient placement of beach quality sand on beaches. Hopper dredges cannot be used to expand the channel limits as proposed.

This flies in the face of Regional Sediment Management (“RSM”) strategies as formulated by the South Atlantic Division (“SAD”). Proper analysis of this project and alternatives to this project must consider these impacts, the costs of mitigating these impacts, and the parties who will bear the responsibility for this mitigation (as discussed more below). We know from recent prior projects that the erosion impacts on our coastal beaches is significant. VBHI alone spent nearly \$47 million protecting and re-nourishing its beaches since the last channel deepening and widening project. This project will have more profound impacts and those impacts need to be thoroughly studied, understood, and appropriately mitigated.

ii) *Estuarine and Riverine Erosion*

The project will also have significant estuarine and riverine erosional impacts. While the channel deepening itself may not directly impact the adjacent shorelines of the entire Cape Fear River, it is undisputable that the larger vessels which are to be specifically accommodated by this project will cause significant erosional impacts. The documented impacts at the Southport and Brunswick Town have already been observed and expensive protective structures were necessary to protect the historic structures associated with the latter site. The Town of Southport is currently in the permitting phase of a shoreline stabilization project. Other properties on the Cape Fear River will be similarly impacted, and sensitive habitats (such as aquatic, avian, and other wildlife nesting and nursery areas) will be damaged by the significant increase in erosion forces. The Draft Report does not even acknowledge the existence of these estuarine impacts (the discussion of erosion is limited to coastal beach erosion; Draft Report Section 2.2 and Section 8). And the Draft Report’s analysis of the erosion impacts of the larger vessels is both frightening and appallingly naive: it acknowledges that the “bed shear stress” created by the larger vessels will be 3 times greater than that caused by the current vessels, Draft Report, p. 164, but it concludes this is not significant since fewer vessels will be transiting. To paraphrase the Report’s logic: A few really big waves are less destructive than many small ones. That is not the experience of sensitive sub-aquatic vegetated (SAV) communities, flats, marshes, or developed waterfront properties. Moreover, the latter ridiculous assumption implies that the Port’s current vessel traffic will be reduced by deepening the channel—when in effect it should theoretically increase.

iii) *Salinity*

There is no doubt that increasing the depth and width of the Cape Fear River (as with the 2000 project) all the way up to Wilmington will further increase salinity intrusion along that entire stretch and upstream, as the ASA(CW) Comments noted. The effects of the prior deepening project are plainly evident by simply driving through the shorelines near Wilmington: The forests of dead trees are everywhere. The Draft Report tries to minimize these impacts by citing that “salinity intrusion ≥ 0.2 ppt in the Cape Fear River as far upstream as the mouth of the Black River would require the

simultaneous occurrence of an exceptionally high tide and an exceptionally low inflow rate.” Draft Report, p. 21. However, climate research widely forecasts a significant increase in the future occurrence of extreme droughts (and hence low input flow) and the Draft Report itself predicts significant increases in high tides caused by the project (discussed below). So both of the factors dismissed by the Draft Report are likely to occur simultaneously with regularity. Moreover, the salinity of the Cape Fear River itself is only one concern: the impact of that increased salinity on adjacent and connected ground waters, and its influence on the advancing “wedge” of salt water related to ongoing sea level rise should be understood, especially considering the fact that many residents are dependent on groundwater for their drinking water. The extent of the increased salinity that will be caused by this project is an important factor to be considered in the impacts of this project and the mitigation that will be necessary, assuming mitigation is feasible.

iv) *Tides, Sea Level Rise, and Resiliency*

Climate change, sea level rise, storm event flooding and high frequency “nuisance” tidal flooding all will have project caused impacts especially in the developed areas of the City of Wilmington. The Draft Report starts with antiquated data (1987 projections of sea level rise), and even these result in the Draft Report projecting 4.6 inch increase in the MLW level in downtown Wilmington. As the ASA(CW) Comments point out, these impacts are repeatedly underestimated, trivialized, or ignored, and the flooding effects of the project are not even explored in the Draft Report. See ASA(CW) Comments, D.1 and D.2. The significance of these impacts bears repeating: “Further deepening will increase these changes [in tidal range] and create additional flood risk from coastal storms due to storm surge amplification [citation omitted]). Nuisance flooding frequency will unequivocally increase as a result of the project. As the tide range expands, some stormwater drainage outfalls to Wilmington harbor will be impacted, resulting in decreased gravity drainage performance.” ASA(CW) Comments, D.2.

Related to these studies is the ongoing Corps South Atlantic Coast study assessing Coastal Resiliency and threats from storms and future climate forces. Proceeding with a half billion dollar project without considering and embracing the importance of this comprehensive federal study on this significant waterway would be reckless. We believe the precepts (and inputs) from the study are an important factor to be considered in the assessment of this project.

3) Mechanisms for Assuring Mitigation

WRDA has stringent requirements concerning mitigation of impacts to fish and wildlife and their habitats. Such mitigation must be provided prior to or concurrently with construction of

the project, 33 U.S.C. § 2283(a)⁴, and must be pursuant to a specific mitigation plan that is submitted with the Secretary's report seeking plan authorization. Under § 2283(d), even submission of a proposal to Congress for authorization of a project alternative without such an accompanying mitigation plan is prohibited. *Id.* The statute achieves the "balanced development" of projects, assuring mitigation and fiscal accountability, through four mechanisms: (1) the Secretary must assess potential impacts in advance, as part of a project proposal; (2) the Secretary must undertake the mitigation before (or concurrently with) construction of the project (*i.e.*, before the impacts occur); (3) the cost of mitigation is included in the project budget; and (4) the cost of mitigation is borne by the project sponsors. These elements together ensure that mitigation in fact occurs and that Corps water resource projects are fiscally and environmentally sound. *See* 33 U.S.C. § 2281(b)(1) ("Assessments. For all feasibility reports for water resources projects completed after December 31, 2007, the Secretary shall assess whether—(1) the water resources project and each separable element is cost-effective"). The Draft Report ignores these statutory mandates, and development of these elements is a major part of the scoping of this project.

The impacts of this project to estuarine, coastal, and ocean habitats are significant and must be assessed and mitigated **before** they occur, as required by WRDA. For example, before vessels generating "bed shear stress up to three times greater" than that caused by the existing fleet are allowed to transit the Cape Fear River, systems and mechanisms to protect the threatened coastal and interior shorelines and habitats must already be in place, and this project must, by the terms of WRDA, have a *specific* plan in place to accomplish this prior to submission to Congress for authorization.

Mitigating the historical coastal and inlet beach erosion caused by both the project's initial construction in the 1900's through its ongoing present day authorized design and channel maintenance is even more troublesome since: the Corps cannot legally be held responsible to perform later actions that are not either (1) elements of the approved project or (2) mitigation *required* for project impacts. VBHI learned this expensive lesson when, after the last channel deepening project, the Corps' dredging and beach re-nourishment operations fell behind schedule and significant erosion of the VBHI beaches accelerated. VBHI sued the Corps to enforce the re-nourishment conditions made by the Corps, repeated as conditions of the CZMA concurrence, and specifically affirmed in the Corps' FONSI approving the prior project. VBHI, the courts held, was without a remedy because the Corps cannot be sued to enforce beach re-nourishment activities post-project construction:

⁴ The Senate Report to the 1986 reauthorization of WRDA, which revamped the mitigation requirement, states: "Non-Federal interests often are reluctant to support fish and wildlife mitigation efforts once a project is in place and consequently this work is frequently not performed. To assure balanced development, this section seeks several basic goals." S. Rep. No. 99-126, at 24 (1985), reprinted in 1986 U.S.C.C.A.N. 6639, 6661.

We therefore conclude that the Corps' implementation of the Wilmington Harbor Project, including the ongoing periodic maintenance dredging and resulting nourishment of nearby beaches, does not constitute “agency action” within the meaning of the APA.

Village of Bald Head Island v. U.S. Army Corps of Engineers, 714 F.3d 186, 194 (4th Cir. 2013).

Therefore, to assure that future harm is avoided or mitigated, and to assure the on-going need for sand placement on beaches to retain sand in the delicate ecosystems of which it is a part, the project design itself must incorporate mitigation elements as project elements with the cost thereof projected and included in the cost-benefit analysis of the project, as required by WRDA. It appears that in other Corps Districts this is accomplished through the policies and principles associated with Regional Sediment Management, as adopted by SAD.

IV. SUMMARY AND CONCLUSION

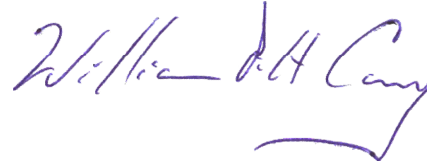
In summary, VBHI asks the Corps to:

1. Disregard the Draft Report in its entirety.
2. Investigate and determine the circumstances under which the Draft Report was prepared.
3. With public involvement, appropriately address and develop the project need, scope, alternatives, costs, and benefits consistent with the requirements of NEPA.
4. Create active stakeholder groups and a technical advisory committee.
5. Make the Authority's and other data and studies cited readily available to the public.
6. Identify appropriate processes to gather data/information and analyze the following substantive issues:
 - a. The extent of the Federal interest in this project.
 - b. Impacts on local and regional sand management and beach erosion on project-adjacent areas.
 - c. Impacts on estuarine erosion and riverine flooding.
 - d. Salinity impacts.
 - e. Tidal, SLR, and resiliency impacts.
7. Identify appropriate mechanisms for assessing needed mitigation and assuring the satisfaction of mitigation requirements, especially in light of 33 USC § 2283 and *Village of Bald Head Island v. Corps*.

Items 1-5 are necessary for a fair and impartial process consistent with Corps regulations and guidance. Items 6 and 7 are necessary before a meaningful consideration of alternatives can be made, and the costs and benefits of each assessed.

VBHI looks forward to working with the Authority, USACE, and stakeholders on this project to ensure that proper processes and sufficiently thorough and detailed analyses occur for the protection of all affected stakeholders, the public, the project sponsors, and the environment.

Sincerely,



William P.H. Cary



Joseph A. Ponzi

cc: Paul Cozza
Andrew Sayre, Mayor, Village of Bald Head Island
R.D. James, Assistant Secretary of the Army (Civil Works)
Justin McCorkle, Wilmington District Counsel, U.S. Army Corps of Engineers
Braxton Davis, Director, Div. of Coastal Management, NC DEQ
Daniel Govoni, Federal Consistency Coordinator, Div. of Coastal Management, NC DEQ
Susi H. Hamilton, Secretary, N.C. Dep't of Natural and Cultural Resources
Deborah Ahlers, Mayor, Town of Caswell Beach
Cin Brochure, Mayor, Town of Oak Island
Tim Hutchinson, Greenberg Traurig
The Honorable Richard Burr
The Honorable Thom Tillis
The Honorable David Rouzer

APPENDIX A

August 29, 2019

Paul Cozza
Executive Director
N.C. State Ports Authority
2202 Burnett Boulevard
Wilmington, NC 28401

Re: Integrated Section 203 Study & Environmental Report
Wilmington Harbor, North Carolina Navigation Improvement Project

Dear Mr. Cozza:

Our firm represents the Village of Bald Head Island in connection with a Wilmington Harbor water resources project proposed by the North Carolina State Ports Authority ("NCSPA"). The proposed project is described in a document titled *Integrated Section 203 Study & Environmental Report* dated June 2019 (the "*NCSPA Report*") recently submitted by NCSPA to the Assistant Secretary for the Army – Civil Works ("ASA(CW)") for its review.

The Village notes it first received a copy of the *NCSPA Report* on July 22, 2019, and has not had an adequate opportunity to review and evaluate the substance of the document. Accordingly, this letter addresses only procedural issues related to the *Report*. The Village reserves the right to submit additional comments at a later time.

As discussed below, the *NCSPA Report* does not embody or reflect a proper feasibility study under Section 203 of the Water Resources Development Act (WRDA) of 1986, as amended, 33 U.S.C. § 2231 ("Section 203"). Its primary defect is the exclusion of meaningful public involvement in the planning for and preparation of the *Report*; the *Report* was prepared essentially behind closed doors, without public input.

The lack of public input affects the analyses and conclusions of the entire *NCSPA Report*. An after-the-fact NEPA review (as NCSPA now proposes) cannot cure the failure to involve the public from the outset. The *NCSPA Report* therefore is not a valid basis for authorizing or recommending any further action on the proposed project, and NCSPA should withdraw the report in order to fully involve the public in the scoping and analyses required, as contemplated by Section 203.

A. Background

The Village is situated on Bald Head Island, North Carolina, at the mouth of the Cape Fear River. Bald Head Island is directly adjacent to the Wilmington Harbor Channel, a federally

maintained navigation channel that connects the port city of Wilmington to the Atlantic Ocean. The Village has a long history of having to endure and respond to the impacts of the Corps' historical deepening and realignment of the Wilmington Harbor Channel.

The Channel was deepened in 1976 and several times subsequently. During 2000, the section of the Channel directly adjacent to Bald Head Island was reoriented closer to the Island, widened, and deepened by approximately four feet (40 to 44 feet). Since those Channel alterations, Bald Head Island's beaches have experienced accelerated erosion, which has resulted in destabilization of the Island's nearshore environs and increased flood tides immediately adjacent to the Island. In effect, the sand of Bald Head Island shores is both sliding into the Channel and being swept away by increased tidal forces.

These sand losses were anticipated during the planning and implementation of the prior Channel alteration project, and a Sand Management Plan was incorporated into the project's permit documents. The goal of that Plan was to retain dredged beach-quality material within the Island shore system and mitigate the predicted increase in erosion from area beaches. But the Plan has not been implemented as designed. The prior Channel alterations therefore have caused dramatic increases in erosion and sand volume loss on and near Island beaches—as predicted.

Because the Island has faced an ongoing sand deficit, the Village has taken a number of actions to mitigate or minimize impacts of the prior Channel alterations and protect its beaches, critical habitats, infrastructure, and residents. The Village's actions since 1995 have included permitting and constructing a terminal groin at the point of the Island (adjacent to the Channel); constructing and periodically replacing the sand-filled geotextile tubes in the groin field behind the terminal groin; and undertaking two storm mitigation renourishment projects to replenish lost sand on the Island's western and southern beaches. The costs incurred by the Village to plan, permit, and implement mitigation measures have exceeded \$47 million, as shown on **Exhibit A** hereto—and are ongoing.

NCSPA now proposes to widen and deepen the Channel yet again. The Village has seen this story before and has every reason to be concerned. Given the history of the Channel's impacts on Bald Head Island, the exclusion of the Village and the public from any meaningful input into the design and plan of NCSPA's proposed project is all the more troubling.

B. Procedural Deficiencies in the Development of the *NCSPA Report*

NCSPA failed to comply with the Corps' procedural mandates in planning and preparing the *NCSPA Report*. The *Report* is not a valid feasibility study pursuant to Section 203 and therefore cannot serve as a basis for authorizing or recommending further study of or action on NCSPA's proposed project.

Section 203 provides a mechanism by which “[a] non-Federal interest may undertake a federally authorized feasibility study of a proposed water resources development project and submit the study to the Secretary.” 33 U.S.C. § 2231(a)(1). Section 203 directs the Secretary to review a feasibility study under § 203 “for the purpose of determining whether or not the study, and the process under which the study was developed, each comply with Federal laws and regulations applicable to feasibility studies of water resources development projects.” 33 U.S.C. § 2231(b) (emphasis added).

Section 203 also directs that the Secretary “shall issue guidelines for feasibility studies of water resources development projects to provide sufficient information for the formulation of the studies.” 33 U.S.C. § 2231(a)(2). The Secretary has issued applicable guidelines, or “Engineer Regulations,” for a proper feasibility study, including:

- ER 1165-2-209: Studies of Water Resources Development Projects by Non-Federal Interests (Feb. 4, 2016);
- ER 1105-2-100: Planning Guidance Notebook (April 22, 2000); and
- ER 200-2-2: Procedures for Implementing NEPA (March 4, 1988).

The process undertaken by NCSPA to develop the *NCSPA Report* did not comply with the congressionally-directed guidelines. The Report is not derived from a transparent process with the full participation of the public, as the guidelines require.

1) NCSPA’s Plan for Public Involvement

The *NCSPA Report* describes the extent of public involvement in the generation of the *Report*, in Appendix Q. A review of that document, and consideration of what it does *not* contain, shows the following:

1. NCSPA announced the study by publishing a notice of an initial “Public Information” meeting in one public newspaper (no state-wide newspaper), and posting a notice on its website (one would have to know NCSPA was proposing this project to go to that website in the first place).
2. No announcement of the study, or any phase of the study or *Report* preparation, was published in the NORTH CAROLINA REGISTER, the mechanism utilized by state agencies (like NCSPA) to provide public notices. This is a prime resource for local cities and counties, NGOs, and citizens.
3. The August 8, 2018 “Public Information” meeting, described in the *NCSPA Report* as a “workshop,” was nothing more than an open-to-the-public display of several posters (Appendix A to the *Report*, except as noted in paragraph 5

below). No presentation was made, no questions were answered, and no meaningful opportunity to evaluate the proposed project or submit comments was given. Indeed, there was nothing substantive to comment on, as the posters demonstrate.

4. The only method for public input identified at the August 8, 2018 “Public Information” meeting was a reference to a website (“WH203NCPorts.com”) purportedly created by NCSPA for receiving public comment. This website was never activated and the domain name is currently available for purchase as having never been used. Small wonder the *NCSPA Report*, Appendix Q, Table 2, identifies only two comments received by NCSPA.
5. The *NCSPA Report* attaches copies of the posters purportedly presented at the “Public Information” meeting as Appendix A to Appendix Q. However, that attachment is not accurate. The poster actually displayed at the “Public Information” meeting requested public comment at the non-functioning web address (“WH203NCPorts.com”). *See* Exhibit B. But the poster provided to the Corps and included in the *NCSPA Report* does not provide a web address; instead, it provides an email address for submitting comments (WH203@NCPorts.com). The timing of and reason for the switch are unclear.
6. The August 8, 2018 “Public Information” meeting was the only public meeting concerning the *NCSPA Report*. No other public notice or forum was provided in preparing the study and *Report*. The next communication the Village received from NCSPA regarding the *Report* was a copy of the *Report* itself.

In the Village’s view, this history reflects no meaningful process or opportunity for public input. The *Report* does not satisfy (or even attempt to satisfy) the requirements of the Corps guidelines on public participation opportunities in the preparation of a Section 203 feasibility study.

- 2) ER 1165-2-209: Studies of Water Resources Development Projects by Non-Federal Interests (Feb. 4, 2016)

“In order to comply with Federal laws and regulations applicable to feasibility studies of water resources development projects”—as expressly required by 33 U.S.C. § 2231(b)—a Section 203 feasibility study “must contain the information required by ER 1105-2-100, ER 200-2-2 and any related guidance.” ER 1165-2-209 at B-1. Public involvement is a critical component of the process:

The Corps of Engineers has established procedures for public involvement in the Corps of Engineers own study process, partly because of legal and regulatory requirements, but also because a general policy of openness and public involvement enhances the credibility and acceptability of the final recommendations. Non-federal studies will be evaluated in part on the degree to which the study process was similarly open to the public. Appendix B of ER 1105-2-100 provides guidance on developing a public involvement strategy.

Id. at B-4.

3) ER 1105-2-100: Planning Guidance Notebook

Engineer Regulation 1105-2-100 “provides the overall direction by which . . . projects are formulated, evaluated, and selected for implementation.” ER 1105-2-100 at 1-1. The Regulation establishes a six-step planning process that “shall be used for all planning studies” to which the guidelines apply:

- Step 1: Identifying problems and opportunities;
- Step 2: Inventorying and forecasting conditions;
- Step 3: Formulating alternative plans;
- Step 4: Evaluating alternative plans;
- Step 5: Comparing alternative plans; and
- Step 6: Selecting a plan.

Id. at 2-2. It further provides that “[a]ll Corps planning studies are required to incorporate public involvement, collaboration and coordination with their Federal and non-Federal partners and the public. This should be initiated during step 1 of the planning process ... and continue throughout the planning process.” *Id.* at 2-15 (emphasis added).

Appendix B of ER 1105-2-100 describes the requirements for public involvement in Corps studies. A planner undertaking a feasibility study “shall conduct planning studies in an open atmosphere to attain public understanding, trust, and mutual cooperation and shall provide the public with opportunities to participate throughout the planning process.” *Id.* at B-1 (emphasis added). To achieve those goals, the planner must develop and implement a public involvement strategy that ensures effective collaboration with the public. *Id.* at B-2.

The Engineer Regulation requires that the public involvement strategy for a feasibility study must “maximize public input at each stage of the planning process.” *Id.* (emphasis added). Indeed, the Regulation recognizes that “[g]enerally, it is impossible to plan effectively for water resources development in accordance with Federal regulations and laws without open and effective

public involvement. Public involvement is integral to all phases and activities of the planning process.” *Id.*

While ER 1105-2-100 sets forth the components of a public involvement strategy, it does not specify a method for integrating public involvement into the feasibility study process, leaving it instead to the discretion of the study team. *Id.* “The important point to keep in mind is to provide an overall strategy that creates relevant, quality public involvement opportunities for those who have, or may have, an interest in the study.” *Id.* Further, public involvement is to be initiated early in the process, “to obtain a clear definition of public needs and concerns.” *Id.*

One key component of the feasibility study process is scoping, used to identify the likely “significant issues.” *Id.* at B-4. “Since much of the information on significant issues rests only with the public, public involvement is the heart of the scoping process. Therefore, the public involvement should be an integral part of the scoping process. A scoping meeting (or meetings, if desired), should be held early in the study.” *Id.*

With respect to the format of public meetings, the “guiding principle” under the Engineer Regulation is that “‘format follows functions,’ meaning that the design of the meeting should reflect the purpose of the meeting.” *Id.* Public meetings “should be designed to be fair and impartial two-way communications,” in order to facilitate “the exchange of views and information.” *Id.* at B-5 (emphasis added). The study team must also take into account the public comments it receives. “The planner should systematically describe, analyze and evaluate the layers of information” usually contained in public comments.” *Id.* at B-6.

4) NCSPA developed the NCSPA Report with no public involvement

In sum, the Corps regulations applicable to the development of a Section 203 feasibility study mandate public involvement in the study, early and often. The purpose of this mandate is to ensure that significant issues raised by the proposed project are adequately identified and evaluated, to address public concerns, and ultimately to attain public understanding, trust, and mutual cooperation. But NCSPA developed its *NCSPA Report* with no significant participation by the public. It neither developed nor implemented a public involvement strategy. It did not hold a public scoping meeting, nor did it undertake any effort to define public needs and concerns. The *NCSPA Report* fulfilled none of the public participation requirements for preparing a Section 203 feasibility study.

C. Procedural Deficiencies in the Development of the NEPA Portion of the NCSPA Report

Generation of a feasibility study under Section 203 must include a National Environmental Policy Act (“NEPA”) analysis. The Village understands that NCSPA now proposes to fund and

allow the Corps to lead a NEPA process, based on the already-prepared draft environmental report submitted with the *NCSPA Report*. The Village objects to this approach for two reasons. *First*, such a *post hoc* analysis cannot cure the failures (discussed above) to comply with the requirements for the other portions of the *Report*. *Second*, it cannot cure the failure to involve the public in the NEPA process from the beginning, as required by the Corps guidelines applicable to Corps projects generally and Section 203 feasibility studies specifically.

1) ER 1165-2-209

Because public participation is so important, the Corps guidelines emphasize that non-Federal interests should adhere to the requirements of NEPA in undertaking a feasibility study: “In order to fulfil the intent of NEPA and to comply with Corps of Engineers policy applicable to feasibility studies, the non-Federal interest should document their decision-making process involved in developing the proposed project in a manner that would comply with NEPA.” ER 1165-2-209 at B-7. Thus, the guidelines direct non-Federal interests to ER 200-2-2 and ER 1105-2-100, which “provide guidance on the requirements to comply with [NEPA].” *Id.* at B-6.

In addition, upon submission of a Section 203 feasibility study, “the Secretary must determine whether the study and the process under which the study was developed comply with Federal laws and regulations applicable to such studies. As such, draft environmental compliance documents are required to be submitted with the feasibility study.” *Id.* at B-8. In other words, Section 203 feasibility studies must comply with Corps requirements for the development of environmental compliance documents, which are found in ER 200-2-2 and ER 1105-2-100. Thus, “[a]fter review of comments from State and Federal agencies on the Section 203 feasibility study and draft NEPA document,” the Corps is directed to prepare a Finding of No Significant Impact or Record of Decision for execution by the ASA(CW) “[t]o close out the NEPA process.” *Id.* at B-9. The ASA(CW) will then submit its recommendation on the feasibility study to Congress, as directed by 33 U.S.C. § 2231. *Id.*

2) ER 1105-2-100

ER 1105-2-100 provides guidance on “applying the environmental evaluation procedures to planning water resources implementation projects while at the same time fulfilling the requirements of the NEPA and other statutory requirements,” by discussing and incorporating the CEQ regulations on NEPA and related Corps guidance, ER 200-2-2. ER 1105-2-100 at C-2.

3) ER 200-2-2 and NEPA

ER 200-2-2 serves as a supplement to CEQ regulations on NEPA, 40 CFR Parts 1500-1508. ER 200-2-2 at 1. Similar to ER 1105-2-100, the Corps guidelines require that the scoping process should be initiated “[a]s soon as practicable,” and should involve public participation. *Id.*

at 6. Further, “this process is the key to preparing a concise EIS and clarifying the significant issues to be analyzed in depth. Public concerns on issues, studies needed, alternatives to be examined, procedures and other related matters will be addressed during scoping.” *Id.*

The CEQ regulations implementing NEPA, incorporated into ER 1105-2-100 and supplemented by ER 200-2-2, provide additional detail on the requirement of public participation. Federal agencies are mandated, “to the fullest extent possible,” to “encourage and facilitate public involvement in decisions which affect the quality of human environment.” 40 CFR 1500.2. The NEPA process must be integrated with other planning “at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts.” 40 CFR 1501.2.

Consistent with the requirements of ER 1105-2-100, “[t]here shall be an early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action,” which requires the participation of the public. 40 CFR 1501.7. Likewise, agencies must “[m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures.” 40 CFR 1506.6. Where an EIS is required, the document “shall be prepared early enough so that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made.” 40 CFR 1502.5. In preparing a final EIS, an agency must assess, consider, and respond to the comments it receives. 40 CFR 1503.4.

- 4) NCSPA developed the environmental documents with no public involvement.

To start the NEPA process with the *NCSPA Report* and draft environmental document prepared by the non-Federal sponsor with no public input, eschewing even the public notice avenues open to it as a state agency and the familiar SEPA process, is inconsistent with the principles espoused in the federal environmental statutes and regulations as well as the Corps rules and guidelines. The approach of *Report* first, public input after, is counter to the intent and mandate of the regulations. A Section 203 feasibility study is required to include full public participation and environmental evaluations, reserving only those narrow issues that are uniquely within the Corps’ purview.

The Village’s overriding concern is that it may be denied the opportunity for it and the public to provide input on the alternatives, the evaluation, and the outcome in the meaningful way contemplated by the Corps’ mandate of robust public involvement. That concern appears validated by NCSPA’s recent Board of Directors Meeting on August 22, 2019, during which NCSPA projected that a draft EIS would be released in November 2019—before any opportunity for public

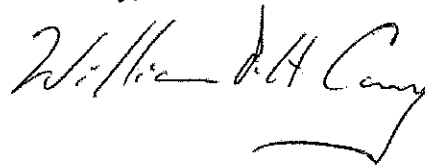
Paul Cozza
August 29, 2019
Page 9

input is given. Were the *NCSA Report* adopted as the basis for a draft EIS and NEPA analysis, the resulting prejudice to the Village and the public could not be cured.

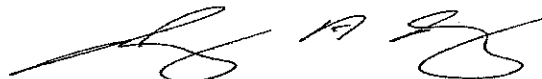
Section 203 requires that a non-Federal feasibility study *and the process under which it was developed* comply with Federal law. The *NCSA Report* does not. NCSA should withdraw its *Report* and, in conjunction with a Corps-led NEPA process, re-open all the elements of the feasibility study to move forward with a full, fair, and transparent process required by Federal law.

The Village has a critical interest in participating fully in the planning of any project that proposes to alter the dimensions of the Channel near Bald Head Island, including proper analysis of the project impacts and mitigation costs, and in ensuring that planning procedures are undertaken in compliance with federal and state law.

Sincerely,



William P.H. Cary



Joseph A. Ponzi

cc: Andrew Sayre, Mayor, Village of Bald Head Island
R.D. James, Assistant Secretary of the Army (Civil Works)
Justin McCorkle, Wilmington District Counsel, U.S. Army Corps of Engineers
Braxton Davis, Director, Div. of Coastal Management, NC DEQ
Daniel Govoni, Federal Consistency Coordinator, Div. of Coastal Management, NC DEQ
Susi H. Hamilton, Secretary, N.C. Dep't of Natural and Cultural Resources
Deborah Ahlers, Mayor, Town of Caswell Beach
Cin Brochure, Mayor, Town of Oak Island
Tim Hutchinson, Greenberg Traurig
The Honorable Richard Burr
The Honorable Thom Tillis
The Honorable David Rouzer

Exhibit A
Mitigation Costs of Navigation Channel Impacts

Previous Projects

• Engineered Beach Project 2009/2010		
• Dredging Contract	\$	14,800,000
• Interest Expense	\$	1,536,000
• Permitting – <i>Land Management Group, Inc., Olsen Associates, Inc., Legal</i>	\$	1,000,000
• Sand Filled Geotextile Groinfield		
• 1995	\$	320,000
• 2005	\$	850,000
• 2009/2010	\$	1,150,000
• Road Overwash		
• South Bald Head Wynd Road Repair 2004	\$	250,000
• Sandbag Revetment Wall	\$	250,000
• Sandpiper Trail Sandbag Wall + 2009 Repairs	\$	65,000
• 2007 Sand Placement (Assist USACOE- limited funds)	\$	900,000
• Periodic Beach Profile Monitoring	\$	595,000
• Required Jay Bird Shoal Biological Monitoring per Permit	\$	50,985
• Required Beach Front Biological Monitoring per Permit	\$	30,030
• Install Emergency Sandbag Revetment at the Point	\$	230,000
• Repair & Maintenance of Revetment at the Point	\$	8,000
• BH Creek 2006 dredging Project w/ sand placed on West Beach	\$	<u>737,858</u>
Total	\$	<u>22,772,873</u>

Additional Expenditures Reimbursed through FEMA Public Assistance Funds

• Bald Head Creek Dredging Project (Emergency Sand Source to mitigate Erosion due to Hurricane Irene)	\$	1,230,000
• Sand-filled Tube Groin Field Repairs due to Hurricane Irene	\$	<u>650,000</u>
	\$	<u>1,880,000</u>

Additional Expenditures Reimbursed through State of NC/DENR Water Resources Development Grant Funds

• Bald Head Creek Dredging Project 2006 (Southwind Construction Co.)	\$	<u>260,000</u>
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The Terminal Groin Project (2015)

- Terminal Groin GO Bond Expenditures @ 2-28-18 (2015 Project)
(Phase I Construction/Orion w/ Corps 2015 O&M Sand)
 - Terminal Groin Construction, part of the T6 project, placing approximately 1 million for the fillet sand to place behind the T6 structure \$ 7,876,858
 - Harbor Jetty Extension w Spurs \$ 1,456,316
 - West Beach and Row Boat Row (Bald Head Creek Dredging) \$ 1,261,026
 - Army COE Reimbursement \$ 105,341
 - MECA Reimbursement 830,514
 - Contract Reimbursements 140,363
 - Total \$ 1,076,218 \$ (1,076,218)
- Total Cost, Phase I \$ 9,517,982
- Breakwaters Project:
 - Construction of two detached rock breakwaters located north of the Marina
 - Intercoastal Maine, LLC \$ 895,052

Current Projects

Sand Re-nourishment / Groin Tube Project (2019)

- Sand Re-nourishment / Groin Tube Replacements (2019 Project)
(Phase II Construction/ SJ Hamill Construction, Bradley Textile Tubes)
 - Beach Nourishment 1million cubic yards, including mobilization \$ 11,767,000
 - Groin Tube manufacture and installation 1,514,429
 - Engineering Costs, entire project 445,000
 - Legal Costs \$ 62,500
- Total Cost, Phase II \$ 13,788,929

Marina Channel Maintenance Program

(Grant received from Department of Environmental Quality Resource Development Project to reimburse the Village for 66% of the cost, current expiration of Grant May 2019.)

- Village portion of expenses paid for Dredging the Channel:
September 2017 – February 2019: \$ 68,857

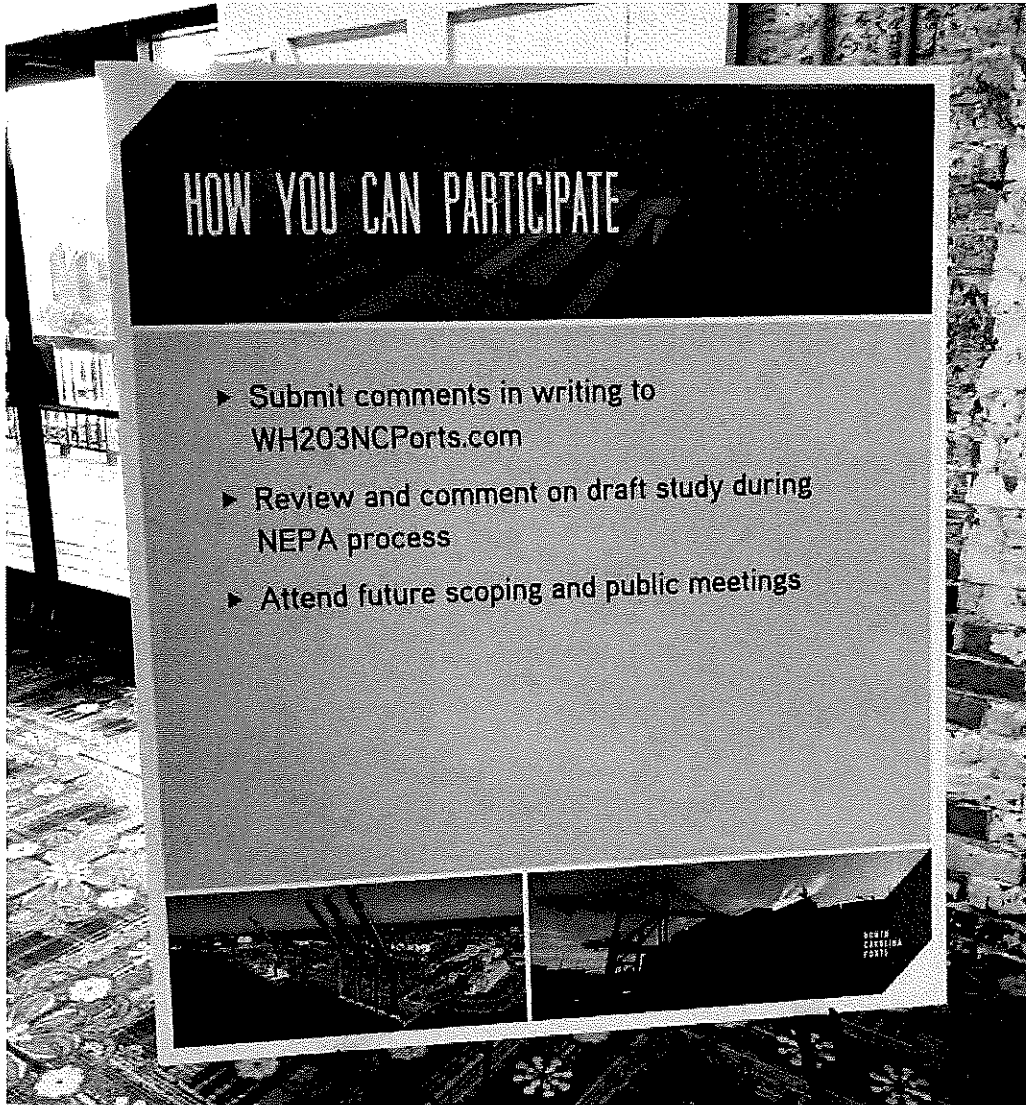
Beach Monitoring

- Seasonal and monthly monitoring surveys FY19 to March 2018 \$ 105,440

Total Accumulated Costs Associated with the Mitigation of the Navigation Channel \$47,149,133.

Exhibit B

Poster Displayed by NCSPA at Public Meeting



APPENDIX B

**Wilmington Harbor Navigation Improvement Project
Section 203 Feasibility Study/Environmental Report, dated June 2019**

Policy Review Assessment – July 2019

Review Assessment

A concurrent review was conducted by the Office of the Secretary of the Army for Civil Works (OASACW) and the Headquarters, US Army Corps of Engineers (USACE) staff. This review has been conducted to determine whether the study and the process under which the study was developed, each comply with Federal laws and regulations; a determination of whether the project is feasible; and identification of any conditions that the Secretary may require for construction of the project. Specific comments on the report are included as below. In summary, the report would need significant revisions before it would be considered to be legally and policy sufficient. Significant review comments were identified, which could preclude the Secretary from making a positive determination of project feasibility in accordance with section 203 of the Water Resources Development Act (WRDA) of 1986, as amended. Issues identified during the review pertain to plan formulation, project economics, evaluation of sea level change, and completeness of the National Environmental Policy Act (NEPA) documentation.

A. Plan Formulation

1. Objectives

Concern: As written, the planning objectives are unclear and could potentially lead to the pre-selection of an alternative plan. The first two objectives, “reduce access restrictions and accommodate efficient loading,” do not identify the effect desired, which is used to measure and compare alternatives. Typically, objectives for deep draft navigation studies would have an effect to reduce the transportation costs, which would then result in cost reduction benefits as noted in ER 1105-2-100. In this instance, the objectives are not linked to a method to analyze beneficial contributions to national economic development. The third objective, “Maintain the Port of Wilmington as a port-of-call for USEC-Asia services from 2027-2076,” seems to be a corporate objective rather than a planning objective. As written, it is not quantifiable or measureable against other plans, and seems to have been used to eliminate potential measures or alternatives that include light loading by establishing a minimum depth for the deepening alternatives.

Basis of Concern: ER 1105-2-100, Section 2-3.a.(4) indicates: Objectives must be clearly defined and provide information on the effect desired (quantified, if possible), the subject of the objective (what will be changed by accomplishing the objective), the location where the expected result will occur, the timing of the effect (when would the effect occur) and the duration of the effect. Additionally, ER 1105-2-100, Section 2-3.c.(1) indicates that “alternative plans shall be formulated to identify specific ways to achieve planning objectives within constraints, so as to solve the problems and realize the opportunities that were identified in Step1.” In this instance,

as the objectives were not correctly written, the planning process and selection of a plan would be inherently flawed.

Significance of Concern: *High, as it seems that depths between 42' and 46' were eliminated from consideration due to flawed objectives.*

Action Needed to Resolve the Concern: Revise the objectives to be policy compliant and conduct a new iteration of plan formulation and evaluation.

2. Screening Criteria

Concern: Section 5.2. Pages 128.-130. Many of the criteria that are listed are unnecessary and could potentially eliminate solutions for the identified problems. The criteria that were listed, technical, economic, environmental, social, etc., should actually be used to establish assumptions for projecting the planning setting in the future with project settings; however, in this instance, by using these elements incorrectly as screening criteria, it seems that the plan formulation and evaluation process may have been unnecessarily restricted. Additionally, some of the elements, such as “the selected plan should be consistent with local, regional, and state goals for water resources development,” are not required for USACE Civil Works projects.

Basis of Concern: ER 1105-2-100, E-10.c.(3)(b) indicates that the planner should “specify the significant technical, economic, environmental, social and other elements of the planning setting to be projected over the period of analysis. Also, the planner should “discuss the rationale for selecting these elements.”

Significance of Concern: *Medium, as improper utilization of these criteria could have affected the formulation and evaluation of measures/alternatives.*

Action Needed to Resolve the Concern: Correctly utilize these criteria in the future project condition and eliminate any screening criteria that may errantly or artificially constrain the planning process. Review the study plan formulation to ensure that potential measures and/or alternatives were not errantly eliminated from consideration.

3. Screening of Measures

Concern: The screening of measures for the study is flawed. According to Table 5-1 on page 134, a stepped channel would meet all 3 project objectives; however, the measure was then eliminated from consideration. Additionally, the table indicates tidal advantage is carried forward even though it does not meet the third objective. What is the criteria for retaining measures? Do they need to meet all 3 of the objectives, or just one? This issue is related to the non-compliant study objectives as mentioned previously.

Basis of Concern: ER 1105-2-100, Section 2-3.d.(2) indicates the following: “Criteria to evaluate the alternative plans include all significant resources, outputs and plan effects. They also include contributions to the Federal objective, the study planning objectives, compliance with environmental protection requirements, the P&G’s four evaluation criteria (completeness,

effectiveness, efficiency and acceptability) and other criteria deemed significant by participating stakeholders.”

Significance of Concern: *Medium, as the study plan formulation may not include all reasonable alternatives.*

Action Needed to Resolve the Concern: After revision of the project objectives, conduct a new iteration of the formulation and screening of management measures.

4. Assumptions/FWOP Condition

Concern: The report indicates that the vessels for USEC-Asia services would not call on the port in the future without project condition due to the high cost of light loading; however, no documentation from the shipping companies has been provided to support this project assumption, which has in turn been used to eliminate full examination of alternatives. As noted in ER 1105-2-100, Section E-10.c.(1)(a), basic assumptions for all studies are non-structural measures within the authority and ability of port agencies, other public agencies, and the transportation industry.

Basis of Concern: ER 1105-2-100, Appendix E, Section E-10.c.(1) indicates the following: “Assumptions specific to the study should be stated and supported.”

Significance of Concern: *High, as the project assumptions/future without project conditions significantly affect the plan formulation and selection of a plan.*

Action Needed to Resolve the Concern: Fully document all assumptions for the study, providing letters or agreements where necessary to evidence conclusions. All assumptions, data, and other information must be specific to the current study and the port of Wilmington, unless it is clear that utilization of data or information from other studies will provide identical conclusions.

B. Environmental

1. Number of Alternatives

Concern: The document only includes one implementation alternative. Normally, navigation improvement projects include increments of dredging depth in the detailed environmental analysis. According to the Principles and Guidelines, the recommended plan will contribute to national economic development consistent with protecting the Nation's environment. Environmental effects of the alternative plans must be considered and can drive the selection of the recommended plan; that's not possible if only one plan is considered. Reasonable alternatives other than channel depth increments with less significant environmental effects, such as relocating facilities should be considered in the report in greater detail to compare the economic and environmental advantages and disadvantages. Decision makers need sufficient information to identify the recommended plan.

Basis of Concern: Principles and Guidelines; NEPA requires agencies to consider reasonable alternatives and the guidance for Studies of Water Resources Development Projects by Non-Federal Interests (ER 1165-2-209) requires Non-Federal Interests to evaluate reasonable alternatives.

Significance of Concern: *High.*

Action Needed to Resolve the Concern: Include additional alternatives in the detailed evaluation.

2. Accuracy Effects Determinations

Concern: The report provides very good information to form the basis of effects determinations, but in many cases, it understates environmental effects in summary statements without fully and objectively relating impacts to the resource characterizations and analysis that preceded it. An example is the treatment of project effects on benthic habitats - which affects the impact analysis for many other resources, e.g. fisheries, threatened and endangered species. The project will change a substantial area of shallow subtidal habitat to deep subtidal habitat. The benthic community in those areas will change because of the physical and chemical changes to the habitat that result. Therefore, a conclusion such as the following for Atlantic sturgeon critical habitat understates the effects, "Based on existing conditions within the new dredging areas, it is anticipated that the recovering benthic communities would provide prey resources similar to those of the existing communities. Therefore, it is expected that effects on foraging habitat PBFs would be short-term." By increasing the depth of shallow areas, the channel deepening and widening will produce a benthic community more similar to that of the existing deep channel bottom, which could be described and quantified by sampling and comparing both areas. This is a long term effect; overall, there will be less shallow subtidal habitat in the estuary and the benthic species composition of those areas will be affected over the long term because of the change in depth and frequency of disturbance.

Similarly, the conclusions do not flow from the information that precedes the following case related to effects on sea turtle habitat and is repeated in many locations within the report, "Operations under the TSP would not be expected to increase the frequency of beach disposal events, as excavation to construct the channel reaches would effectively eliminate the need for a scheduled maintenance dredging event. Based on the proposed conservation measures, it is expected that any adverse indirect effects on sea turtle nesting habitat would be minor and short term." Increasing the depth and width of the project would increase the volume of sediment removed and the area affected by its disposal, including during future maintenance dredging. That is a long term effect.

Section 8.24.3.3 Benthic Communities seems to be describing the effects of maintenance dredging for improvement dredging: "New dredging in the channel expansion areas would remove the majority of the associated soft bottom benthic invertebrate infauna and epifauna, resulting in an initial sharp reduction in community levels of abundance, diversity, biomass, and availability of prey for predatory demersal fishes within the dredged areas. Dredging involves

direct, short term impacts to softbottom communities in the dredge footprint during construction; however the communities are not expected to be negatively affected over the long term.”

Basis of Concern: NEPA regulations, Clean Water Act, Section 404(b)(1) Guidelines, Marine Protection, Research and Sanctuaries Act regulations

Significance of Concern: *Medium*

Action Needed to Resolve the Concern: Review the report and ensure that summary statements accurately reflect the magnitude of effects described in the preceding text, particularly, accurately describing long term or permanent effects vs. short term effects. Clearly distinguish the difference in effects between the new areas affected by improvement dredging and those that are regularly exposed to maintenance dredging.

3. Presentation of Effects Determinations

Concern: In many cases, the report uses qualifying words, such as may, potentially, and just, to lessen the description of project impacts. For instance, Section 8.11.2.1 provides several examples highlighted in italics in the following paragraph:

“Temporary losses of benthic invertebrates in the new dredging areas may negatively affect the foraging activities of predatory demersal fishes (e.g., flounders, rays, spots, and croakers), *potentially* inducing fishes to seek out alternative soft bottom foraging habitats (Byrnes et al. 2003). It is expected that rapid recolonization of disturbed soft bottom habitats in the new dredging areas would provide substantial prey resources within a relatively short period of time. However, increases in depth and subsequent periodic disturbance from maintenance dredging *may* permanently shift community composition towards a more early successional benthic assemblage. At greater depths, lower DO concentrations and reduced sunlight penetration *may* limit the productivity of benthic communities as a prey resource for demersal fishes. However, the vast majority of the ~547 acres of estuarine softbottom habitat that would be affected by new dredging are located in relatively deep waters (97% >12ft and 99% >6ft) along the margins of the existing navigation channel, and thus are presently subject to frequent disturbance from strong tidal currents, ship prop wash, and maintenance dredging; as well as depth limitations on productivity. Therefore, the recovering communities would generally be expected to provide benthic prey resources that are similar to those of the existing communities. The proposed new dredging areas encompass *just* 5.9 acres of shallow (<6 ft) soft bottom habitat. In contrast, the Cape Fear River estuary contains an estimated 37,800 acres of shallow softbottom habitat in waters <6 ft and an estimated 188,549 acres of softbottom habitat in waters >6 ft (NCDEQ 2016). However, it is anticipated that the effects of prey loss on demersal fishes would be localized and short-term based on the following considerations: 1) early recruitment of opportunistic benthic taxa to the disturbed areas would provide substantial prey resources within a relatively short period of time, 2) demersal fishes are highly mobile and capable of seeking out alternative habitats, and 3) the distribution of alternative shallow soft bottom habitats within the overall project area is expansive.”

Basis of Concern: NEPA – Planning Guidance Notebook. The NEPA requires that decision making should proceed with full awareness of the environmental consequences that follow from a major federal action that significantly affects the environment.

Significance of Concern: *Low.*

Action Needed to Resolve the Concern: Remove qualifiers to provide more objective predictions of effects.

4. Mitigation Plan

Concern: The mitigation recommendations are not linked to an explicit consideration of the level of significance of the resources and impacts and may imply a greater commitment to mitigation than is justified.

Basis of Concern: Planning Guidance Notebook - Justification of mitigation features recommended for inclusion in projects shall be based upon analyses that demonstrate the combined monetary and non-monetary values of the last increment of losses prevented, reduced, or replaced is at least equal to the combined monetary and non-monetary costs of the last added increment so as to reasonably maximize overall project benefits. In addition, an incremental cost analysis, to the level of detail appropriate, will be used to demonstrate that the most cost effective mitigation measure(s) has been selected. And, Non-monetary value shall be based upon technical, institutional, and public recognition of the ecological, cultural and aesthetic attributes of resources within the study area. Criteria for determining significance shall include, but not be limited to, the scarcity or uniqueness of the resource from a national, regional, state, and local perspective.

Significance of Concern: *Medium.*

Action Needed to Resolve the Concern: Recognizing that the cost effectiveness/incremental cost analysis would be premature at this stage, revise the mitigation plan section to clearly establish the significance of the resources and impacts following the procedures in ER 1105-2-100, then provide only those mitigation options (without commitments) that would be required to ensure that the recommended plan would not have more than negligible adverse impacts on ecological resources and may fully justified.

5. Environmental Commitments

Concern: The report indicates that “The USACE commits to completing or implementing the following analyses and measures.”

Basis for Concern: Studies of Water Resources Development Projects by Non-Federal Interests (ER 1165-2-209)

Significance of Concern: *High.*

Action Needed to Resolve the Concern: Revise the text to say, “8.25.6 Future Environmental Considerations – The following actions will be considered during the preparation of a NEPA document.”

C. Economics

1. Price Levels

Concern: The report correctly uses the FY 19 price level and discount rate. However, if future versions of the report cross into FY 20 then it will be necessary to update the recommended plan at that time.

Basis of Concern: Reference ER 1105-2-100 Appendix D-3.d.(2).

Significance of Concern: *Low. Reporting requirement not likely to impact plan selection.*

Action needed to resolve the concern: *This is a proactive comment for awareness and requires no action at this time. Appropriate updates should be made prior to the final report to ASA(CW).*

2. Interest during Construction (IDC)

Concern: It is unclear from the economic analysis if IDC was calculated correctly.

Basis of Concern: IDC is an important economic cost that must be accounted for in plan selection and justification; ER 1105-2-100 Appendix D Para D-3.e. (11).

Significance of Concern: *Low to Medium. Not likely to impact plan selection or justification if it was calculated, but full extent of an incorrect calculation cannot be determined without additional information.*

Action needed to resolve the concern: Update the economic analysis to demonstrate that IDC was calculated correctly.

3. Commodity Forecast for TEUs

Concern: The only benefitting containerized trade in the economic analysis is the USEC-Asia route. The commodity forecast presented for that one trade route far exceeds what could be supported by empirical data from the Waterborne Commerce Statistics Center (WCSC) for all Port of Wilmington containerized trade. For example, Table 2-4 of the economic appendix shows the economic analysis assumes 272,615 TEUs for USEC-Asia traffic for 2025 and total Port TEUs of 425,328 (179,713 + 272,615) – see image below. However, the most recent WCSC data for 2017 for total Port TEUs is only 178,865. Even accounting for growth between 2017 and 2025, the forecast assumes a 137% $((425,328 - 178,865) / 178,865)$ increase of TEUs, as compared to WCSC officially collected data. It appears that the commodity forecast has been significantly overestimated. Correcting that error would result in a dramatic reduction in project benefits.

Table 2-4
Port of Wilmington Containerized Cargo Forecast (TEUs)

Region	Port	2025	2030	2035	2040	2045
Non-Asia	Wilmington, NC	179,713	223,554	252,930	286,168	323,772
Asia	USEC Alternate	272,615	339,119	383,682	434,101	491,145

Basis of Concern: Validity of assumptions that form a building block of the economic analysis.

Significance of Concern: *High. Directly impacts both plan selection and justification.*

Action Needed to Resolve the Concern: Correct the economic analysis to use appropriate number of TEUs for the benefitting USEC-Asia traffic or clearly explain and defend the dramatic difference in the number of TEUs used (i.e., between the WCSC data and that used in the analysis).

4. Future Without Project Assumptions – Alternative Port (1)

Concern: The economic analysis assumes that the Future Without Project (FWOP) condition of no additional depth at the Port of Wilmington would result in a transfer of all USEC-Asia TEUs to alternative Ports and that the TEUs would then be trucked to their final destinations. This appears to be a faulty assumption in that the Port of Wilmington is currently still getting TEUs on smaller vessels even though most of the alternative east coast ports are already deeper than Wilmington.

Basis of Concern: Validity of assumption.

Significance of Concern: *High. This comment has direct impact on all of the economic benefits claimed.*

Action Needed to Resolve the Concern: Update the economic analysis using a more reasonable and defensible assumption of the FWOP as TEUs continuing to go through the Port of Wilmington.

5. Future Without Project Assumptions – Fleet Transition

Concern: The economic analysis assumes that the Future Without Project (FWOP) condition has a USEC-Asia transition to virtually all PPX3 and larger vessels. While it is acknowledged that the world fleet is transitioning to larger vessels with the opening of the newly expanded Panama Canal, it is not realistic to assume that 100% of the fleet for USEC-Asia will transition to the largest containership vessel classes. This is a critical assumption because if the fleet did not transition 100% as assumed and Panamax vessels remained in the fleet mix, then the assumption of FWOP TEUs leaving to alternative ports would not be valid (see comment on Future Without Project Conditions – Alternative Ports).

Basis of Concern: Validity of assumption.

Significance of Concern: *High. This comment has direct impact on all of the economic benefits claimed.*

Action Needed to Resolve the Concern: Update the economic analysis to document a more reasonable assumption of the FWOP as the USEC-Asia fleet having a distribution rather than an unrealistic assumption of 100% PPX3 and greater.

6. Overstating of Landside Benefits

Concern: Please note Future Without Project (FWOP) Condition Assumption comments that question the validity of the transition to other ports.

Notwithstanding other concerns, if it is assumed that USEC-Asia TEUs would transition to alternative ports in the future FWOP condition, it appears that the benefits are significantly overstated. The reason for this is (1) all of the alternative ports have rail connections to the hinterland and rail was not considered as a land transportation alternative despite rail being significantly cheaper than trucking and (2) Wilmington is not the closest port to a number of the destinations, including Charlotte, which is almost a wash with Charleston.

Table B-2
Round Trip Distances Between Ports and Cities

City	Round Trip Port Distance (mi)			
	Wilmington	Norfolk	Charleston	Savannah
Fayetteville, NC	196	454	432	524
Raleigh, NC	284	390	572	666
Columbia, SC	396	778	224	318
Charlotte, NC	416	648	428	520
Winston-Salem, NC	450	508	596	688
Greenville, SC	574	854	404	496
Nashville, TN	1278	1412	1108	974
Cleveland, OH	1376	1080	1412	1506
Chicago, IL	2008	1794	1842	1934

Basis of Concern: Validity of assumption. Next Least Costly Alternative - ER 1105-2-100 Appendix E Page E -6 Paragraph E-3.a.(4)(a)(2)(c).

Significance of Concern: *High. This comment has direct impact on all of the economic benefits claimed.*

Action Needed to Resolve the Concern: Notwithstanding the other comments that could change the economic analysis and assuming the transition assumption remains, the economic analysis must be updated to only count landside costs for those TEUs where the Port of Wilmington is actually closer than alternative ports AND the analysis must include rail as a potential least cost alternative.

7. Evidence for Supporting Assumptions

Concern: There are a number of assumptions used in the analysis that do not have sufficient evidence to support the assumptions. Two examples are the assumption that 100% of the vessel fleet for the USEC-Asia will be PPX3 or greater and that TEUs will transfer to other Ports. We are now going into the 4th year of the newly expanded Panama Canal and if the trends that are assumed are really underlying, there would seem to be evidence of it already starting to happen. However, Waterborne Commerce Statistics Center (WCSC) data does not support these conclusions. What has happened to Wilmington shipping since the Panama Canal third lock opened in 2016?

Basis of Concern: Validity of key underlying assumption.

Significance of Concern: *High. This comment has direct impact on all of the economic benefits claimed.*

Action needed to resolve the concern: Present clear evidence that validates the assumptions being made.

8. Overall Economic Feasibility and Selection of the NED Plan

Concern: Based on Economic comments 12-16, there is a high likelihood that neither -47FT nor -48FT are the NED plan. Further, project justification (positive NED benefits) at those depths is uncertain.

Basis of Concern: Cumulative effect on benefits resulting from the number of high significance concerns.

Significance of Concern: *High. Directly calls into question the NED plan and demonstrating economic feasibility as required for Sec 203 reports.*

Action Needed to Resolve the Concern: Update the economic analysis to use reasonable assumptions, determine the NED Plan, and document/support plan selection.

9. Sufficient Array of Alternatives to Identify the NED Plan

Concern: Reference table 4-7 of the economic appendix. The economic analysis only evaluates -47FT and -48FT and identifies -47FT as the NED Plan because it has greater net benefits than -48FT. However, -47FT cannot be determined to be the NED Plan because a lesser alternative was not evaluated. The argument presented is that there are \$0 in landside costs for -44FT, -

45FT, and -46FT. This does not seem reasonable as there is no evidence that larger ships could not call on Wilmington harbor at those depths. Data for other east coast ports shows PPX3 and larger vessels calling at depths below -47FT. If this singular assumption did not hold true, the NED Plan would not be -47FT.

Basis of Concern: Economic and Environmental Principles and Guidelines for Water and Related Land Resources Implementation Studies 1983 Section VI; ER 1105-2-100 2-4.

Significance of Concern: *High. Directly calls into question the identification of the NED plan.*

Action Needed to Resolve the Concern: Update the economic analysis to show benefits for depths below -47FT and then identify the NED Plan.

10. Independent External Peer Review (IEPR)

Concern: IEPR is required for Section 203 project just like USACE led projects. Given the magnitude of the project implementation costs and the non-traditional economic analysis and the assumptions used, IEPR is recommended.

Basis of Concern: ER 1165-2-209.

Significance of Concern: *Medium to high. This comment has direct impact on all of the economic benefits claimed.*

Action Needed to Resolve the Concern: Conduct an IEPR or obtain an IEPR exclusion from the Chief of Engineers.

D. Climate Preparedness and Resilience

1. Climate Hydrology Analysis

Concern: The report lacks a discussion relevant information about observed and expected climate change impacts in hydrologic analyses developed for the study. These impacts combined with sea level change will profoundly impact the future with project conditions and inform cost and cost risk assumptions of future OMRR&R costs related to dredging.

Basis of Concern: ECB 2018-14 requires a qualitative analysis of climate-impacted hydrology to describe future conditions, which includes a literature review. Climate change information for hydrologic analyses includes direct changes to hydrology through changes in temperature, precipitation, evaporation rates and other climate variables, as well as dependent basin responses to climate drivers, such as sedimentation loadings. For the Wilmington Harbor Section 203 study, this analysis would inform future potential changes to streamflow, precipitation and sedimentation in the project area which is currently lacking the report.

Significance of concern: Low to medium. The qualitative analysis required by this ECB should focus on those aspects of climate and hydrology relevant to the project's problems, opportunities,

and alternatives, and include consideration of both past (observed) changes as well as projected, future (modeled) changes.

Future with project impacts on water quality should be informed by changes in water temperature and freshwater inputs. Sediment delivery and transport to the project area are impacted by these changes and would impact the shoaling rates developed in the analysis, adding uncertainty to future with project assumptions informed by the analysis conducted for the study.

Action Needed to Resolve the Concern: A policy compliant climate hydrology analysis should be performed using ECB 2018-14 guidance. The climate discussion should be summarized in the main report, with the detailed material included in Appendix A (Engineering). The results should be integrated into the key assumptions in the future with and without project assumptions, and inform any adjustments to risk register and current cost risk assumptions in the report.

2. Sea Level Change (SLC) Analysis

Concern: The report and analysis are not fully compliant with USACE policy on SLC.

Basis of concern: Review of the documents provided and analysis indicate that SLC was incorporated into analyses and discussion, in various sections of the main report; however, application and presentation is piecemeal in the report and does not appear to inform performance and impact risk of TSP. Specific concerns by discipline/section follow.

Sea Level Change – The sea level rates are presented in section 2.6, presenting the 50 year project projections for the Wilmington, NC NOAA tide gauge. These projections are understating the changes in future water levels. Due to the alteration of the Cape Fear River Estuary (CFRE) by the federal navigation project over the last 150 years, the Wilmington tidal gauge has experienced an anomalously large increase in tidal constituents and tidal range since the current NOAA tidal gauge records in the 1930's. The tidal datum which is defined by the tidal range is not stable and is increasing at a greater rate than the mean sea level trend. The significance of this phenomena is that tide level and extreme water level projections should not be based on the published observed 2006 mean sea level trend (2.13 mm/year), but on the MHW trend, 4.26 mm/yr. (Zervas, 2013) This is approximately double the rate used in the study analysis, and result in a RSLR increase between 0.70 to 2.92 feet compared to 0.34 to 2.56 feet respectively.

Plan Formulation – Future without project and future with project discussions do not fully integrate impacts of climate change to hydrology and changes in sea level. Future changes in water levels, salinity intrusion due to RSLR and further channel alteration are likely understated. The section listing constraints does not include increases in water levels or induced flooding.

Economics/Planning – The non-structural measure “tidal advantage” should perform better under the intermediate/high scenarios since the tidal range is increasing. Has a sensitivity analysis been done showing performance of larger tidal ranges on tidal advantage?

Engineering Analysis/Hydrodynamic Modeling – Future without project, future with project modeling is likely underestimating impacts since the RSLR rates are low by a significant amount. Changes in flood risk for the with project condition was not investigated.

ER 1100-2-8162/Hydrodynamics – “As used in this ER, locations with oceanic astronomical tidal influence, as well as connected waterways with base-level controlled by sea level. In the latter waterways, influence by wind driven tides may exceed astronomical tidal influence. Coastal areas include marine, estuarine, and riverine waters and affected lands.” In addition to the impacts of future conditions described in earlier comments, when assessing coastal storm risk in the estuary, wind loading should be considered.

NEPA/Impacts – The CFRE is a funnel shaped estuary, which has an increasing tidal range due to incremental deepening and channel maintenance over the last 150 years. Further deepening will increase these changes and create additional flood risk from coastal storms due to storm surge amplification (Famikhali and Talke, 2016). Nuisance flooding frequency will likely increase as a result of the project. As the tide range expands, some stormwater drainage outfalls to Wilmington harbor will be impacted, resulting in decreased gravity drainage performance. Future salinity changes in the estuary have been underestimated. Future freshwater inputs from the watersheds may trend upward under climate change ameliorating the impacts of the deepening slightly.

Significance of concern: *High.*

Action Needed to Resolve the Concern: Coordinate with Navigation PCX, HH&C, CPR CoP's, vertical team for specific direction.

E. Counsel

1. Study Authority

Concern: The study authority cited in section 1.2 of the report is not cited correctly.

Basis of Concern: Section 203 of the Water Resources Development Act (WRDA) of 1986, Public Law 99-662 (33 U.S.C. 2231) was further amended by section 1152 of WRDA 2018, Public Law 115-270. Specifically, section 1152 amended subsections (c) and (e) of section 203.

Significance of Concern: Medium. The non-federal interest should understand the revisions to the study authority, as explained in the implementation guidance for section 1152 approved by the Assistant Secretary of the Army for Civil Works on 2 May 2019.

Action Needed to Resolve the Concern: The study authority cited in section 1.2 of the report should be updated to include the modifications to the authority made by section 1152 of WRDA 2018. The non-federal interest also should review the “Implementation Guidance for Section 1152 of the Water Resources Development of 2018, Studies of Water Resources Development Projects by Non-Federal Interests,” dated 2 May 2019.

2. Tentatively Selected Plan

Concern: Sections 6.1 and 10.1 of the report describe the recommended plan as “dredging” the federal navigation channel.

Basis of Concern: Dredging may occur for construction, operation, or maintenance of navigation projects. For clarity and to avoid confusion with operation and maintenance dredging activities, the tentatively selected plan should be described as “deepening” the federal navigation channel instead.

Significance of Concern: *Low.*

Action Needed to Resolve the Concern: The tentatively selected plan recommended generally should be referred to in sections 6.1 and 10.1 and throughout the report and its appendices as “deepening” the federal navigation channel, rather than simply “dredging” the federal navigation channel.

3. Recommendations

Concern: For the recommendations in section 14, the report describes only the first cost and annual incremental operations and maintenance cost to the federal government. No reference is made to the mitigation required for the project.

Basis of Concern: When a project is authorized by Congress, the recommendations contained in the feasibility report become the basis for proceeding with the project as a Federal undertaking. ER 1105-2-100, App’x G, para. G-9.i.(1). The wording of recommendations, incorporated by reference in the authorizing act, has the force of law for the project, and therefore requires special attention. The recommendations must contain a “clear reference to the plan being recommended for implementation, including appropriate mitigation.” ER 1105-2-100, App’x G, para. G-9.i.(4)(a).

Significance of Concern: *Medium. While total project costs and mitigation are summarized elsewhere in the report, the recommendations section needs to clear reference these items as well.*

Action Needed to Resolve the Concern: Provide the total project cost at FY 2019 price levels in the recommendations section of the report. Indicate the expected federal and non-federal cost-share amounts. Summarize the mitigation for the project as well.

4. Items of Local Cooperation

Concern: The non-federal responsibilities listed in the recommendations section of the report states the North Carolina State Ports Authority will “[a]ccomplish all removals determined necessary by the Federal Government other than those removals specifically assigned to the Federal Government.”

Basis of Concern: It is not clear to what “removals” refers, particularly given that no real estate plan was provided.

Significance of Concern: *Medium.*

Action Needed to Resolve the Concern: Explain what “removals” refers to in the recommendations section of the report. As noted in a few paragraphs above this reference, the non-federal sponsor would be responsible to perform or ensure performance of all relocations determined necessary for the project.

5. Real Estate Plan

Concern: There is no Real Estate Plan (REP).

Basis of Concern: Section 12-16(b) in Chapter 12 of ER 405-1-12 specifies that “A REP must be prepared in support of decision documents for all types of water resources projects whether full Federal or cost shared, specifically authorized or continuing authority. The level of detail required for each item described in subparagraph c below will vary depending on the scope and complexity of each project.”

Significance of Concern: *High. The significance of this concern is high because it describes a fundamental problem with the project that could affect the recommendation, success, or justification of the project.*

Action Needed to Resolve the Concern: A REP consistent with the requirements of Section 12-16(c) in Chapter 12 of ER 405-1-12 should be added to the report. Per the guidance from Section 12-16(c), the Real Estate Plan must identify a number of requirements, such as "a description of the LER required for the construction, operation and maintenance of the project including those required for relocations, borrow material and dredged or excavated material disposal." The Corps recognizes that if it is doing the construction for the project, no land must be acquired for the dredging itself, but the Mitigation, Monitoring, and Adaptive Management Plan is missing a number of requirements relating to the lands needed for mitigation that would be in the REP.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 19-20327-cr-ALTONAGA/GOODMAN

UNITED STATES OF AMERICA

vs.

TRACEY JORDAN SELLERS,

Defendant.

JOINT FACTUAL STATEMENT

This Joint Factual Statement contains an agreed statement of the facts and circumstances that accompany the above-referenced criminal case and Plea Agreement signed and dated this same day between the United States of America and the defendant, Tracey Jordan Sellers (hereinafter referred to as "SELLERS"). The defendant is pleading guilty to the one-count Information because she is in fact guilty. The defendant certifies and hereby admits that the facts and circumstances set forth below are true and, were the case to go to trial, the United States would be able to prove these specific facts and others beyond a reasonable doubt, meeting all of the elements, with respect to the count charged in the criminal Information, meeting the elements of the crime charged.

1) SELLERS began employment with the U.S. Army Corps of Engineers ("USACE") in 2001. At all relevant times, she was a Biologist and Lead Biologist for the Planning & Policy Division, Environmental Branch, and Coastal Section of the USACE Jacksonville District. She coordinated the development of environmental plans and documents for USACE, coordinated with federal, state, and local agencies, monitored the environmental compliance of USACE activities in Florida, and assessed potential impacts from USACE projects.

2) At all relevant times, an environmental consulting company ("COMPANY")

performed substantial work as a contractor and sub-contractor for major USACE dredging projects in South Florida. Some of COMPANY's contracts related to dredging projects exceeded millions of dollars in value.

3) SELLERS participated substantially in USACE's management of coastal dredging projects in the Southern District of Florida. In particular, SELLERS performed technical reviews of COMPANY's involvement in dredging projects in the Southern District of Florida and in Miami, Florida.

4) Federal ethics laws and regulations governed the relationship of federal employees, such as SELLERS, with outside entities such as COMPANY.

5) Unbeknownst to the USACE Jacksonville District, SELLERS violated these laws and regulations for the benefit of COMPANY, including but not limited to the following violations:

- a. SELLERS used her personal, non-USACE email account to share sensitive, internal draft government documents that she received in her official capacity at USACE with COMPANY. The internal draft documents were created by both USACE and other agencies. SELLERS forwarded them from her official USACE email account to her personal email account, and then sent them from her personal email account to COMPANY while commenting, "You didn't get this from me."
- b. SELLERS used her personal, non-USACE email account to participate in private email conversations with employees of COMPANY in which they discussed environmental problems with a dredging project in frank terms. This information was highly pertinent to USACE's oversight of the dredging project. SELLERS

neither forwarded these conversations to her official USACE email account nor shared the contents of them with her colleagues and management at USACE.

- c. SELLERS used her personal, non-USACE email and social media accounts to assist COMPANY in contract negotiations and to share sensitive internal government estimates in an effort to benefit COMPANY.

6) In November 2014, a senior member of COMPANY approached SELLERS through her personal, non-USACE email account and offered her a part-time job with COMPANY related to a bid proposal that COMPANY planned to submit to a state agency in North Carolina. SELLERS did not seek or obtain approval from USACE ethics officials. Instead, in an exchange occurring through her non-USACE email account, SELLERS indicated her interest in assisting COMPANY with the project, provided her resume to COMPANY, and reviewed and made suggested edits to part of COMPANY's bid proposal. Because this state project would later be reviewed by USACE's Wilmington District, SELLERS agreed to limit her participation to "technical writing support only" and suggested that she not attend any meetings with USACE. In the winter and spring of 2015, SELLERS used her personal email and social media accounts to seek status updates from the senior member of COMPANY about the project. There was no negotiation of COMPANY's payment of SELLERS for this work.

7) In October of 2018, the same senior member of COMPANY approached SELLERS through her non-USACE, personal email account and offered her a second part-time job with COMPANY on another project in North Carolina. This project would likewise receive regulatory review from USACE's Wilmington District, and the senior member of COMPANY stated that COMPANY would keep SELLERS's participation "confidential of course." In an exchange

conducted through her non-USACE email account, SELLERS provided advice about the project and asked for a contract for her services. On December 8, 2018, SELLERS received from, signed, and returned to COMPANY an independent consultant contract agreeing to pay SELLERS up to \$9,000.00 over a six-month period at the rate of \$50.00 per hour. Additionally, SELLERS received project materials from, forwarded materials to, scheduled phone calls with, and participated in tele-conferences with COMPANY related to the project. At no time did SELLERS seek or obtain authorization from USACE ethics officials to participate in this COMPANY project.

8) In January 2019, the same senior member of COMPANY approached SELLERS through her non-USACE email account and offered SELLERS a third part-time job with COMPANY. Specifically, COMPANY's senior member inquired whether she was interested in "some more consulting work" on a COMPANY proposal for a project in Louisiana. The senior member of COMPANY indicated that the project would receive regulatory review from USACE. The next day, SELLERS used her non-USACE email account to ask for an independent consulting contract for this project. The senior member noted that, if COMPANY were to win the project, "there could be more work for you" than on the North Carolina project. SELLERS did not seek or obtain authorization from USACE's ethics officials to participate in this COMPANY project.

9) On February 8, 2019, two special agents conducted a recorded interview of SELLERS in an office on the premises of the USACE Jacksonville District. The agents began the recorded interview by providing SELLERS both *Miranda* and *Garrity* warnings. The agents advised SELLERS that it was a crime to lie during the interview. After receiving these advisements, SELLERS knowingly and voluntarily agreed to answer questions.

10) The agents asked SELLERS whether she had ever received any job offers from COMPANY. SELLERS responded that she had performed some work for COMPANY over a decade ago, but that she had obtained authorization from USACE and declared this income to the IRS. The project was distinct from COMPANY's November 2014 offer, its October 2018 offer, and its January 2019 offer to SELLERS.

11) SELLERS failed to mention COMPANY's November 2014 offer to work on a COMPANY bid proposal until the agents confronted her with documents that demonstrated COMPANY's offer of work. After reviewing the documents, SELLERS falsely stated that she did not accept the offer.

12) SELLERS stated to the agents that, in November of 2018, the senior member of COMPANY approached her about a project in North Carolina. She falsely stated, however, that she had not "written anything or done anything or participated in any meetings because I wanted to talk to [USACE's] Office of Counsel about whether or not that would be considered a conflict of interest."

13) The agents then asked SELLERS whether she had ever received any other job offers from COMPANY, and SELLERS falsely stated, "No." This statement omitted any reference to COMPANY's January 2019 offer of work on a COMPANY project in Louisiana, and SELLERS's request for a contract for her services in response.

14) SELLERS made these false statements knowingly and willfully in an effort to hide the extent of her illicit relationship with COMPANY.


15) Shortly after the conclusion of her recorded interview, SELLERS used a personal, non-USACE social media account to communicate with the senior member of COMPANY and stated, "I can't do any of this work for you. I am on admin leave from usace [sic]. Conflict of interest. May be fired."

16) SELLERS regrets and is remorseful for her actions and her false statements to the agents.

ARIANA FAJARDO ORSHAN
UNITED STATES ATTORNEY

Date: 7/12/19

By:


JAIME A. RAICH
ASSISTANT UNITED STATES ATTORNEY

Date: 7/12/19

By:


PAUL D. PETRUZZI
ATTORNEY FOR DEFENDANT

Date: 7/12/19

By:


TRACEY JORDAN SELLERS
DEFENDANT

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 19-20327-cr-ALTONAGA/GOODMAN

UNITED STATES OF AMERICA

vs.

TRACEY JORDAN SELLERS,

Defendant.

PLEA AGREEMENT

The United States Attorney's Office for the Southern District of Florida ("this Office") and Tracey Jordan SELLERS (hereinafter referred to as the "defendant") enter into the following agreement:

1. The defendant agrees to plead guilty to the Information, which count charges the defendant with false official statement, in violation of Title 18, United States Code, Section 1001(a)(2).

2. The elements of this offense are:

- (1): That the defendant made the statement as charged;
- (2): That the statement was false;
- (3): That the falsity concerned a material matter;
- (4): That the defendant acted willfully, knowing that the statement was false;
and
- (5): The false statement was made or used for a matter within the jurisdiction of a department or agency of the United States.

Eleventh Circuit Patten Jury Instructions (Criminal Cases), O36 (2016).

3. The defendant is aware that the sentence will be imposed by the Court after considering the advisory Federal Sentencing Guidelines and Policy Statements (hereinafter

"Sentencing Guidelines"). The defendant acknowledges and understands that the Court will compute an advisory sentence under the Sentencing Guidelines and that the applicable guidelines will be determined by the Court relying in part on the results of a pre-sentence investigation by the Court's probation office, which investigation will commence after the guilty plea has been entered. The defendant is also aware that, under certain circumstances, the Court may depart from the advisory sentencing guideline range that it has computed, and may raise or lower that advisory sentence under the Sentencing Guidelines. The defendant is further aware and understands that the Court is required to consider the advisory guideline range determined under the Sentencing Guidelines, but is not bound to impose a sentence within that advisory range; the Court is permitted to tailor the ultimate sentence in light of other statutory concerns, and such sentence may be either more severe or less severe than the Sentencing Guidelines' advisory range. Knowing these facts, the defendant understands and acknowledges that the Court has the authority to impose any sentence within and up to the statutory maximum authorized by law for the offense identified in paragraph 1 and that the defendant may not withdraw the plea solely as a result of the sentence imposed.

4. The defendant also understands and acknowledges that the Court may impose a statutory maximum term of imprisonment of up to five years, followed by a term of supervised release of up to three years. In addition to a term of imprisonment and supervised release, the Court may impose a fine of up to \$250,000 and may order forfeiture and restitution.

5. The defendant further understands and acknowledges that, in addition to any sentence imposed under paragraph 4 of this agreement, a special assessment in the amount of \$100 will be imposed on the defendant. The defendant agrees that any special assessment imposed shall be paid at the time of sentencing. If a defendant is financially unable to pay the

special assessment, the defendant agrees to present evidence to this Office and the Court at the time of sentencing as to the reasons for the defendant's failure to pay.

6. This Office reserves the right to inform the Court and the probation office of all facts pertinent to the sentencing process, including all relevant information concerning the offenses committed, whether charged or not, as well as concerning the defendant and the defendant's background. Subject only to the express terms of any agreed-upon sentencing recommendations contained in this agreement, this Office further reserves the right to make any recommendation as to the quality and quantity of punishment.

7. The defendant understands that this agreement, whereby she agrees to plead guilty to the Information, is not a grant of immunity or exoneration from prosecution for other crimes and offenses.

8. The defendant agrees that she shall cooperate fully with this Office by: (a) providing truthful and complete information and testimony, and producing documents, records and other evidence, when called upon by this Office, whether in interviews, before a grand jury, or at any trial or other Court proceeding; (b) appearing at such grand jury proceedings, hearings, trials, and other judicial proceedings, and at meetings, as may be required by this Office; and (c) if requested by this Office, working in an undercover role under the supervision of, and in compliance with, law enforcement officers and agents. In addition, the defendant agrees that she will not protect any person or entity through false information or omission, that she will not falsely implicate any person or entity, and that she that he will not commit any further crimes.

9. This Office reserves the right to evaluate the nature and extent of the defendant's cooperation and to make that cooperation, or lack thereof, known to the Court at the time of sentencing. If in the sole and unreviewable judgment of this Office the defendant's cooperation

is of such quality and significance to the investigation or prosecution of other criminal matters as to warrant the Court's downward departure from the advisory sentencing range calculated under the Sentencing Guidelines and/or any applicable minimum mandatory sentence, this Office may make a motion prior to sentencing pursuant to Section 5K1.1 of the Sentencing Guidelines and/or Title 18, United States Code, Section 3553(e), or subsequent to sentencing pursuant to Rule 35 of the Federal Rules of Criminal Procedure, informing the Court that the defendant has provided substantial assistance and recommending that the defendant's sentence be reduced. The defendant understands and agrees, however, that nothing in this agreement requires this Office to file any such motions, and that this Office's assessment of the quality and significance of the defendant's cooperation shall be binding as it relates to the appropriateness of this Office's filing or non-filing of a motion to reduce sentence.

10. The defendant understands and acknowledges that the Court is under no obligation to grant a motion for reduction of sentence filed by this Office. In addition, the defendant further understands and acknowledges that the Court is under no obligation of any type to reduce the defendant's sentence because of the defendant's cooperation.

11. The defendant agrees to the adjudication of her guilty plea and sentencing in the Southern District of Florida, and to waive any objection to venue under Amendment VI of the U.S. Constitution.

12. This Office and the defendant agree that, although not binding on the probation office or the Court, they will jointly recommend that the Court make the following findings and conclusions as to the sentence to be imposed:

- a. Loss: That the relevant amount of actual, probable or intended loss under Section 2B1.1(b)(1) of the Sentencing Guidelines resulting from the offense

committed in this case is \$18,000.00.

- b. Abuse of Trust: That the defendant abused a position of public trust in a manner that significantly facilitated the commission or concealment of the offense pursuant to Section 3B1.3 of the Sentencing Guidelines.

13. This Office and the defendant agree that, although not binding on the probation office or the Court, they will jointly recommend that the Court impose a sentence within the advisory sentencing guideline range produced by application of the Sentencing Guidelines. Although not binding on the probation office or the Court, this Office and the defendant further agree that, except as otherwise expressly contemplated in this Plea Agreement, they will jointly recommend that the Court neither depart upward nor depart downward under the Sentencing Guidelines when determining the advisory sentencing guideline range in this case.

14. The defendant is aware that Title 18, United States Code, Section 3742 and Title 28, United States Code, Section 1291 afford the defendant the right to appeal the sentence imposed in this case. Acknowledging this, in exchange for the undertakings made by the United States in this plea agreement, the defendant hereby waives all rights conferred by Sections 3742 and 1291 to appeal any sentence imposed, including any restitution order, or to appeal the manner in which the sentence was imposed, unless the sentence exceeds the maximum permitted by statute or is the result of an upward departure and/or an upward variance from the advisory guideline range that the Court establishes at sentencing. The defendant further understands that nothing in this agreement shall affect the government's right and/or duty to appeal as set forth in Title 18, United States Code, Section 3742(b) and Title 28, United States Code, Section 1291. However, if the United States appeals the defendant's sentence pursuant to Sections 3742(b) and 1291, the defendant shall be released from the above waiver of appellate rights. By signing this agreement,

the defendant acknowledges that the defendant has discussed the appeal waiver set forth in this agreement with the defendant's attorney. The defendant further agrees, together with this Office, to request that the Court enter a specific finding that the defendant's waiver of his right to appeal the sentence imposed in this case was knowing and voluntary.

15. The defendant is aware that the sentence has not yet been determined by the Court. The defendant also is aware that any estimate of the probable sentencing range or sentence that the defendant may receive, whether that estimate comes from the defendant's attorney, this Office, or the probation office, is a prediction, not a promise, and is not binding on this Office, the probation office or the Court. The defendant understands further that any recommendation that this Office makes to the Court as to sentencing, whether pursuant to this agreement or otherwise, is not binding on the Court and the Court may disregard the recommendation in its entirety. The defendant understands and acknowledges, as previously acknowledged in paragraph 3 above, that the defendant may not withdraw her plea based upon the Court's decision not to accept a sentencing recommendation made by the defendant, this Office, or a recommendation made jointly by the defendant and this Office.

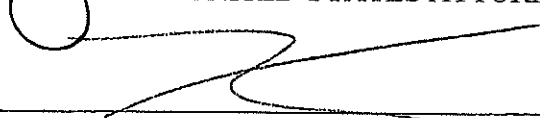
16. This is the entire agreement and understanding between this Office and the defendant. There are no other agreements, promises, representations, or understandings.

ARIANA FAJARDO ORSHAN
UNITED STATES ATTORNEY

Date: 7/18/19

By: 
JAME A. RAICH
ASSISTANT UNITED STATES ATTORNEY

Date: 7/12/19

By: 
PAUL D. PETRUZZI
ATTORNEY FOR DEFENDANT

Date: 7/12/19

By: 
TRACEY JORDAN SELLERS
DEFENDANT