UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
GREATER ATLANTIC REGIONAL FISHERIES OFFICE
55 Great Republic Drive
Gloucester, MA 01930

July 11, 2022

Colonel Matthew W. Luzzatto
District Engineer
New York District
U.S. Army Corps of Engineers
Jacob K. Javits Federal Building
26 Federal Plaza, Room 17-302
New York, NY 10278-0090

RE: Port of Albany Expansion Project; NAN-2021-00948-UDA - Albany Port District Commission

Dear Colonel Luzzatto:

We have reviewed Public Notice No. NAN-2021-00948-UDA dated May 24, 2022, which describes the Albany Port District Commission's Port of Albany Expansion Project. We have also reviewed the essential habitat assessment (EFH) worksheet and other application materials received on June 15, 2022. The proposed project includes the construction of a new port terminal on an undeveloped property on the Hudson River and Normans Kill in the City of Albany and Town of Bethlehem, Albany County, New York. The activities proposed include the discharge of fill into 0.81 acres of waters of the U.S including wetlands; 2.72 acres of new dredging with upland disposal and 10-year maintenance dredging; and the construction of a new wharf, a new bridge, and a warehouse and manufacturing facility with attendant features. The dredging would result in the loss of 0.21 acres of submerged aquatic vegetation (SAV). The stated purpose of the project is to generate economic development and support the State of New York in achieving its renewable energy goals by providing additional port infrastructure to support the manufacturing and distribution of wind turbine components for offshore wind facilities.

As described in more detail in the Attachment, we have a number of significant concerns about the proposed project and its potential impacts to NOAA trust resources in the Hudson River. We appreciate that the applicant has proposed to use a number of best management practices during construction as described in the public notice including: Using a vibratory hammer and a bubble curtain during pile installation; using a weighted turbidity curtain and closed clamshell environmental bucket during dredging; conducting the in-water work between September 1 through January 31; and restoring temporarily impacted aquatic resources to pre-construction contours and conditions upon completion of the construction activities. However, we remain concerned about the lack of an analysis of alternatives, particularly alternate locations or project designs that avoid or minimize impacts to aquatic resources. We are especially concerned about the impacts to SAV and wetlands. In addition, the applicant's proposal lacks a viable conceptual compensatory mitigation plan to offset impacts to aquatic resources.

Based upon the information provided, the activities proposed may have substantial and unacceptable impacts to aquatic resources of national importance including anadromous fish species, SAV, and wetland habitats, and these impacts can be avoided, minimized, or otherwise offset through the development of robust analysis of alternatives, including alternate locations for the project, and the development of a viable compensatory mitigation plan to offset any unavoidable impacts. We request that the Department of the Army (DA) permit for this project be held in abeyance in accordance with Part IV, Paragraph 3(a), of the Memorandum of Agreement (MOA) between our agencies until the requested analyses and information are provided to us for review and comment. We will continue to work with your staff to evaluate the impacts of the proposed project and develop site-specific comments and recommendations for the project. As you may be aware, Part IV of the MOA between our agencies grants us an additional 25 days from the end of the public comment period, in this case August 5, 2022, to notify you if we have determined if the proposed project will have substantial and unacceptable impacts to aquatic resources of national importance. It is our hope that the applicant provides the requested information prior to this date so that we can conclude our coordination on this project in a timely manner.

As always, we are available to discuss this project, data gaps and information needs, and the required consultations with you or your staff if you have any questions or require clarification on our comments. If you would like to discuss this matter further, please contact Jessie Murray at (978) 675-2175 or jessie.murray@noaa.gov with our Habitat and Ecosystem Services Division and/or Edith Carson-Supino at (978) 282-8490 or edith.carson-supino@noaa.gov with our Protected Resources Division.

Sincerely,

Michael Pentony
Regional Administrator

Attachment

cc: USACE – S. Ryba, A. Dangler
GARFO PRD – E. Carson-Supino, C. Vaccaro
GARFO HESD – J. Murray, K. Greene
FWS – S. Sinkevich
EPA Region II – R. Ballas, M. Finocchiaro, A. Jepsky

Attachment
NMFS Comments on Port of Albany Expansion Project
NAN-2021-00948-UDA - Albany Port District Commission

Project Description

The proposed project involves the construction of a new port facility on approximately 82 acres of undeveloped property along the Hudson River and Normans Kill. A new 500-linear foot long wharf is included as part of the development, which will impact approximately 0.63-acre of open water through shading, and an unknown area of fill for the installation of 136, 48-inch diameter shaft foundations with steel casings, and 263 cubic yards (CY) of riprap below mean high water (MHW). An 18-inch diameter water intake pipe (which is assumed to be associated with the proposed fire suppression system) with an unknown size of associated screening or proposed intake velocity, is also proposed to be installed within the Hudson River. The proposed new dredging is expected to remove approximately 80,000 cubic yards of sediment to a depth of somewhere between -32 and -35 feet at mean low water (MLW) over 2.72-acres with upland disposal, and two additional dredging events in a ten-year maintenance period. The dredging will result in the permanent loss of 0.21-acres of SAV. A rip-rap stone revetment will also be placed over 0.42-acres within the dredge footprint for slope protection. A 3-span bridge is also to be constructed over Normans Kill, which would permanently impact 0.04-acre of freshwater emergent wetlands. An additional 0.81-acres of freshwater wetlands are also proposed to be filled and 0.32- acre of forested wetlands are to be permanently converted to emergent wetlands for the construction of a warehouse and manufacturing buildings. According to the public notice, compensatory mitigation for proposed impacts will be through the purchase 1.46 credits from an approved In-Lieu Fee (ILF) Mitigation Program and the preservation of a 2.87-acre riparian buffer along approximately 1,700 linear feet of Hudson River shoreline by securing a restrictive covenant on the land. The EFH assessment worksheet also mentions creating 1-acre of benthic habitat (by converting habitat that is currently uplands) at Schodack Island State Park.

Aquatic Resources and Anticipated Impacts

Anadromous Fishes
The Hudson River and Normans Kill provide migration, spawning and nursery habitat for corridors for anadromous fish such as alewife (*Alosa pseudoharengus*) and blueback herring (*Alosa aestivalis*) (collectively river herring) and American shad (*Alosa sapidissima*). These species spend most of their adult life at sea, but return to freshwater areas to spawn in the spring. These species demonstrate some degree of repeat spawning behavior and generally returning to their natal rivers. Following spawning, some proportion of adults out-migrate to the ocean while their offspring rear in freshwater areas. River herring have been designated as Species of Concern by NOAA. Species of Concern are those species about which we have some concerns regarding status and threats, but for which insufficient information is available to indicate a need to list the species under the ESA. We wish to draw proactive attention and conservation action to these species.

As juveniles and adults, alosines are important forage for several species managed by the New England Fishery Management Council and the Mid-Atlantic Fishery Management Council and for which essential fish habitat has been designated. They provide trophic linkages between

freshwater/estuarine and marine food webs. Juvenile Alosa species have also all been identified as prey species for bluefish (*Pomatomus saltatrix*), summer flounder (*Paralichthys dentatus*) and windowpane flounder (*Scophthalmus aquosus*) whose EFH has been designated in the estuarine portions of the Hudson River. As a result, actions that reduce the availability of prey species (i.e., alosines), either through direct harm or capture, or through adverse impacts to their spawning habitat may adversely impact federally managed fisheries and their EFH. In addition, adverse impacts to EFH can occur both inside or outside areas designated as EFH, particularly if a project impacts water quality.

American shad, blueback herring, and alewife formerly supported the largest and most important commercial and recreational fisheries throughout their range, with fishing activities spanning across rivers (both fresh and saltwater), tributaries, estuaries, and the ocean. Commercial landings for these species have declined dramatically from historic highs. Due to their complex life histories, these species are adversely affected by various anthropogenic stressors, including barriers, diminished water quality and eutrophication, ocean fisheries, and climate change. Notably, poor water quality, habitat degradation, and the resulting diminished prey availability in freshwater/estuarine habitats have been indicated as a major driver limiting juvenile recruitment.

It appears that potential impacts to anadromous and resident fish that use this section of the Hudson River as migratory, spawning, nursery, resting, and foraging habitat were not fully considered during project planning and design. Specifically, we are concerned that the proposed project will affect these resources adversely through habitat and water quality degradation, impingement and entrainment of early life stages in the proposed intake and the intake of ballast water, and the loss of intertidal and subtidal shallow water habitats and SAV beds.

Submerged Aquatic Vegetation
The project area has been documented to contain SAV, predominantly wild celery (*Vallisneria americana*). SAV habitats are among the most productive ecosystems in the world and perform a number of irreplaceable ecological functions which range from chemical cycling and physical modification of the water column and sediments to providing food and shelter for commercially and recreationally important fishery species. SAV provides valuable nursery, forage and refuge habitat for a variety of migratory and forage fish species including alewife and blueback herring. It is also an important food source for waterfowl. In addition, the U.S. Environmental Protection Agency has designated SAV as a special aquatic site under the CWA Guidelines, due to its important role in the marine ecosystem for nesting, spawning, nursery cover, and forage areas for fish and wildlife.

According to the public notice, approximately 0.21 acres of this important habitat will be lost due to the dredging. It is unclear, however, the extent of SAV that will be impacted as a result of vessel operations and the associated water quality changes. Consistent with the Atlantic States Marine Fisheries Commission's (ASMFC) 2022 SAV policy (ASMFC 2022), avoidance and minimization measures should be demonstrated before unavoidable impacts to SAV are considered. This includes impacts to either present or historically present beds as well as a buffer between the proposed activities and SAV habitat. Based on the information provided, we are concerned the project has not demonstrated that the proposed activities have avoided and

minimized adverse impacts to SAV to the furthest extent practicable. Additionally, we are concerned the project has not included compensatory mitigation for the loss of SAV.

Wetlands

The wetlands on the project site are primarily freshwater and non-tidal. However, they are hydrologically connected to the Hudson River and Normans Kill. Wetlands provide many important ecological functions and services to society including fish and wildlife habitat, food chain support, surface water retention or detention, groundwater recharge, and nutrient transformation, sediment retention and atmospheric equilibrium. The primary production in wetlands forms the base of the food web that supports insects and forage fish that are then prey species for larger fish such as river herring. The water quality services provided by these wetlands retain nutrients, sediments and contaminants and improve water quality, therefore the proposed modification could adversely affect the habitat and water quality of the Hudson River near the project site by eliminating wetlands that export nutrients and filter runoff from upland sources. The surface water retention and detention and ground water recharge also provides flood control services to the surrounding community. With more prevalent flooding expected through climate change and sea level rise, the loss of wetland areas on site may reduce water storage capacity and significantly impact downstream property owners and communities. Wetlands such as these may also help to moderate global climate change through carbon storage with the plant communities and soil. The loss of wetlands as a result of this project can adversely affect resources of concern to NMFS species through the reduction in prey species and primary production, as well as water quality degradation from the reduction in sediment retention and pollution filtration.

Project Purpose and Need, Alternatives Analysis, and Minimization of Impacts

The applicant's stated project purpose is to generate economic development and support New York State in achieving its renewable energy goals by providing additional port infrastructure to support the manufacturing and distribution of wind turbine components for offshore wind facilities. This statement does not provide a clear explanation of why this particular project is needed at this location and why alternate locations and configurations are not practicable, particularly with other port facilities proposed in the Port of Coeymans and elsewhere in NY and other parts of the Mid-Atlantic. Furthermore, since there is no specific occupant identified for this site, a demonstrated need to construct this particular facility in the proposed location appears lacking.

In addition, according to the federal mitigation rules published in April 10, 2008 (33 CFR Chapter 2 Part 332.4 (b)), public notices must contain a statement explaining how impacts associated with the proposed activity have been avoided, minimized and compensated. The public notice and EFH assessment do not contain this information and a separate analysis of alternatives and minimization measures has not been provided. In addition, the CWA Section 404 (b) (1) Guidelines (Guidelines) outline a sequence to be followed when evaluating permit applications. It must first be demonstrated that potential impacts have been avoided and minimized to the maximum extent. The Guidelines allow permit issuance for only the least environmentally damaging practicable alternative. For non-water dependent activities, such as the construction of warehousing, manufacturing facilities, and attendant features proposed by the applicant, there is a presumption in the CWA that alternatives exist that do not involve special

aquatic sites such as wetlands, and that these alternatives would have less impact on the aquatic environment. Information has not been provided to demonstrate that alternative sites for the proposed project that have less adverse impacts to aquatic resources are not practicable, or that the proposed project cannot be redesigned or reduced in scope to minimize impacts.

Compensatory Mitigation

Compensatory mitigation for the loss of wetlands is mentioned in both the public notice and EFH assessment, yet the type of mitigation proposed is not consistently described. The purchase of ILF wetland credits and riparian buffer preservation is mentioned in the public notice, while the creation of benthic habitat at Schodack Island State Park mentioned in the EFH assessment worksheet. However, because there is no approved ILF instrument for any ILF mitigation provider for the Middle Hudson service area, and as such no ILF credits are available in that area, the proposal to purchase credits is not a viable compensatory mitigation option. In addition, while we support the preservation of riparian buffers, the preservation of a 2.87-acre riparian buffer along approximately 1,700 linear feet of Hudson River shoreline does not appear to be consistent with the 2008 Compensatory Mitigation for Losses of Aquatic Resources Final Rule. This rule states that preservation may be used to provide compensatory mitigation for activities authorized by Department of the Army (DA) permits when all the following criteria are met:

- The resources to be preserved provide important physical, chemical, or biological functions for the watershed;
- The resources to be preserved contribute significantly to the ecological sustainability of the watershed. In determining the contribution of those resources to the ecological sustainability of the watershed, the district engineer must use appropriate quantitative assessment tools, where available;
- Preservation is determined by the district engineer to be appropriate and practicable;
- The resources are under threat of destruction or adverse modifications;
- The preserved site will be permanently protected through an appropriate real estate or other legal instrument (e.g., easement, title transfer to state resource agency or land trust).

The rule also stated that where preservation is used to provide compensatory mitigation, to the extent appropriate and practicable the preservation shall be done in conjunction with aquatic resource restoration, establishment, and/or enhancement activities. In this instance, sufficient information has not been provided to demonstrate that the area proposed for preservation meets this criteria, especially since the only threat to the riparian area appears to be from the applicant. Further, no information has been provided on the ecological value of the area or what measures beyond a restrictive covenant will be used to protect the ecological integrity of this area from the impacts of the adjacent development. Lastly, details on the proposed benthic habitat creation Schodack Island State Park is lacking and none of the information provided explains how their proposed compensatory mitigation would offset the ecological effects of their proposed port development. As a result, it does not appear that the applicant has provided a viable conceptual mitigation plan to offset the impacts proposed. Once the applicant has demonstrated that all impacts to the aquatic environment have been avoided and minimized to the maximum extent practicable, a compensatory mitigation plan developed in accordance with the 2008 final mitigation rule should be developed and provided to us for review.

Endangered Species Act

Threatened or endangered species under our jurisdiction including federally listed species Atlantic sturgeon (*Acipenser oxyrhynchus*) and shortnose sturgeon (*Acipenser brevirostrum*) may be present in the project area. The US Maritime Administration (MARAD), as the lead federal action agency, is coordinating with our Protected Resources Division in accordance with Section 7 of the Endangered Species Act (ESA). We will keep your staff apprised of the progress and the results of this coordination so that it can be incorporated into your public interest review for this action.

Conclusion

As discussed above, the information provided to us does not adequately document project purpose and need, avoidance and minimization of adverse impacts to aquatic resources, and that unavoidable impacts will be sufficiently offset. The need for another port facility when there are others within a short radius from the proposed site should be explained, particularly since there is no specific occupant identified for this site. The applicant should also provide a full and complete analysis of project alternatives, including alternate sites as well as reduced or redesigned project components to avoid and minimize impacts to the aquatic environment. In particular, as discussed above, project components that are not water dependent such as warehousing and manufacturing should be located entirely on uplands and port facilities should be located outside of areas supporting SAV. Compensatory mitigation should be provided for all unavoidable impacts and a conceptual compensatory mitigation plan developed in accordance with the 2008 final rule should be provided. In the absence of this information, we must conclude that the project may have substantial and unacceptable impacts to aquatic resources of national importance including alewife, blueback herring, SAV, and wetlands.

We recommend that you hold your decision on this permit in abeyance in accordance with Part IV, Paragraph 3(a) of the CWA Section 404 MOA between our agencies until the outstanding issues regarding alternatives, impact minimization, and compensatory mitigation are resolved.