



FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION

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GOVERNOR

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April 8, 2013

U.S. Army Corps of Engineers
Eric Summa
Jacksonville District
P.O. Box 4970 Jacksonville, FL 32232-0019

Modification No. 0196204-014-JN
Variance No. 0196204-003-EV, Nassau County
Kings Bay Variance, Time Extension

Dear Mr. Summa:

Your request to modify Variance No. **0196204-003-EV** was received on January 23, 2013, and has been reviewed by Department staff. The proposed modification is to extend the expiration date of the mixing zone variance for maintenance dredging of the Kings Bay Entrance Channel in order for it to be consistent with the expiration date of Permit No. **0196204-001-JC**.

Background

On December 30, 1992, the Department issued a Wetland Resource Permit (No. 452025139) to the U.S. Army Corps of Engineers (Corps), Jacksonville District Office, to conduct maintenance dredging of the King's Bay Entrance Channel, with both beach and nearshore disposal along Amelia Island. This permit was modified 3 times through Permit Modification Numbers **0196204-002-EM**, **0196204-004-EM**, **0196204-005-EM**. That permit has now expired.

The Corps applied on February 28, 2002, to the Department for a Joint Coastal Permit (JCP) to maintain the King's Bay Entrance Channel, by dredging up to 1.0 million cubic yards of material annually. The disposal areas included placement on the beach, in the nearshore and in the Fernandina Ocean Dredged Material Disposal Site (ODMDS). Permit No. **0196204-001-JC** was issued for this project on September 22, 2003, and was originally set to expire on September 22, 2013.

The Department received an application for a water quality variance (Variance No. **0196204-003-EV**) on February 3, 2003, to establish a mixing zone greater than 150 meters within the areas of dredging and disposal of Class III Waters of the Atlantic Ocean, Fort Clinch Aquatic

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Preserve (OFW), for a duration of 120 days in any given maintenance dredging event. That variance was granted on October 27, 2003, and is currently set to expire on September 22, 2013.

For additional background, please see the *Consolidated Notice Of Intent To Issue Joint Coastal Permit, Variance, and Authorization To Use Sovereign Submerged Lands* at the following website:

ftp://ftp.dep.state.fl.us/pub/ENV-PRMT/nassau/issued/0196204_Kings_Bay_Entrance_Channel_Maintenace_Dredging/001-JC/Intent%20%2802-04-03%29/

The application for Permit Modification No. **0196204-006-JC** was received by the Department on February 10, 2005, requesting authorization to dredge the King's Bay Entrance Channel between stations 80+00 to 100+00, with disposal at the appropriate location (according to the geotechnical analyses of the dredged material). The modification request was ultimately withdrawn on April 13, 2007.

Permit Modification No. **0196204-007-JC** was issued on September 7, 2005, for an expanded disposal area along the Ft. Clinch State Park and for placement at the base of the south jetty (by the park fishing pier).

The Department received the application for Permit Modification No. **0196204-008-JC** on December 2, 2005, for additional dredging from Cut 1N, and placement within the North Settling Basin. Also, on November 2, 2005, the Corps submitted a letter to the Department requesting a waiver from the requirements of the 1986 'Memorandum of Understanding' (MOU) between the Navy and the Department, which required beach-quality sand dredged from the Kings Bay Entrance Channel to be placed on the beach at Ft. Clinch State Park. These requests were made because the bids received by the Corps for the annual winter maintenance dredging of Kings Bay Entrance Channel and Fernandina Harbor were so high, and the high bid prices for beach placement prevented them from awarding the contract. The Department determined that deleting the requirement for beach placement would conflict with the intent of the permit and the MOU. However, the MOU includes an emergency provision in Section III.B. that would allow nearshore placement (without a waiver to the MOU) in the case of "a bona fide emergency which necessitates immediate action." The Corps ultimately submitted this final modification request to temporarily redistribute sand within the channel and basin, and rescinded the MOU waiver request letter. On January 13, 2006, the Department issued Modification No. 0196204-008-JC, which authorized temporary placement of material dredged from Cut 1N, Stations 100+00 to 220+00 into the North Settling Basin until a subsequent dredging event could place the material on the beach.

The application for Permit Modification No. **0196204-009-EM** was received by the Department on November 16, 2006, and authorized on December 8, 2006. The Corps initially approached

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the Department with a concern that their bids from the dredging contractors were not financially feasible due to the contractors' issues with the water quality requirements stipulated in the permit. Essentially there were major concerns over whether they could achieve the anti-degradation requirement of 0 NTUs above background within the Ft. Clinch Aquatic Preserve, due to the existing natural fluctuations in turbidity levels. There were many discussions with the Corps about their options, and how best to achieve an optimum bid from the contractors, while still accomplishing the dredging and disposal within the subject areas of the OFW. These issues were resolved by allowing a turbidity deviation of +/- 2 NTUs for the background turbidity measurements taken during dredging and placement activities at Ft. Clinch and South Jetty, within the OFW. Some of the background turbidity sampling language was also modified to allow flexibility of the sampling locations inside the 1,500 meter mixing zone, within the OFW.

The Department received an application for Permit Modification No. **0196204-010-EM** on May 17, 2007, and issued the modification on June 27, 2007. This modification allowed the Permittee to place beach-quality material, dredged from Stations 119+00 to 228+00 of the North Settling Basin, onto the approved beach disposal site. The Corps requested this modification as a means to prevent any future discrepancy regarding the source and quality of the material that is to be dredged from the North Settling Basin (Cut 1 N) and placed onto the beaches at Ft. Clinch State Park.

On October 4, 2007, the Department received an application from the Corps to extend the northern limit of the beach placement area from R-15 to R-13. The Department issued Permit Modification No. **0196204-011-EM**, as requested, on October 12, 2007.

The Department received an application for Permit Modification No. **0196204-012-JN** on June 15, 2009. That request was to expand the nearshore (ocean-front) disposal site. In a meeting that took place on July 7, 2009, between representatives of the Corps, Ft. Clinch State Park and the Bureau of Beaches & Coastal Systems, the Department recommended an alternative disposal site on the Ft. Clinch shoreline. All parties found this alternative to be acceptable, and the Fort Clinch placement area was expanded 1000 feet to the east, from R-3 to R-4, with the issuance of Permit Modification No. 0196204-012-JN on August 31, 2009.

On December 26, 2012, the Department received an application from the Corps to use the statutory time extension for Permit No. 0196204-001-JC. On February 14, 2013, the Department issued Modification No. **0196204-013-JN** to extend the permit expiration date from September 22, 2013 to September 22, 2015.

Modification Justification and Staff Assessment

The current variance, No. 0196204-003-EV, is due to expire on September 22, 2013. In order for the variance duration to coincide with the statutory time extension for Permit No. 0196204-001-JC, the expiration date of the variance needs to be extended until September 22, 2015. The project has a long history, with no record of recurring compliance problems. The Project is

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currently in compliance with the existing permit. The extension of the expiration date of the variance is not expected to cause adverse impacts to water quality or other resources.

After thorough review of your application, staff finds that the proposed modification is not expected to adversely affect water quality or change the determination that the project is clearly in the public interest. Staff has also determined that the proposed alteration does not increase the potential for adverse impact on the coastal system, public beach access seaward of the mean high water line or nesting sea turtles and hatchlings and their habitat, and that the proposed alteration does not reduce the design adequacy of the project. Since the proposed modification is not expected to result in any adverse environmental impact or water quality degradation, the **variance is hereby modified** as stated above. By copy of this letter, we are notifying all necessary parties of the extension for the variance.

This letter of approval extends the expiration date of Variance No. 0196204-003-EV from September 22, 2013 to September 22, 2015. This letter must be attached to the original permit along with the original variance.

This variance is hereby modified unless a sufficient petition for an administrative hearing is timely filed under Sections 120.569 and 120.57, Florida Statutes (F.S.), as provided below. The procedures for petitioning for a hearing are set forth below. Mediation under Section 120.573, F.S., is not available for this proceeding.

NOTICE OF RIGHTS

A person whose substantial interests are affected by the Department's action may petition for an administrative proceeding (hearing) under Sections 120.569 and 120.57, F.S. The petition must contain the information set forth below and must be filed (received by the clerk) in the Office of General Counsel of the Department at 3900 Commonwealth Boulevard, Mail Station 35, Tallahassee, Florida 32399-3000.

Because the administrative hearing process is designed to redetermine final agency action on the application, the filing of a petition for an administrative hearing may result in further modification of the variance or even a denial of the application. If a sufficient petition for an administrative hearing or request for an extension of time to file a petition is timely filed, this variance modification automatically becomes only proposed agency action on the application subject to the result of the administrative review process. Accordingly, the applicant is advised not to commence construction or other activities under this variance modification until the deadlines noted below for filing a petition for an administrative hearing or request for an extension of time has expired.

Under Rule 62-110.106(4), Florida Administrative Code (F.A.C.), a person whose substantial interests are affected by the Department's action may also request an extension of time to file a petition for an administrative hearing. The Department may, for good cause shown, grant the

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request for an extension of time. Requests for extension of time must be filed with the Office of General Counsel of the Department at 3900 Commonwealth Boulevard, Mail Station 35, Tallahassee, Florida 32399-3000, before the applicable deadline. A timely request for extension of time shall toll the running of the time period for filing a petition until the request is acted upon. If a request is filed late, the Department may still grant it upon a motion by the requesting party showing that the failure to file a request for an extension of time before the deadline was the result of excusable neglect.

In the event that a timely and sufficient petition for an administrative hearing is filed, other persons whose substantial interests will be affected by the outcome of the administrative process have the right to petition to intervene in the proceeding. Any intervention will be only at the discretion of the presiding judge upon the filing of a motion in compliance with Rule 28-106.205, F.A.C.

In accordance with Rule 62-110.106(3), F.A.C., petitions for an administrative hearing by the applicant must be filed within 14 days of receipt of this written notice. Petitions filed by any persons other than the applicant, and other than those entitled to written notice under Section 120.60(3), F.S., must be filed within 14 days of publication of the notice or within 14 days of receipt of the written notice, whichever occurs first.

Under Section 120.60(3), F.S., however, any person who has asked the Department for notice of agency action may file a petition within 14 days of receipt of such notice, regardless of the date of publication.

The petitioner shall mail a copy of the petition to the applicant at the address indicated above at the time of filing. The failure of any person to file a petition for an administrative hearing within the appropriate time period shall constitute a waiver of that person's right to request an administrative determination (hearing) under Sections 120.569 and 120.57, F.S.

In accordance with Rule 28-106.201, F.A.C., a petition that disputes the material facts on which the Department's action is based must contain the following information:

- (a) The name and address of each agency affected and each agency's file or identification number, if known;
- (b) The name, address, and telephone number of the petitioner; the name, address, and telephone number of the petitioner's representative, if any, which shall be the address for service purposes during the course of the proceeding; and an explanation of how the petitioner's substantial interests are or will be affected by the agency determination;
- (c) A statement of when and how the petitioner received notice of the agency decision;
- (d) A statement of all disputed issues of material fact. If there are none, the petition must so indicate;

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- (e) A concise statement of the ultimate facts alleged, including the specific facts that the petitioner contends warrant reversal or modification of the agency's proposed action;
- (f) A statement of the specific rules or statutes that the petitioner contends require reversal or modification of the agency's proposed action, including an explanation of how the alleged facts relate to the specific rules or statutes; and
- (g) A statement of the relief sought by the petitioner, stating precisely the action that the petitioner wishes the agency to take with respect to the agency's proposed action.

A petition that does not dispute the material facts on which the Department's action is based shall state that no such facts are in dispute and otherwise shall contain the same information as set forth above, as required by Rule 28-106.301, F.A.C. Under Sections 120.569(2)(c) and (d), F.S., a petition for administrative hearing must be dismissed by the agency if the petition does not substantially comply with the above requirements or is untimely filed.

This action is final and effective on the date filed with the Clerk of the Department unless a petition is filed in accordance with the above. Upon the timely filing of a petition this order will not be effective until further order of the Department.

This variance modification constitutes an order of the Department. The applicant has the right to seek judicial review of the order under Section 120.68, F.S., by the filing of a notice of appeal under Rule 9.110 of the Florida Rules of Appellate Procedure with the Clerk of the Department in the Office of General Counsel, 3900 Commonwealth Boulevard, Mail Station 35, Tallahassee, Florida 32399-3000; and by filing a copy of the notice of appeal accompanied by the applicable filing fees with the appropriate district court of appeal. The notice of appeal must be filed within 30 days from the date when the final order is filed with the Clerk of the Department.

When there has been no publication of notice of agency action or notice of proposed agency action as prescribed in Rule 62-110.106, F.A.C., a person may request a copy of the agency action. The Department shall upon receipt of such a request, if agency action has occurred, promptly provide the person with notice. The Department does not require notice of this agency action to be published. However, the applicant may elect to publish notice as prescribed in Rule 62-110.106, F.A.C., which constitutes notice to the public and establishes a time period for submittal of any petition.

If you have any questions regarding this matter, please contact Lauren Wild by email at Lauren.Wild@dep.state.fl.us or by telephone at (850) 414-7731.

Sincerely,

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Martin K. Seeling, Administrator
Beaches, Inlets & Ports Program
Division of Water Resource Management

MKS/lw

cc: Jim More, US Navy
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Mike Hollingsworth, USACE
Geoff Klug, USACE
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FILING AND ACKNOWLEDGMENT

FILED, on this date, pursuant to Section 120.52, Florida Statutes, with the designated Department Clerk, receipt of which is hereby acknowledged.



Deputy Clerk

4-8-13

Date