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Promoting and protecting the health of the public and the environment

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November 15, 2011

U.S. Mail – Certified and Electronic Mail

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RE: ***Final Review Conference - Docket No. 11-RFR-52*** – Decision dated September 30, 2011, to deny a 401 Water Quality Certification and objection to the Federal Consistency Determination under the Coastal Zone Management Act.

Dear Counsel:

Please find enclosed the Final Agency Decision in the above referenced matter.

Sincerely,

Lisa Lucas Longshore
Clerk

**IN THE STATE OF SOUTH CAROLINA
BEFORE THE BOARD OF HEALTH AND ENVIRONMENTAL CONTROL
FINAL AGENCY DECISION**

IN RE: Savannah Harbor Expansion Project (SHEP)

Board Docket Number 11-RFR-52

Appearances:

Col. Jeffrey M. Hall, for Requestor US Army Corps of Engineers

Curtis Foltz, for Requestor Georgia Ports Authority

John Harleston, Esq. for South Carolina Department of Health & Environmental Control

This Final Agency Decision is issued with the consent of the Department of Health and Environmental Control staff (DHEC), the US Army Corps of Engineers (COE), and the Georgia Ports Authority (GPA) to resolve the Requests for Review presented herein regarding the Savannah Harbor Expansion Project.

DHEC staff denied COE's request for certification from DHEC under Section 401 of the Clean Water Act and for concurrence from DHEC with COE's consistency determination under the federal Coastal Zone Management Act for the Savannah Harbor Expansion Project ("the Project"). COE and GPA requested review by the Board of the staff decisions and a final review conference was scheduled before the Board at its November 10, 2011 meeting. At the conference, it was stated that DHEC staff and the Requestors, COE and GPA, reached an agreement that resolves the disputed issues among them concerning the Project, and presented the agreement to the Board for approval.

The Board finds that the agreement is consistent with the laws of the State of South Carolina and that the applicant COE is entitled to the requested approvals. The Board adopts the agreement of DHEC staff, COE, and GPA as the Final Agency Decision.

FINDINGS OF FACT

The Savannah District of the United States Army Corps of Engineers (COE) proposes to deepen the Savannah Harbor navigational channel. The Project will involve dredging the Savannah Harbor navigational channel in the Savannah River which forms the boundary between the State of Georgia and the State of South Carolina. The COE requests Section 401 Water Quality Certifications from the Georgia Department of Natural Resources (Georgia DNR) and from the South Carolina Department of Health and Environmental Control and seeks concurrence from Georgia DNR and DHEC that the Project is consistent with the States' Coastal Zone Management Programs.

On November 15, 2010, COE issued a Joint Public Notice for the Project which served as an application to DHEC for a Section 401 Water Quality Certification and Coastal Zone Management consistency determination. On January 25 and 31, 2011, DHEC's Office of Ocean and Coastal Resource Management issued letters objecting to COE's determination that the project is fully consistent with the South Carolina Coastal Tidelands and Wetlands Act and the Coastal Zone Management Program. On September 30, 2011, DHEC issued a letter reiterating that position. On September 30, 2011, DHEC also issued a Notice of Department Decision proposing to deny the application for a Section 401 Water Quality Certification.

On October 7, 2011, COE filed a timely Request for Final Review of both the proposed denial of the Section 401 Water Quality Certification and the finding that the project was not consistent with the South Carolina Coastal Tidelands and Wetlands Act and the Coastal Zone

Management Program. GPA also filed a timely Request for Review of both staff decisions. On November 3, 2011, the South Carolina Coastal Conservation League, South Carolina Wildlife Federation, and Savannah Riverkeeper filed a motion to intervene, which the Board denied.

CONCLUSIONS OF LAW

DHEC has authority under Section 401 of the Clean Water Act, 33 USC §1341, the S.C. Pollution Control Act, S.C. Code Ann. §§48-1-10, et seq., and S.C. Code R.61-101 to grant and deny certifications of projects affecting waters of the State. DHEC also has authority to certify projects affecting the Coastal Zone for consistency with the Coastal Management Program under the federal Coastal Zone Management Act, 16 U.S.C. §§1451, et seq., and South Carolina Coastal Tidelands and Wetlands Act, S.C. Code Ann. §§48-39-10, et seq. Subject to the conditions of this agreement, the Board concludes that DHEC has reasonable assurance that the Project will comply with South Carolina water quality standards, and that the Project is consistent with enforceable provisions of the Coastal Management Program.

IT IS THE FINAL AGENCY DECISION OF THE BOARD, WITH THE CONSENT OF THE PARTIES, that:

1. COE will commit to operation of the Dissolved Oxygen system as stated in the letter from Col. Jeffrey M. Hall of November 4, 2011, specifically:

First, the project Record of Decision will expressly recognize a binding commitment to install, operate, and maintain the DO system in accordance with the project mitigation plan, subject to Congressional appropriation of funds for the project. Second, the Savannah District will make the DO system a top priority for annual operation and maintenance (O&M) funds appropriated and received for the project, above normal maintenance requirements.

2. The GPA will provide financial assurance, in a manner acceptable to DHEC, that it will fund operation and maintenance of the Dissolved Oxygen system in any year that sufficient

federal funds for the operation and maintenance of the system are not made available. This obligation extends for the life of the project (50 years). Such financial assurance may be achieved through a Standby Trust Fund, Surety Bond, Letter of Credit, Insurance, or other means deemed acceptable to DHEC. The GPA will provide the financial assurance before any dredging begins. For purposes of the COE, this offer and commitment by GPA to provide financial assurance does not constitute an item of local cooperation or cost-shared feature.

3. To address DHEC concerns about the sufficiency of mitigation for potential impacts on salt marsh, the State of Georgia agrees to transfer salt marsh to the State of South Carolina to maintain as a marsh or for the State of Georgia to preserve as marsh in perpetuity and from development an amount of acreage of salt marsh in South Carolina equivalent to 2,200 mitigation credits (generally 1,690 acres) as part of its Environmental Sustainability Program. For purposes of the COE, this offer and commitment by GPA to transfer salt marsh does not constitute an item of local cooperation or cost-shared feature.

4. COE shall comply with all terms and conditions in the National Marine Fisheries Service Final Biological Opinion.

5. To ensure protection of cultural resources, DHEC must receive an executed Programmatic Agreement for Cultural Resources signed by COE and the South Carolina Historic Preservation Office.

6. To ensure that the levels of environmental effects predicted in the Environmental Impact Statement (EIS) are not exceeded, COE will comply with the Monitoring and Adaptive Management Plan provided as Appendix D of the EIS. The Monitoring and Adaptive Management Plan will ensure the accuracy of the predicted environmental impacts, assess the effectiveness of the mitigation features, and provide for modification of the Project as needed.

7. The attached 401 certification and concurrence with COE's Coastal Management Plan consistency determination are hereby issued.

8. COE agrees that no Project dredging will begin until compliance with these conditions, and specifically that no dredging will begin until the provision by the Georgia Ports Authority of the financial assurance required above.

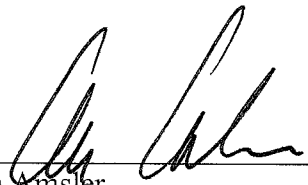
9. The GPA represents and agrees that it has authority to execute this agreement on behalf of itself and the State of Georgia, with regard to their respective obligations, and that its consent to this agreement fully binds the GPA and the State of Georgia to the terms of this agreement.

10. COE and the GPA acknowledge that this agreement is legally binding and DHEC may enforce their respective obligations assumed herein as necessary and appropriate in a court of law with jurisdiction.

11. Neither COE nor the GPA admits that the project as described in the Environmental Impact Statement was or is not in compliance with the requirements of the 2008 Mitigation Rule or any other applicable requirements for mitigation. The GPA and the State of Georgia agree to the additional measures required above in order to facilitate settlement of the disputes among the parties and to alleviate DHEC concerns regarding the environmental effects of the Project.

DHEC understands that the COE may not include these additional measures in the Final EIS or ROD for the Project.

11/15, 2011



Allen Amisler
Chairman
Board of Health and Environmental Control
For the Board

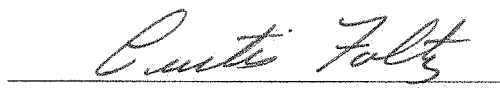
CONSENTED TO AND AGREED BY:


John Harleston
Attorney for DHEC, Respondent

11/15/11
Date


Jeffrey M. Hall, Col, US Army
For COE, Requestor

15, Nov, 2011
Date


Curtis Foltz
For GPA, Requestor

11/15/11
Date