



Tulane Environmental Law Clinic

January 19, 2010

Via Certified Mail, Return Receipt Requested
No. 7008 1830 0002 8233 3378

Ref # 112-004.1

Lieutenant General Robert L. Van Antwerp
Commanding General of the US Army Corps of Engineers
Headquarters, US Army Corps of Engineers
441 G Street, NW
Washington, DC 20314-1000

**Re: Industrial Canal Lock Replacement Project
Notice of Intent to File Citizen Suit for Failure to Comply with Clean Water
Act Section 404**

Dear Lt. General Van Antwerp:

This letter constitutes notice pursuant to Clean Water Act § 505(b)(1)(a), 33 U.S.C. § 1365(b)(1)(a), and in accordance with 40 C.F.R. § 135, that Holy Cross Neighborhood Association, Gulf Restoration Network, Louisiana Environmental Action Network, Sierra Club, and Citizens Against Widening the Industrial Canal intend to file a citizen suit pursuant to Clean Water Act § 505(a)(1) against the U.S. Army Corps of Engineers and Lt. General Van Antwerp, in his official capacity as Commanding General of the Corps. These parties are taking this action because of the Army Corps of Engineers' failure to comply with Section 404 of the Clean Water Act. Holy Cross Neighborhood Association, Gulf Restoration Network, Louisiana Environmental Action Network, Sierra Club, and Citizens Against Widening the Industrial Canal are sending you this letter to preserve their rights under the Clean Water Act, but would welcome the opportunity to resolve these issues out of court.

I. BACKGROUND

In 2006, the Eastern District of Louisiana found that the Corps violated the National Environmental Policy Act because it "failed to take a 'hard look' at the environmental impacts" *Holy Cross v. U.S. Army Corps of Eng'rs*, 455 F. Supp. 2d 532, 540 (E.D. La. 2006). The court found that the Corps' analysis in its 1997 environmental impact statement was inadequate even before the events following Hurricane Katrina revealed deficiencies. The court noted the Corps failed even to "consider the reasonable dredging and disposal alternatives that the Corps has recently adopted for maintenance dredging of the same waters." *Id.* The court enjoined the

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6329 Freret St., Ste. 130, New Orleans, LA 70118-6231 tel 504.865.5789 fax 862.8721 www.tulane.edu/~telc

project, stating that “[w]ithout further study and planning, the project cannot be considered ‘environmentally conscious.’” *Id.*

Despite the court’s instructions to the Corps to reconsider the Industrial Canal lock replacement project, the Corps has again failed to take a hard look at the project as a whole, including reasonable alternatives, and instead prepared a limited “supplemental” impact statement that considered only a deep-draft lock alternative—the project recommended in 1997. Michael Walsh, Brigadier General, U.S. Army Division Commander, signed the Record of Decision approving the Corps’ lock replacement plan for a deep-draft lock on May 20, 2009.

II. CLEAN WATER ACT

The Clean Water Act provides that “any citizen may commence a civil action on his own behalf – against any person (including ... (ii) any other governmental instrumentality or agency) ... who is alleged to be in violation of ... an effluent standard or limitation under this chapter.” CWA § 505(a)(1)(A), 33 U.S.C. § 1365(a)(1)(A).

The Clean Water Act requires a sixty (60) day waiting period upon providing notice of intent to sue. 33 U.S.C. § 1365(b)(1)(A); 40 C.F.R. §135.3. This waiting period gives the parties a reasonable time to resolve the matter cooperatively, without litigation.

III. GENERAL STATEMENT OF VIOLATIONS

The Army Corps of Engineers (“Corps”) proposes to dredge the Industrial Canal and destroy wetlands during its proposed lock replacement project on the Inner Harbor Navigation Canal (“Industrial Canal”). Because the project involves filling wetlands, the Clean Water Act mandates that the Corps choose the least environmentally harmful alternative. Because the Corps has not done so and has begun constructing the project, the Corps is violating the Clean Water Act.

A. The Clean Water Act Requires the Corps to Select the Practicable Alternative Having the Fewest Impacts on the Environment When it Authorizes Projects That Will Destroy Wetlands.

Clean Water Act § 404 authorizes the Corps to issue permits for the discharge of dredge or fill material at “specified disposal sites.” *See* 33 U.S.C. § 1344(a). The Act mandates that “each such disposal site [for dredge and fill material] shall be specified... through the application of guidelines developed by” EPA. *See* 33 U.S.C. § 1344(b); *see also* 40 C.F.R. § 230.12. Though the Clean Water Act does not explicitly allow dredging without a permit, the Corps does not issue permits for its own dredge and fill projects pursuant to federal regulations. *See* 33 C.F.R. § 336.1(a). Federal regulations require the Corps to comply with “all applicable substantive legal requirements, including... the section 404(b)(1) guidelines.” *Id.*

EPA's § 404(b)(1) guidelines state that "no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse *environmental* consequences." 40 C.F.R. § 230.10(a) (emphasis added). In other words, the guidelines require the Corps to select the practicable alternative to a proposed action that has the least adverse impact on the environment. *Id.*

An alternative is "practicable" if "it is available and capable of being done," considering cost, technology, logistics, and project purposes. *See* 40 C.F.R. § 230.10(a)(2). The guidelines recognize that the impact of dredged material can be minimized by limiting the amount of material discharged at a disposal site. *See* 40 C.F.R. § 230.71(b).

If the Corps cannot explain why there is no practicable alternative with less adverse environmental impact, it must "reconsider its determination based on an adequate analysis of the alternatives." *See Alliance to Save the Mattaponi v. U.S. Army Corps of Eng'rs*, 606 F. Supp. 2d 121, 130 (D.D.C. 2009). "It must explain fully, based [on] analysis adequate to the task, why other alternatives are either impracticable or more damaging." *Id.*

B. The Corps is Building a Deep-Draft Lock Even Though A Shallow-Draft Lock Would Meet the Project's Needs, is Practicable, and Would Have Fewer Impacts on the Environment.

The Corps' construction of the project violates the Clean Water Act because the Corps selected a deep-draft alternative instead of a shallow-draft alternative for the lock replacement project. The shallow draft lock is a practicable alternative because it meets the project's needs and would cost less than building a deep-draft lock. A shallow-draft lock will require the Corps to dredge less sediment and, in turn, destroy fewer acres of wetlands when it dumps that dredged spoil in wetlands. A shallow draft lock, by reducing the amount of dredged material, makes clamshell dredging and landfill disposal—two dredging alternatives that have fewer environmental impacts than the Corps' planned methods—practicable dredging and disposal alternatives.

The Corps' §404(b)(1) analysis falls short because it does not even consider building a shallow-draft lock. The Corps failed to explain why a shallow draft lock is not practicable, and the Corps failed to explain why there is no alternative to a deep-draft lock replacement that has less adverse environmental impact. Not only is the analysis arbitrary and capricious in violation of the Administrative Procedures Act, but it violates the Clean Water Act.

C. The Corps Has Begun Constructing the Industrial Canal Project and Is Violating the Clean Water Act.

The Clean Water Act prohibits any discharge of dredge or fill material except in compliance with § 404 of the Act. *See* 33 U.S.C. § 1311. The Corps' lock replacement project

violates this provision because, as noted above, the Corps failed to select the least damaging practicable alternative when authorizing the project. *See* 33 U.S.C. §1326(a). Here, the Corps has commenced a project to dredge the Industrial Canal and deposit the dredged spoil in wetlands along the Mississippi River Gulf Outlet and the Gulf Intercoastal Waterway—wetlands that are waters of the United States—without selecting the least damaging practicable alternative. Each discharge of dredged material from the project constitutes an additional violation of the Act.

IV. PERSONS GIVING NOTICE

The name, address, and phone number of persons giving notice is:

Louisiana Environmental Action Network
P.O. Box 66323
Baton Rouge, LA 70896
(225) 928-1315

Holy Cross Neighborhood Association
P.O. Box 3417
New Orleans, LA 70177
(504) 324-9955

Sierra Club
5534 Canal Blvd.
New Orleans, LA 70124
(504) 427-1885

Gulf Restoration Network
P.O. Box 2245
New Orleans, LA 70176
(504) 525-1528

Citizens Against Widening the Industrial Canal
4442 Arts Street
New Orleans, LA 70122
(504) 615-7266

V. IDENTIFICATION OF COUNSEL

Adam Babich (No. 27177)
Tulane Environmental Law Clinic
6329 Freret Street
New Orleans, LA 70118
Phone: (504) 862-8800
Fax: (504) 862-8721

VI. RELIEF SOUGHT

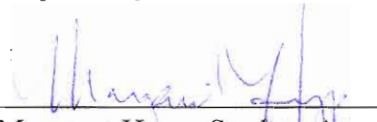
The U.S. Army Corps of Engineers and Lt. General Van Antwerp, in his official capacity as Commanding General of the Corps, is responsible for these violations of the Clean Water Act. *See* 33 U.S.C. § 1365. This letter gives the Corps and Lt. General Van Antwerp notice of Holy Cross Neighborhood Association, Gulf Restoration Network, Louisiana Environmental Action

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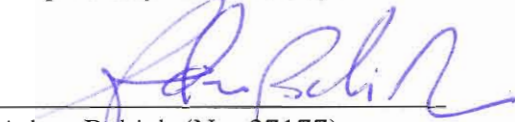
Network, Sierra Club, and Citizens Against Widening the Industrial Canal's intent to sue if this violation cannot be remedied through negotiation. If a lawsuit is necessary to resolve this issue, Holy Cross Neighborhood Association, Gulf Restoration Network, Louisiana Environmental Action Network, Sierra Club, and Citizens Against Widening the Industrial Canal may seek declaratory and injunctive relief.

We look forward to discussing how we can work together to resolve the issue.

Prepared by:


Margaret Hupp, Student Attorney
Tulane Environmental Clinic

Respectfully submitted by:


Adam Babich (No. 27177)
Tulane Environmental Clinic
6329 Freret St.
New Orleans, LA 70118
Tel. No. (504) 862-8800
Fax No. (504) 862-8721

Counsel for Holy Cross Neighborhood Association, Gulf Restoration Network, Louisiana Environmental Action Network, Sierra Club, and Citizens Against Widening the Industrial Canal

cc:

Via Certified Mail
No. 7008 1830 0002 8233 3361
Secretary
Louisiana Department of Environmental Quality
602 N. Fifth Street
Baton Rouge, LA 70802

Via Certified Mail
No. 7008 1830 0002 8233 3354
Mr. Eric Holder
Attorney General
U.S. Department of Justice
950 Pennsylvania Ave, NW
Washington, DC 20530-0001

Via Certified Mail
No. 7008 1830 0002 8233 3347
Dr. Alfredo Armendariz
Regional Administrator - EPA Region 6
U.S. Environmental Protection Agency
Fountain Place 12th Floor, Suite 1200
Dallas, TX 75202-2733

Via Certified Mail
No. 7008 1830 0002 8233 3330
Ms. Lisa P. Jackson, Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Ave, NW
Washington, DC 20460