

UNITED STATES ARMY CORPS OF ENGINEERS

**United States Army
Reserve Training Center
Middletown, Connecticut**

September 30, 2008

Richard Blumenthal, Attorney General of Connecticut, hereby files these comments with the United States Army Corps of Engineers (“the Army Corps”) regarding the proposed Armed Forces Training Center (“AFTC”) in Middletown, Connecticut.

SUMMARY

The men and women of the armed services deserve the best training facilities available. The citizens of Middletown and the state of Connecticut deserve an open, unbiased process that complies with federal and state law.

- The Army Corps of Engineers, like any other federal agency, is bound by the strict mandates of the National Environmental Policy Act and is therefore obligated to provide a full and public assessment of the environmental impacts of any site considered for the proposed AFTC in Middletown. In particular, this environmental review must include an analysis of all reasonable alternatives. Predetermined analyses favoring a selected site are flatly unacceptable and would fail to meet the terms of federal law.
- The Army Corps of Engineers must conduct an environmental impact assessment on any preferred site, particularly the

Boardman site, with its active farmland and potentially significantly wetlands which should clearly meet the requirements for an EIS.

- Any site that contains designated wetlands cannot be selected without approval of the Connecticut Department of Environmental Protection.
- The Army Corps of Engineers and the Department of Justice must comply with the federal Freedom of Information Act and disclose all documents related to the legal interpretation restricting site selection within the city of Middletown.

NEPA

The National Environmental Policy Act, 42 U.S.C § 4321, *et seq.* (“NEPA”), mandates that federal agencies involved in activities that may have significant impact on the environment must complete a detailed statement of the environmental impacts and project alternatives and this statement must be included in any recommendation regarding the siting of these activities. NEPA provides, in pertinent part, as follows:

The Congress authorizes and directs that, to the fullest extent possible . . .

(2) all agencies of the Federal Government shall -- . . .

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on --

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

42 U.S.C. § 4332.

NEPA directs that these environmental issues must be studied and considered by the reviewing agency before any decisions are made. Federal appellate courts have been very clear that NEPA is an important federal law and compliance is mandatory. “NEPA was created to ensure that agencies will base decisions on detailed information regarding significant environmental impacts and that information will be available to a wide variety of concerned public and private actors. *Morongo Band of Mission Indians v. Federal Aviation Administration*, 161 F.3d 569, 575 (9th Cir. 1998).” *Mississippi River Basin Alliance v. Westphal*, 230 F.3d 170, 175 (5th Cir. 2000).

Thus, the fundamental goal of an evaluation under NEPA is to require government agencies involved with a given project to undertake a careful and thorough analysis of the need for that project and its impacts before committing to proceed with the project. As the Tenth Circuit has held:

The purpose of NEPA is to require agencies to consider environmentally significant aspects of a proposed action, and, in so doing, let the public know that the agency's decision-making process includes environmental concerns. *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council*, 462 U.S. 87, 97, 76 L. Ed. 2d 437, 103 S. Ct. 2246 (1983); *Sierra Club v. United States Dep't of Energy*, 287 F.3d 1256, 1262 (10th Cir. 2002).

Utahns For Better Transportation v. United States Dept. of Transp., 305 F.3d 1152, 1162 (10th Cir. 2002)

As the District of Columbia Circuit has held:

"NEPA was intended to ensure that decisions about federal actions would be made only after responsible decision-makers had fully adverted to the environmental consequences of the actions, and had decided that the public benefits flowing from the actions outweighed their environmental costs." *Jones v. District of Columbia Redevelopment Land Agency*, 162 U.S. App. D.C. 366, 499 F.2d 502, 512 (D.C. Cir. 1974). . . .

Illinois Commerce Com. v. Interstate Commerce Com., 848 F.2d 1246, 1259 (D.C. Cir. 1988).

Importantly, it is not only the government decision-makers who are to be served by an EIS. As one court noted: "The purpose of an EIS is to 'compel the decision-maker to give serious weight to environmental factors' in making choices, *and to enable the public to 'understand and consider meaningfully the factors involved.'* *County of Suffolk [v. Secretary of Interior]*, 562 F.2d at 1375 (citing *Sierra Club v. Morton*, 510 F.2d 813, 819 (5th Cir. 1975))." *Town of Huntington v. Marsh*, 859 F.2d 1134, 1141 (2d Cir. 1988)

As the United States Court of Appeals for the Second Circuit has stated:

The sufficiency of an EIS is determined according to the "rule of reason," under which the EIS will be upheld as adequate if it has been compiled in good faith and sets forth sufficient information to enable the decision-maker to consider fully the environmental factors involved and to make a reasoned decision after balancing the risks of harm . . . against the benefits to be derived from the proposed action, as well as to make a reasoned choice between alternatives. *County of Suffolk v. Secretary of Interior*, 562 F.2d 1368, 1375 (2d Cir. 1977), *cert. denied* 434 U.S. 1064, 55 L. Ed. 2d 764, 98 S. Ct. 1238 (1978).

Town of Huntington v. Marsh, 859 F.2d 1134,1140 (2d Cir. 1988).

Proposed Middletown Training Center

I have significant legal concerns with the selection process to date. Specifically, I am concerned that the Army Corps has not adequately examined alternatives to the selected site or properly evaluated known environmental conditions, as required by federal law.

NEPA requires federal agencies to consider the environmental consequences of their actions and to prepare an environmental impact statement for any major federal action that significantly affects the quality of the human environment. Representatives of the Army Corps publicly conceded at a press conference in Middletown, Connecticut, on July 31, 2008, that this project requires a NEPA review. I fully concur.

One of the key requirements of NEPA is that environmentally preferable alternatives be considered to determine whether they are feasible. However, the Army Corps' public statements to date suggest that the Boardman Lane site continues to be evaluated despite environmental issues and public opposition.

Information provided to my office indicates that the site contains a significant amount of wetlands as well as a potentially historic 18th century farmhouse. Additionally, there is reliable information indicating that endangered species or species of concern have been found at the site. Under these circumstances, it would be difficult if not impossible for the Boardman Lane site to be best suited for the AFTC.

Neither the Boardman Lane site nor any other site currently under consideration by the Army Corps have been the subject of necessary historical, archeological, traffic and wetlands studies. It is illogical, if not illegal, to pre-select a preferred site without

having done even the most minimal of examinations under NEPA. Furthermore, such pre-selection fundamentally undermines public confidence in the entire process.

While Army Corps officials have not publicly acknowledged that they will follow the mandatory requirements of the Clean Water Act, 33 USCS 1351, *et seq*, the law is clear that if there are significant amounts of wetlands on the site, the Corps will need to obtain a permit under section 401 of the Clean Water Act. Section 401 permits are reviewed and issued by the Connecticut Department of Environmental Protection (DEP) and, to date, I understand that no 401 permit application has been filed with the DEP.

Freedom of Information Act

On August 4, 2008, I filed a request under the federal Freedom of Information Act (FOIA), 5 USC 552, for a copy of the opinion letter to which the Army Corps has repeatedly referred as legally requiring them to site this facility in Middletown. I have not received any such document from either the Army Corps or the Department of Justice which issued the legal opinion letter. Compliance with FOIA is required under the law and necessary for the public's full understanding of the integrity of the Army Corps selection process.

The clear language of the Base Realignment and Closure Act of 2005 provides that the federal government should "relocate units to a new Armed Forces Reserve Center, Organizational Maintenance Shop and Army Maintenance Support Activity in Middletown, CT, if the Army is able to acquire land suitable for the construction of the facilities. (emphasis added)

This language appears to permit sites outside Middletown under some circumstances, but the Army Corps has refused to provide its legal opinion concluding the contrary. If the Army Corps and the Department of Justice continue to refuse to disclose this opinion letter, I fully intend to take all legal steps necessary to provide the public with this letter.

CONCLUSION

I assure you that I will closely monitor compliance with the requirements of NEPA and the Clean Water Act for this project and, in particular, I will examine the environmental assessment and environmental impact statement closely to ensure that the environmental consequences of the construction and alternative sites are given sufficient and earnest weight, especially in light of the existing wetlands on the site. I will take all appropriate action to ensure that Connecticut's environment is adequately protected. If necessary, I will take vigorous court action to ensure the Army Corps complies with environmental laws and selects a site that best serves the public interest.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Richard Blumenthal', written in a cursive style.

RICHARD BLUMENTHAL
Attorney General, State of Connecticut
Dated: September 30, 2008