UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

City of North Charleston,	)	
	)	Case No.:
Plaintiff,	)	
	)	
vs.	)	
	)	
S.C. State Ports Authority,	)	**COMPLAINT**
	)	
S.C. Department of Commerce,	)	Administrative Procedures Act (5 U.S.C.§701)
	)	Clean Water Act (33 U.S.C. § 1365)
S.C. Department of Public Railways,	)	National Environmental Policy Act
	)	(42 U.S.C. § 4321, et seq.)
State of South Carolina,	)	
	)	
United States Army Corps of Engineers, Charleston District	)	
	)	
Lt. General Meredith W. B. Temple, in his official capacity as Chief of Engineers, U.S. Army Corps of Engineers, and	)	
	)	
Lt. Colonel Edward P. Chamberlayne, in his official capacity as District Engineer, U.S. Army Corps of Engineers, Charleston District,	)	
	)	
Defendants.	)	
_____	)	

Plaintiff alleging and complaining of the Defendants named herein would respectfully show this Court:

I.
Nature of the Action

1. This action is a challenge to acts by the State of South Carolina ("the State") taken toward the construction and establishment of an intermodal rail yard in addition to the 300 acre marine cargo terminal to be operated by the South Carolina State Ports Authority ("Ports Authority"). The proposed intermodal facility violates promises to the City of North Charleston (City) and the permit granted the State by the United States Army Corps of Engineers ("Corps"). It would result in the State building rail lines where such lines, by agreement, were never to run.

2. In the federal National Environmental Policy Act (NEPA) portions of this lawsuit the City is asking the Court to consider whether the United States, through the Corps, and State of South Carolina have taken an adequate, careful, "hard look" at the environmental consequences of certain railroad plans pursued by the State of South Carolina. NEPA requires that a careful supplemental environmental study be conducted before any rail lines or facilities are built which modify those already permitted and studied by the Corps. This includes the requirement for the Corps to create a "detailed statement" on possible "alternatives to the proposed action". 42 U.S.C. 4332(c)(iii).

3. The NEPA required evaluation of environmental impacts is done by the preparation of an Environmental Impact Statement (EIS) or Supplemental EIS. This applies to new projects as well as expansions of old projects where, as here, the activity would materially change the environmental impact compared to the status quo. Thus, NEPA requires an EIS (or Supplemental EIS) in situations like this where the Port was previously permitted based on one

set of assumptions (no Northern rail), but now is proposed to be built and operated under a different reality (Northern rail installed).

4. The Clean Water Act also plays a role in this lawsuit. The State's container terminal could, under federal law, proceed only in accordance with the terms specified in a federal permit. The addition of rail facilities to the previously permitted scope of work violates the permit and hence the Clean Water Act.

II.
The Parties

5. The Plaintiff, the City of North Charleston (hereinafter "City"), is a municipal corporation, incorporated under the laws of the State of South Carolina, and located in Charleston, Dorchester and Berkeley Counties.

6. The South Carolina State Ports Authority (hereinafter "Ports Authority") is an instrumentality of, alter ego of, and an arm of the State of South Carolina both by virtue of state statutes (See S.C. Code 54-3-10, et seq., S.C. Code 54-3-110) and by repeatedly holding itself out as an agency and alter ego of the State. The Defendant Ports Authority possesses the express power to be sued in its own name by statute (S.C. Code 54-3-140).

7. The South Carolina Department of Commerce ("Department of Commerce") is an instrumentality of, alter ego of, and an arm of the State of South Carolina both by virtue of state law (S.C. Code Ann. 13-1-10(A)(Commerce is an administrative agency of the State) and by repeatedly holding itself out as an agency and alter ego of the State. The Defendant Department of Commerce is capable of being sued in its own name by express statute statutory authority (S.C. Code Ann. 13-1-1330(1))

8. South Carolina Public Railways, (hereinafter, "SCPR" or "Public Rails"), technically known as the South Carolina Department of Commerce, Division of Public Railways, is a sub-entity of the Department of Commerce. See S.C. Code Ann. 13-3-1310 (Public Rails is a division of the Department of Commerce.) It also is an alter ego, and an instrumentality of, and arm of the State of South Carolina .

9. The State of South Carolina (hereinafter the State or South Carolina) is a body politic validly existing under both federal and state law and is capable of being sued in its own name by explicit statute and by virtue of countless prior cases.

10. The Corps is an agency of the United States and has the responsibility in South Carolina for administering the permitting programs established pursuant to the Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. 403 and Section 404 of the Clean Water Act, 33 U.S.C. 1344. Lt. General Temple is the commander of this agency, and Lt. Colonel Kirk is the commander of the Charleston District of this agency.

III.
Jurisdiction / Venue / Related Matters

11. This Court has jurisdiction pursuant to Section 505 of the Clean Water Act, 33 USC 1365, because it is alleged that the State is violating the terms and conditions of the permit issued to it pursuant to Section 404 of the Clean Water Act, 33 U.S.C. 1344 by the Corps. The Court has further jurisdiction and authority to review this case pursuant to 42 U.S.C. 4321 (National Environmental Policy Act); 28 U.S.C. 1331 (federal question); 28 U.S.C. 1361, 28 U.S.C. 2201 and 2202 (declaratory judgment); and the Administrative Procedures Act, 5 U.S.C. 701-706.

12. As required by the Clean Water Act and its implementing regulations, 33 U.S.C.1365(b); 40 C.F.R. 135, Plaintiff provided the Corps and EPA with more than 60 days written notice of Plaintiff's intent to bring this action to remedy the Clean Water Act violations that are alleged herein, and have provided the same notice to the Attorney General of the United States, the Commissioner of S.C.D.H.E.C., the Attorney General of the State of South Carolina and the three state agencies involved in the violation of the terms and conditions of the Corps' permit.

13. This Court has jurisdiction over all parties hereto and over the subject matter hereof. The violations of law alleged herein have occurred within the District of South Carolina. Venue is proper in this Court pursuant to 28 U.S.C. 1391, 5 U.S.C. 703 and Local Rule 3.01(A)(1).

IV.
Background Facts

14. A 2002 Memorandum of Understanding and Agreement was formally executed between the City and the Ports Authority at the direction of the South Carolina General Assembly and expressly ratified at the very highest levels of this State by the South Carolina Budget and Control Board. The 2002 MOU is incorporated into and made a condition of the Army Corps permit now at issue in this litigation.

15. The 2002 MOU was formally executed on October 25, 2002.

16. The 2002 MOU is a binding agreement between the City and the State of South Carolina (acting through its instrumentality and alter ego, the Ports Authority) governing the terms and conditions under which Navy Base land would be divided as directed by the South Carolina General Assembly and pursuant to which the State and the Ports Authority would conduct shipping / terminal operations on the Navy Base.

17. The 2002 MOU is fully binding and operative on all parts of State Government, including the named Defendants, both as a legally binding agreement and as a condition of the Corps' Clean Water Act permit and, thus, enforceable as a matter of federal law.

18. In 2002, the General Assembly directed the Ports Authority to cease plans to create a port terminal on Daniel Island and instead locate a new shipping terminal on the former Navy Base in North Charleston. Pursuant to said directive, the Ports Authority, acting on behalf of the State, applied to the Corps of Engineers for a permit to construct a 300 acre marine cargo terminal on the southern portion of the former Naval Base property in North Charleston This application was denominated PN 2003-1T-016 by the Corps of Engineers and was required prior to the construction of the terminal as that project would require authorization pursuant to Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403 for alteration of navigable waters of the United States and pursuant to Section 404 of the Clean Water Act, 33 U.S.C. § 1344 for the discharge of fill material into waters of the United States

19. On or about May 28, 2002, the General Assembly ratified Bill No. 4879 requiring conveyance of various properties on the former Naval Base to the City and the Ports Authority, but requiring as a precondition to such conveyance that the City and the Ports Authority enter into a Memorandum of Understanding for the operation of container terminal, rail, and docks.

20. Bill 4879 reads in pertinent part:

> **"Property transfer; continuation of benefits, revenues, and funding**
>
> SECTION 15. **Notwithstanding any other provision of law** the Charleston Naval Complex Redevelopment Authority (RDA), upon receiving ownership from the United States of America, shall convey certain parcels of real property to the City of North Charleston as per the **mutual agreement** described hereafter. These parcels shall be delineated through a **mutual agreement**

between the City of North Charleston and the South Carolina State Ports Authority that takes into account the respective needs of each entity in the property south of Necessary Street. All conveyances shall be at no consideration once the City of North Charleston and the South Carolina State Ports Authority have entered into a **memorandum of understanding and agreement for the operation of breakbulk, roll on roll off, and container terminals and dock operations on appropriate properties that are subject to the oversight or control of the Charleston Naval Complex Redevelopment Authority**. The City of North Charleston shall honor all existing leases as negotiated by the Charleston Naval Complex Redevelopment Authority prior to the effective date of this section. Furthermore, all properties conveyed shall retain any Tax Increment Finance District status, any state or federal grants applied to the area, and any state revenues currently directed to the Charleston Redevelopment Authority on a per acre basis for the relative properties conveyed to the City of North Charleston. In addition, any revenues received from the State under the Rural Development Act relating to the number of federal employees at the naval complex shall be shared pursuant to the location of the jobs on the complex."
Emphasis Added.

V.
The 2002 Memorandum of Understanding

21. The above-described MOU at Paragraphs 1 and 2 states that the agreement is binding and was being executed at the express direction of the General Assembly.

22. Bill 4879 also specifically required that the 2002 MOU go beyond merely setting forth a dividing boundary line between operations of the contracting parties and required that the MOU comprehensively address "the respective needs of each entity [SPA and City] in the property south of Necessary Street" and that, in addition to setting a dividing line, it also address "the operation of ...terminals and dock operations...."

23. Pursuant to Bill 4879, the City and Ports Authority included a number of terms governing operation of the future Ports Authority terminal, among other things, concerning the following areas:

a Zoning issues

b Traffic issues (including the requirement for access roads and overpasses), and

c Rail issues

The MOU also expressly dealt with the manner in which lands provided to the City as a result of the MOU might later be converted to Port use.

24. The MOU recognized that funding sources outside the SPA might be necessary or desirable to pay for certain rail and road improvements. Because future funding can be uncertain, the MOU expressly provided the City with concrete and certain protection that was not dependent upon future funding: the Ports Authority, formally agreed that it would not be permitted to operate the facility if certain infrastructure were not in place. As stated in the MOU, the "SPA acknowledges that the City requires that certain minimum infrastructure be in place before the SPA commences container operations. This minimum infrastructure includes a truck access road leading directly from the Port Facility Area to I-26 and three rail overpasses...." Further, the "SPA acknowledges that the City does not want the SPA to utilize rail access from the north end of the Property, and the SPA will use rail access exclusively from the south end of the Property."

VI.
Formal Ratification of the MOU by Budget & Control Board

25. The RDA, a state agency, informed both the City and the Ports Authority, that it did not have the authority to dispossess State (RDA) owned real property absent specific approval of the State Budget and Control Board as evidenced by a vote of that body

26. As a consequence, the RDA, the City, and the Ports Authority agreed to present the 2002 MOU to the State Budget and Control Board to obtain the State's necessary formal permission and consent, pursuant to the 2002 MOU, for the transfer of the Navy Base property to the City and Ports Authority. The parties thus sought formal ratification by the State on behalf of all of its agencies, alter egos, and instrumentalities of the 2002 MOU.

27. On or about December 2, 2002, the State Budget and Control Board reviewed the Naval Base property transfer request predicated on the 2002 MOU and formally approved transferring title from the State to the City of North Charleston and the Ports Authority, thus ratifying the 2002 MOU.

28. Subsequently, on or about February or March of 2003, the RDA transferred the first installment of property to the City pursuant to the 2002 MOU terms. Subsequent land transfers followed.

29. In the years that followed the formal Budget and Control approval, there were innumerable instances of good faith detrimental reliance upon the validity and binding effect of the 2002 MOU, by the City, the Ports Authority, the State, other governmental agencies, and the public at large, acting in reliance that the 2002 MOU was valid, binding, and fully operative.

VII.
Corps of Engineers Review and Permitting

30. In order to proceed with the terminal, the State (acting through the Ports Authority) was required to secure authorization from the Corps in the form of a permit issued pursuant to Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. 403 because the marine cargo

terminal required filling and other alterations to the course condition and capacity of the Cooper River, a navigable water of the United States.

31. The State was also required to secure authorization from the Corps in the form of a permit issued pursuant to Section 404 of the Clean Water Act, 33 U.S.C. 1344 because the marine cargo terminal required the discharge of dredged or fill material into waters of the United States.

32. As the marine cargo terminal would involve significant environmental impacts, the Corps was required by the National Environmental Policy Act, 42 U.S.C. 4321, to evaluate all environmental impacts and all feasible alternatives to the proposed marine terminal through preparation of an EIS.

33. The Corps considered and relied on the MOU and its "rail clause" as it processed and issued the State's (Ports Authority's) application and permit.

34. The MOU was incorporated into the Corps' EIS and the Corps based its decision to issue the State Permit Number 2003-1T-016 for the 300 acre marine cargo terminal in part on the provisions of the MOU forbidding container cargo to be transported to or from the terminal by rail from the north end of the Base property.

35. The Corps issued said permit to the State for the marine cargo terminal on April 26, 2007 and included in the permit special conditions "k" and "l" which require implementation and enforcement of all provisions of the CNC Marine Terminal Mitigation Plan of May 1, 2006, including at paragraph 4.8 the MOU and the prohibition of rail transport of container cargo from the terminal across the northern end of the Base property.

VIII.
Actual Case and Controversy

36. As set forth herein, there exists an actual, real, ripe, concrete dispute regarding the Clean Water Act, NEPA and the Due Process clause so as to implicate the federal defendants.

37. In 2008, the General Assembly of South Carolina adopted the "State Rail Plan" which provided for options for direct rail access to and service of the marine cargo terminal permitted by the Corps of Engineers and to be constructed by the State on the southern end of the Former Naval Base property. After further refinement, the S.C. Department of Commerce and its subsidiary agency, the S.C. Public Railways pursued the development of an intermodal rail yard on 326 acres a short distance to the north of the new marine cargo terminal permitted by the Corps of Engineers and designed so as to provide direct rail service to the new marine cargo terminal by rail across the northern section of the Former Naval Base property in violation of the MOU.

38. The concept plan developed for the intermodal rail yard included a single use private road linking the intermodal rail yard directly to the marine terminal for the purpose of transporting cargo between the two facilities and effectively making the two facilities a single transportation facility.

39. The Department of Commerce and the S.C. Public Railways in December 2010 filed and served landowners Notices of Condemnation for certain properties in the City of North Charleston, including properties owned by the City, for the express purpose of constructing the proposed intermodal rail yard adjacent the the marine cargo terminal permitted by the Corps of Engineers. No agency of the State requested permission from the Corps of Engineers to

construct this facility or to modify the Corps permit so as to authorize construction of this 326 acre addition to the marine cargo terminal. The City instituted Challenge actions to the taking of its properties in the Charleston County Court of Common Pleas as authorized and required by South Carolina law.

40. The above described violations of the MOU have federal law implications since the various federal permits and analyses were based upon them. Thus, the violation of the MOU constitutes a violation of the Clean Water Act in this instance. Further, the Corps' refusal to conduct a supplemental EIS review also violates NEPA.

IX.
FOR A FIRST CAUSE OF ACTION
(VIOLATION OF THE CLEAN WATER ACT, 33 U.S.C. § 1301, et seq.)
(State Affiliated Defendants)

41. Plaintiff repeats the allegations of all prior paragraphs as if set forth verbatim herein.

42. The Corps is required by the regulations promulgated to implement Section 404 of the Clean Water Act, 33 U.S.C. § 1344, to consider all impacts anticipated to arise from a proposed project requiring its permit. 33 C.F.R. Part 320.4(a) and (r) and 325.4.

43. The Corps is authorized to include conditions in permits issued pursuant to the Clean Water Act that are designed to minimize and/or to mitigate for environmental impacts of permitted projects. 33 C.F.R. Part 325.4

44. The Corps Permit Number 2003-1T-0016 issued to the State authorizing the marine cargo terminal included special conditions "k" and "l" requiring implementation and enforcement of the entire CNC Marine Terminal Mitigation Plan (including the MOU) and a prohibition on transporting cargo from the terminal across the northern end of the Base property.

45. The State's above described and ongoing establishment of an intermodal rail yard as an addition to the marine cargo terminal is a flagrant violation of the permit issued by the Corps to the State as the express purpose and design of the rail yard is to transport cargo from the marine terminal by rail across the northern end of the Base property. The State's actions also constitute illegal avoidance of required review and/or approval of a federal permit or license mandated by the Coastal Zone Management Act, 16 U.S.C. § 1451, et seq., Section 401 of the Clean Water Act, 33 U.S.C. § 1341, the Fish and Wildlife Coordination Act, 16 U.S.C. § 661, et seq., the Endangered Species Act, 16 U.S.C. § 1531, et seq., the National Historic Preservation Act, 16 U.S.C. § 470, et seq., and, as explained below, the National Environmental Policy Act, 42 U.S.C. § 4231, et seq.

46. The State's actions, therefore, constitute a violation of the Clean Water Act entitling the City to an injunction prohibiting any further acts in furtherance of this rail yard project until such time as the State's permit is amended or modified, and to reimbursement of the attorney's fees and costs of pursuing this action.

X.
FOR A SECOND CAUSE OF ACTION
(NATIONAL ENVIRONMENTAL POLICY ACT, 42 U.S.C. § 4231, et seq. AND ADMINISTRATIVE PROCEDURES ACT, 5 U.S.C. § 701)
(All Defendants)

47. Plaintiff repeats the allegations of all prior paragraphs as if set forth verbatim herein.

48. NEPA regulations at 40 C.F.R. Part 1502.9 (c)(1) and 23 C.F.R. Part 771.130(a) require that a federal agency prepare a supplement to the EIS if either the agency makes substantial changes to the proposed action that are relevant to environmental impacts, or there are significant new circumstances or information relevant to environmental impacts of the proposed action.

49. The actions of the State described above in proceeding to establish and construct an intermodal rail yard as an addition to the marine cargo terminal constitutes a significant change to the project as evaluated and permitted by the Corps.

50. The Corps Permit Number 2003-1T-0016 for the marine cargo terminal states that its decision to permit that project was based in part on implementation of the CNC Marine Terminal Mitigation Plan including the statement in that plan that the MOU constituted mitigation for rail impacts from the marine terminal – impacts that manifestly, according to the terms of the MOU, would not include rail from the north end of the Base property.

51. Failure to address the impacts and feasible alternatives to the State's intermodal rail yard project constitute an improper segmentation of what is one project – a marine cargo terminal with an associated and adjacent intermodal rail yard – in a single EIS and such segmentation violates NEPA regulations at 40 C.F.R. 1502.4(a) and 1508.25(a) and 23 C.F.R. 771.111(f). The intermodal rail yard is a project that has little or no independent utility from the marine terminal and yet involves a large and irretrievable commitment of resources and, in effect, forces a large project to go forward notwithstanding the environmental consequences.

52. The Corps has not, therefore, considered the many unique impacts to the human environment which would unavoidably result from construction and operation of the intermodal yard in conjunction with the marine terminal, including, but not limited to: noise, air pollution, traffic disruption, storm water runoff of contaminants, and deleterious effects on specific urban planning and development undertaken by the City and its citizens in direct reliance on the MOU being fully implemented by the State.

53. Based on the above substantial and fundamental changes in the marine terminal project as permitted by the Corps and the significant new information on environmental impacts certain to flow from that project, none of which were considered by the Corps in its FEIS, the federal defendants failure to prepare a Supplemental EIS violates NEPA and its implementing regulations, and is arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with law and is reviewable under the APA. 5 U.S.C. 701-706.

54. A Supplemental EIS is also independently warranted pursuant to 40 C.F.R. 1508.27 (activity that is highly controversial, with a significant level of public opposition, warrants EIS because it, by definition, creates a "significant impact.")

55. By reason of such violations of law, the City is entitled to an injunction prohibiting the State from any and all acts taken in furtherance of establishment and construction of the intermodal rail yard as well as to reimbursement of attorney's fees and costs of pursuing this matter and/or in the alternative a finding by this Court that the current EIS has become deficient, based on new, materially and substantially changed plans, and order a supplemental environmental impact statement be conducted.

NOW THEREFORE, Plaintiff prays that this Court inquire into the matters set forth herein and issue an Order providing:

1. A permanent injunction pursuant to the Clean Water Act, 33 U.S.C. § 1365 prohibiting the State or any instrumentality thereof from taking any action to establish or construct the intermodal rail yard addition to the marine cargo terminal until such time as the Corps of Engineers has modified the permit

described above;

2. A permanent injunction prohibiting the State or any instrumentality thereof from taking any action to establish or construct the intermodal rail yard addition to the marine cargo terminal until such time as the U.S. Army Corps of Engineers has prepared a Supplemental Environmental Impact Statement fully considering all impacts of the project as it might be modified by such rail yard and all feasible alternatives thereto;
3. Reimbursement to Plaintiff by the Defendants of all attorney's fees and costs incurred in the pursuit of this action;
4. Such other relief as this Court may deem just and proper.

Respectfully Submitted,

s/ Stan Barnett

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