



North Carolina Coastal Federation

Working Together for a Healthy Coast

September 6, 2013

Mickey Sugg
Project Manager
U.S. Army Corps of Engineers
69 Darlington Avenue
Wilmington NC 28403-1343

Dear Mickey,

Please accept the following comments on the Figure "8" Beach Homeowners Association terminal groin draft Environmental Impact Statement (DEIS) on behalf of the N.C. Coastal Federation.

The federation recently learned from the official minutes of the Association's July meeting that:

"...the Association obtained permission from the Corps of Engineers to include a proposal for a possible alternative location for the terminal groin."

The minutes (attached) include an exhibit that shows this alternative. This new design is significantly different from any of the alternatives described and evaluated in DEIS circulated for public comment in 2012. There has been no updated notice from your agency that a new alternative is now being considered.

Major differences in the new design include:

- (1) The structure is longer, bigger, and more expensive.
- (2) The portion of the structure that has six feet of elevation is longer and more substantial.
- (3) Buried sheet piles now extend along the entire length of the groin.
- (4) The footprint of the structure is new and angled.
- (5) Different aerial photography (dated in June 2012) is now being used.
- (6) The extent of the barrier island, inlet, and estuarine habitats impacted is even more sensitive, and valuable for fish and wildlife.
- (7) The structure conflicts with uses of public trust resources (the dry sand beach and navigation) increase significantly.



Design differences are so drastic that the new design cannot be considered a version of the previously proposed preferred alternative, but rather a completely new alternative. This has major implications for the status of the DEIS, and the adequacy of any previous analysis that has been completed about prior alternatives.

This new alternative is **not reasonable**, and it is a huge waste of everyone's limited time and resources to now amend the DEIS process to evaluate it. This new alignment increases the impact of the project on natural habitat, barrier island processes, and public trust rights by moving the structure further seaward. This new alternative does not resolve the fact that the Association does not own the property rights necessary to construct it, just like it does not have those rights on the preferred alternative already contained in the DEIS. The only reason that the new alternative has emerged at this late date in the DEIS process is an attempt by the Association to bypass the private property rights of individuals who have refused to grant easements to allow the groin to be built on their land. Your office has been informed that there are property owners that they do not intend to grant easements to allow the construction of the new alignment.

The attached law review article by Joseph Kalo includes the following statement:

When such privately funded projects are permitted, the filling and raising of submerged lands has no effect on the title or the littoral rights of the oceanfront property owner. Under the applicable North Carolina statute, the oceanfront property owner would hold title to the newly raised shore to the mean high water mark. Such title, as all private titles to the dry sand beach, remain subject to public trust rights. Since the oceanfront owner would have title to the water's edge, exactly as before the beach nourishment, the project would have no effect on any littoral rights that previously existed.

The illustration of the new groin alternative being circulated by the Association clearly shows that the project will create a dry sand beach (called adjusted shoreline with terminal groin) that will directly connect and extend private property with the project. Thus, just like the existing "preferred alternative," this new alternative can never be constructed without legal easements being granted by these adjacent private property owners. The Association does not have the power to condemn their properties to construct the project.

The COUNCIL ON ENVIRONMENTAL QUALITY has issued a memorandum to agencies that include the forty most asked questions concerning NEPA. Question 29b asks: *How must an agency respond to a comment on a draft EIS that raises a new alternative not previously considered in the draft EIS? CEQ answers: A fourth possibility is that a commenter points out an alternative which is not a variation of the proposal or of any alternative discussed in the draft impact statement, and is a **reasonable** alternative that warrants serious agency response. In such a case, the agency must issue a supplement to the draft EIS that discusses this new alternative. For example, a commenter on a draft EIS on a nuclear power plant might suggest that a*

reasonable alternative for meeting the projected need for power would be through peak load management and energy conservation programs. If the permitting agency has failed to consider that approach in the Draft EIS, and the approach cannot be dismissed by the agency as unreasonable, a supplement to the Draft EIS, which discusses that alternative, must be prepared. (If necessary, the same supplement should also discuss substantial changes in the proposed action or significant new circumstances or information, as required by Section 1502.9(c)(1) of the Council's regulations.)

Thus, if you mistakenly assume that this new alternative is **reasonable**, then your agency will need to issue a supplement to the draft EIS. This will be no small or inexpensive undertaking since the draft DEIS we reviewed last year was based on loss of imminently threatened structures (sandbagged). These structures are no longer imminently threatened since the beach has now naturally accreted. This **change in circumstances** should require a redetermination of purpose and need for the project. In addition, the cost-benefit analysis must be redone to reflect the lack of threat to these structures, as well the increased costs of the new alternative. In short, while this might be called a "supplement," in reality it will be an entirely new DEIS.

C.F.R.40 § 1502.14 states that all alternatives must be rigorously explored and evaluated in the DEIS and their environmental consequences described and evaluated (C.F.R.40 § 1502.16). **Each alternative needs to be compared based upon a common set of criteria.** It is reasonable to assume that the new design will have different and expanded environmental, social, and economic effects that need to be evaluated and presented for the Project Review Team's assessment as well as for public input. These new environmental effects need to be accounted for and discussed through a transparent public process as prescribed by NEPA.

Furthermore, the Figure Eight DEIS preferred alternative was based on the aerial photography of the island from April 2006, and a set of assumptions that existed on the island many years ago. However, as it can be observed in Figure 1, which is based on aerial photography from June 2012, the inlet and beach conditions at Figure Eight have substantially changed since the DEIS process was started. After comparing topographies of 2006 and 2012 (and after the different map scales have been accounted for) it is obvious that approximately 350 feet of new wet sand beach have accreted in the project area.

It is important to observe that the existing landforms at Rich Inlet were not predicted or even suggested by the previous DEIS evaluation and computer models. We have commented previously that the models used in the DEIS are not useful and are a waste of time and resources, and are inappropriately applied to this analysis. Our criticism of these models is not a hypothetical concern - the actual changes that have occurred in Rich Inlet clearly illustrate the folly and uselessness of these models. We are dismayed that your agency has never asked for or received the technical documentation that must be done to run these computer models, that allow results to be understood based upon

assumptions made, and some level of "confidence" in results to be quantified. We have requested this information from your agency and were told you do not have it. You suggested we ask your third party contractor for the reports. We made those request repeatedly, and the contractor has been completely unresponsive and not forthcoming with the reports. Thus, we can only take the results of these computer models on face value—and their projections have been completely inaccurate. It makes no sense to spend even more resources evaluating the new alignment with the same failed models that experts say are of no value for this type of permit analysis.

The Council of Environmental Quality guidelines refer to substantial changes in DEIS in C.F.R.40 § 1502.9 and allow the Agency to develop a supplement to the DEIS if it (i) "makes substantial changes in the proposed action that are relevant to environmental concerns;" or if (ii) "there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts."

However, we believe that this completely new alternative cannot be treated as a "substantial change" given its critical differences shown above, and that an entirely new DEIS will be needed if this alternative is now proposed. There were no "environmental concerns" that prompted the applicant to propose this new alternative. The concern was legal: the applicant spent a huge amount of money pursuing this project without first securing the property rights to build the project it proposes—and that is not resolved by this new alternative. Furthermore, the newly accreted land in the project site requires an entirely new set of baseline data for evaluating project impacts including the impacts of all evaluated alternatives. Therefore, a new DEIS is necessary to incorporate the newly formed shoreline as a new baseline upon which the new alternatives analysis should be based on is warranted.

For all these reasons, the federation urges that the previous DEIS process be stopped, and the applicant be informed that if it intends to pursue this project, a new DEIS will have to be developed starting at step one in the NEPA process.

Thank you.

Sincerely,



Ana Zivanovic-Nenadovic
Program and Policy Analyst



Todd Miller
Executive Directors