

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA**

SAVE OUR WETLANDS

Plaintiff,

v.

TERREBONNE LEVEE &
CONSERVATION DISTRICT

Defendant.

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Case No.: 08-2159

Sect. F Judge: Feldman

Mag. 2 Judge Wilkinson

Ref: 163-001

CONSENT DECREE

Plaintiff Save Our Wetlands and Defendant Terrebonne Levee & Conservation District (“TLCD”), the parties consenting to this Decree (hereinafter “the Parties”) hereby agree to and request entry of this Consent Decree (hereinafter “Decree”) to resolve the instant litigation.

RECITALS

WHEREAS, this action relates to the construction of the 2.7 mile-long Reach J1 Levee in the wetlands along Bayou Pointe-aux-Chenes, in Terrebonne Parish, Louisiana. On or around April 21, 2006, TLCD began construction on the Reach J1 Levee, and as of November 13, 2007 the work on the levee’s first of two lifts was 90 percent complete. Building the levee involved filling in approximately 23 acres of wetlands.

WHEREAS, on April 29, 2008, Save Our Wetlands filed its Complaint in this matter alleging that TLCD violated § 404 of the Clean Water Act, 33 U.S.C. § 1344, by failing to first receive a permit from the U.S. Army Corps of Engineers (“Corps”) for the discharge of fill

materials into the 23 acres of wetlands under the footprint of the levee. TLCD denies and disputes the allegations and claims set forth in Save Our Wetlands' complaint, contending that the Corps directed TLCD to withdraw its § 404 permit application for Reach J1 and instead issued an Environmental Assessment and Finding of No Significant Impact ("FONSI") for the project before TLCD began construction on Reach J1.

WHEREAS, Save Our Wetlands' principle objectives in this litigation are two-fold: *(1)* to ensure that TLCD's construction, operation, and maintenance of Reach J1 – including work that has already been completed, is currently in progress, and is undertaken in the future – complies with the specifications, terms, and conditions set forth in the Corps' Environmental Assessment for Reach J1 and *(2)* to ensure that in the future, Save Our Wetlands is notified before actual construction begins of any decision by either the Corps or TLCD to rely upon either an environment assessment or environmental impact statement in place of a § 404 permit for levee-building in Terrebonne Parish.

WHEREAS, TLCD has no objections to complying with Save Our Wetlands' voiced objectives, given that: *(1)* with respect to TLCD's construction, operation, and maintenance of Reach J1, TLCD already has and currently is complying with the specifications, terms, and conditions of the Environmental Assessment for Reach J1, and intends to likewise do so in the future and *(2)* TLCD's decision to the rely upon the Environmental Assessment in place of the standard § 404 permit was based on express oral directives from the Corps, and that therefore, TLCD has no objections to providing Save Our Wetlands of notice to proceed in a similar manner, should the Corps so direct.

WHEREAS, the Parties wish to implement this Decree to avoid protracted and costly litigation and to preserve judicial resources.

WHEREAS, the Parties recognize, and the Court entering this Decree finds, that this Decree has been negotiated in good faith and that the Decree is fair, reasonable, and in the public interest.

DECREE

NOW, THEREFORE, it is hereby Decreed and Ordered as follows:

1. This Court has jurisdiction over the Parties and the subject matter of this Decree as to these specific claims and parties.
2. This Decree shall apply to and be binding upon each of the Parties, their officers, agents, employees, contractors, successors in interest, and assigns.
3. TLCD shall construct, operate, and maintain the Reach J1 Levee in compliance with the specifications, terms, and conditions set forth in the Corps' Environmental Assessment for Reach J1. In particular, TLCD shall ensure that the following details of the Environmental Assessment are fully met, including for construction, maintenance, and operation activities already completed, currently in progress, and undertaken in the future:

3.1 The levee shall be constructed in two lifts, with the final height built to a design grade of +13 feet North American Vertical Datum 1988. Approximately 1.5 million cubic yards of fill shall be used in the first lift, and 350,000 cubic yards in the second lift. The fill shall come from two sites, one adjacent to the levee, and the other from a site near Montegut, LA. The first lift is estimated to take 12 months and the second lift is estimated to take 9 months, with approximately 4 years between lifts. Once construction is complete, the levee shall be seeded with cover grass.

3.2 The levee will be built on geotextile fabric with compacted soils coming from adjacent local borrow and trucked in from an off-site borrow field. The wave berm

on the flood side would have a 1-foot vertical on 12-foot horizontal side slopes. The levee would have a 1-foot vertical on 4-foot horizontal side slopes and would be built to a height of 14 feet with a 10-foot wide crown. On the protected (land) side of the levee, the slope would be 1-foot vertical on 4-foot horizontal to the +6 foot elevation. From that point it would have a 1-foot vertical on 16-foot horizontal side slope to the +2 foot elevation, then taper to natural ground. Each end of the new levee would connect with existing levees.

3.3 The borrow canal adjacent to the levee, on the flood side, shall consist of a segmented channel at a depth of 26.5 feet, with a 58-foot bottom width, a 202-foot top width, and 1-foot vertical and 3-foot horizontal side slopes. Each segment of the borrow canal shall be approximately 1,550 feet in length, separated by a 200 foot long segment of marsh.

3.4 The marsh platform shall be built on the flood side of the levee, after construction of the first lift. The platform shall be constructed to an initial elevation of approximately 2 feet. Where there is no adjacent borrow canal, the platform shall be 50 feet wide, and adjacent to the borrow area, the platform shall be 119 feet wide (extending up to 121-240 feet from center line of the levee). Once construction is complete, the platform shall be planted with wetland species, as chosen by the inter-agency Habitat Evaluation Team that was assembled by the Corps during the Environmental Assessment process. Once planted, a successional process shall be allowed to resume on the marsh platform. Marsh-creation activities on the platform shall be conducted in a manner that avoids adverse impacts to existing marsh within the marsh-creation area. Existing

marshes impacted by project-related activities shall be restored to pre-construction conditions.

3.5 To ensure water drainage and to allow continued fisheries access on the protected side of the levee, five different trenasses shall be cut across existing marsh peninsulas where they intersect with the levee. The trenasses shall be dug to a depth of 2 feet and will be 3 to 10 feet wide. The location and exact width of the trenasses are described on page 25 of the Environmental Assessment. Six 24-inch culverts shall be installed in the old board road to assure continuation of drainage and water circulation.

3.6 To avoid possible impacts to cultural site (16TR323) that is within the *Right-of-Way* of the levee and on the edge of the footprint itself, a “no work zone” shall be defined around the known edges of the site, and the Right-of-Way would be adjusted such that no disturbance is brought to the site.

3.7 The contractor(s) or subcontractor(s) shall use Aragon Parish Road to LA State Hwy 58 La State hwy 55 to LA State Hwy 665 to the project site when hauling levee material to Reach J1. Return trip to the borrow site will be the reverse of this route. In the event of road closures, alternative routes may be required. The contractor shall comply with Louisiana State Highway regulations and Terrebonne Parish ordinances governing commercial haul use of the noted roadways. In support of and in addition to the state regulations and the parish ordinance, the haul contractor shall observe road limits, whether posted or not, and all traffic signage. Current load limits cannot exceed 80,000 pounds, and the height restriction at the Terrebonne Bayou Bridge is 13 feet 6 inches (LA DOTD). Departure from the borrow site shall be by a contractor designed limestone roadway to the highway entrance point. The roadway shall be designed by the

contractor to have limestone turn-outs and limestone wash points to ensure entry to the highway is safe and that trucks do not carry borrow site material or deleterious material to the highway/road. Departure points from the project site for return to the borrow site shall be similarly equipped. The hours of operation for hauling material to Reach J1 levee site shall be Monday through Saturday between the hours of 7am to 5pm, excluding state and parish holidays. Haul material or other deleterious material dropped or deposited on the established haul travel routes shall be immediately removed and cleaned. State and parish haul routes shall be kept in operable condition at all times.

3.8 To ensure that the mitigation measures provide sufficient compensation for project-related wetland impacts, after construction monitoring shall be conducted as follows:

- 3.8.1 Elevation surveys shall be conducted one year, three years, and five years after construction is completed. These surveys shall encompass the created marsh platform, the trenasses, the degraded temporary access road, and the culverts under the board road.
- 3.8.2 One full year after construction of the marsh creation platform, that platform shall be within the functional marsh elevation range (to be determined by the Habitat Evaluation Team, plus or minus 3 inches). However, ten percent of that platform may exceed the functional marsh range, provided it exceeds the designated functional marsh elevation range.
- 3.8.3 One full growing season after planting the marsh creation platform, planting survival shall be at least 50 percent.

3.8.4 If TLCD determines the survivability of the plants is less than 50%, TLCD shall develop a plan to replace and replant vegetation in the mitigation area in consultation with Habitat Evaluation Team for the Morganza Project. The goal of this program will be 100% viable plants after the replanting. TLCD shall implement this replanting program prior to the end of the next growing season.

3.8.5 Post-construction photographs of vegetation on the mitigation berm shall be taken at locations recorded by a Global Positioning System and re-photographed at year 3 and year 5.

4. All the specifications, terms, and conditions outlined in provision 3 above are mandatory and enforceable under this Decree.

5. TLCD shall allow representatives from the Save Our Wetlands or the Corps to reasonably inspect the Reach J1 levee upon reasonable notice and reasonable logistical conditions to ensure that it is being or has been accomplished in accordance with the terms and conditions of provision 3.

6. Should TLCD wish to modify the Environmental Assessment, including, but not limited to the provisions set forth in paragraph 3 of this Order, it must submit those modifications in writing to the Corps and Save Our Wetlands prior to the modification. Additional mitigation may be necessary if the proposed modification would destroy or impact additional wetlands. Upon the Corps' approval of any modifications, this Order will be deemed to include the approved modifications.

7. TLCD shall provide Save Our Wetlands with notice of any Congressional authorization received for any portion of the Morganza-to-the-Gulf Project, including levees which either TLCD or the Corps intends to build, as well as any additional portions such as any portions related to navigation. Such notice shall be made in writing and sent by U.S. mail to counsel for Save Our Wetlands within one week after TLCD becomes aware of such Congressional authorization.

8. As consideration for the commitments TLCD has made herein, Save Our Wetlands releases any and all claims that they may have against TLCD for failing to obtain a Clean Water Act § 404 permit prior to building the Reach J1 Levee.

9. This Decree shall be effective upon the date of its entry by the Court. This Decree shall expire five years from the date of entry, unless a party moves and the Court grants an extension.

10. Nothing herein shall prevent TLCD from undertaking reasonable and proper emergency action for flood protection within the footprint of the Reach J1 Levee.

11. The Court shall maintain jurisdiction over this action for the purpose of enabling the Parties and any third party beneficiaries to apply to the Court to construe, carry out, or enforce compliance with the terms and conditions set forth in this Decree.

12. Each Party shall bear its own costs and attorney fees.

13. The undersigned representatives of the respective Parties certify that they are fully authorized by the Party that they represent to enter into the terms and conditions of this Decree and to legally bind that Party. This Decree may be signed in counterparts.

14. Upon entry of this Decree, this case shall be dismissed with prejudice, except that this Court retains all jurisdiction necessary to construe, carry out, and enforce compliance with this Decree.

The undersigned party agrees to the Consent Decree in Save Our Wetlands v. Terrebonne Levee & Conservation District, 08-2159 (E.D. La.)

Save Our Wetlands

/s Janet Moulton
Janet Moulton, President
Save Our Wetlands

Date: February 10, 2009

Approved as to form:

For Save Our Wetlands

/s Jill M. Witkowski
Jill M. Witkowski, La. Bar No. 30121
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The undersigned party agrees to the Consent Decree in Save Our Wetlands v. Terrebonne Levee & Conservation District, 08-2159 (E.D. La.)

Terrebonne Levee & Conservation District

/s Anthony J. Alford

Name: Anthony J. Alford

Title: President

Date: February 9, 2009

Approved as to form:

For Terrebonne Levee & Conservation District

/s C. Berwick Duval II
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Entered as an Order of this Court 11th day of February, 2009

BY THE COURT

JUDGE MARTIN C. FELDMAN