

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA

LOUISIANA CRAWFISH PRODUCERS)
ASSOCIATION-WEST, ATCHAFALAYA)
BASINKEEPER, and LOUISIANA)
ENVIRONMENTAL ACTION)
NETWORK,)

Plaintiffs,)

v.)

LIEUTENANT GENERAL ROBERT L.)
VAN ANTWERP (in his official capacity)
as U.S. Army Chief of Engineers and)
Commanding General of the U.S. Army)
Corps of Engineers), and)

U. S. ARMY CORPS OF ENGINEERS,)

Defendants.)

COMPLAINT

INTRODUCTION

1. This lawsuit challenges the U.S. Army Corps of Engineers’ (the “Corps”) issuance of after-the-fact permits for destruction of Atchafalaya Basin wetlands to Mallard Basin, Inc.

2. By issuing after-the-fact permits, the Corps encourages lawless behavior— sending the message that it is easier to seek forgiveness than permission. Such permits encourage destruction of Atchafalaya Basin wetlands, a precious and endangered national resource that is also key to the livelihood and culture of Plaintiffs’ members.

3. The challenged permits purport to validate prior illegal activity on the part of Mallard Basin, Inc. Seeking to replace natural Atchafalaya Basin wetlands with a private duck pond, Mallard Basin, Inc. dug over two miles of ditch in wetlands, drained the water out of a lake, and installed a dam and metal water control devices to artificially control the flow and levels of water in 600 acres of hardwood swamp—all without obtaining legally-required permits. These actions alter the hydrology of 600 acres or more of forested hardwood swamp in the Atchafalaya Basin in an area designated as critical habitat for the Louisiana black bear. By granting after-the-fact permits, the Corps purported to bless these actions and make them permanent.

4. Further, the Corps violated federal law when it attempted to validate illegal destruction of the Atchafalaya Basin wetlands at issue. Upon information and belief, the Corps issued an arbitrary “finding” that the destruction of the Atchafalaya Basin wetlands would not affect any endangered or threatened species without conducting any investigation, without reliable support in the record, and without conducting a legally required consultation with the U.S. Fish and Wildlife Service. The Corps also violated the National Environmental Policy Act and the Clean Water Act by, among other things, failing to consider viable alternatives to destruction of the wetlands at issue and by failing to prepare an environmental impact statement. Moreover, as applied to the facts of this case and to the endangered Atchafalaya Basin, the Corps’ practice of issuing after-the-fact permits is arbitrary, capricious, and in violation of the Administrative Procedure Act.

5. The Plaintiffs are Louisiana Crawfish Producers Association-West, Atchafalaya Basinkeeper, and the Louisiana Environmental Action Network (“Plaintiffs”), who bring this suit under the citizen suit provision of the Endangered Species Act § 11(g)(1)(A), 16 U.S.C. §

1540(g)(1)(A), and the Administrative Procedure Act, 5 U.S.C. §§ 703-706, to protect their members, including members who have commercially fished in and around the area that the permits affect.

6. Plaintiffs ask this Court to declare the permits invalid, enjoin and vacate the permits, and remand them to the Corps.

JURISDICTION

7. This Court has subject matter jurisdiction over this action under 28 U.S.C. § 1331 because this case concerns federal questions that arise under the Endangered Species Act, 16 U.S.C. § 1540(c); the Administrative Procedure Act, 5 U.S.C. § 703; and the Declaratory Judgment Act, 28 U.S.C. § 2201.

VENUE

8. Venue in this Court is proper under 28 U.S.C. §1391(e) because, *inter alia*, the wetlands at issue are in this judicial district.

NOTICE

9. On December 9, 2010, Plaintiffs sent a Notice of Intent to Sue (“Notice”) by certified mail to the Corps and to the Secretary of the U.S. Department of the Interior. The Notice detailed the Corps’ violations of Endangered Species Act §§ 7(a)(1) and 7(a)(2). A true and correct copy of the Notice is attached as Exhibit A and incorporated by reference.

10. More than sixty days have passed since Plaintiffs provided the Notice.

PARTIES

Plaintiffs

11. The Louisiana Crawfish Producers Association-West (LCPA) is a non-profit corporation organized under the laws of Louisiana. Its members are commercial crawfishermen,

recreational fishermen, hunters and nature photographers. Its members regularly use the Atchafalaya Basin and other public waters and lands in pursuit of these interests. The members of LCPA have economic, recreational, cultural, historic, spiritual and aesthetic interests in the Basin. In its work to protect the Basin, LCPA helps to ensure that laws and regulations of the State and the United States, intended to preserve and enhance the Basin's natural resources and environmental quality, are followed. Members of LCPA have commercially fished in and around the area affected by the challenged permits. The damming of Fisher Lake, the removal of trees, the dredging, and the pumping have harmed members of LCPA in their pursuit of a livelihood and in their attempts to preserve their culture and history as Cajuns.

12. LCPA has a demonstrated interest in protecting the Louisiana black bear and its designated critical habitat. In 2007, LCPA filed suit in the Western District of Louisiana to force the Secretary of the Interior to designate critical habitat for the Louisiana black bear. *See Schoeffler and Louisiana Crawfish Producers Association-West v. Kempthorne*, 493 F. Supp. 2d 805 (W.D. La. 2007).

13. Neither the claims asserted nor the relief requested in this case require the participation of any of LCPA's members. This lawsuit is germane to LCPA's purpose.

14. The Atchafalaya Basinkeeper is a non-profit corporation organized under the laws of Louisiana. It is dedicated to protecting and restoring the ecosystems within the Atchafalaya Basin, acting as an advocate for the protection of these wetlands. It is a Waterkeeper program under the Waterkeeper Alliance, which is a grassroots advocacy organization consisting of over 200 local Waterkeeper programs dedicated to preserving and protecting the nation's waters.

15. The Atchafalaya Basinkeeper has an interest in protecting the Louisiana black bear and its designated critical habitat within the Atchafalaya Basin, as well as in ensuring that

the Corps adequately considers and follows environmental protection laws when issuing permits in the Atchafalaya Basin. It works to ensure that the Atchafalaya Basin and its dependents have a positive future. This lawsuit is germane to the Atchafalaya Basinkeeper's purpose. Neither the claims asserted nor the relief requested in this case requires the participation of any of the Atchafalaya Basinkeeper's members.

16. The Atchafalaya Basinkeeper's interest in the Atchafalaya Basin ecosystem, including its land, flora, fauna, and water quality, flows directly from the interests of its members, who live, work, and recreate in and around the project area. Any degradation of the Basin, such as Mallard Basin, Inc.'s activities permitted by the Corps, directly harms members of the Atchafalaya Basinkeeper. The Atchafalaya Basinkeeper's members have suffered, are suffering, and will continue to suffer injury from the Corps' violations alleged in this Complaint. The Atchafalaya Basinkeeper's members' enjoyment of natural resources in the vicinity of the project is impaired by the Corps' action.

17. The Louisiana Environmental Action Network (LEAN) is a non-profit corporation organized under the laws of the State of Louisiana. LEAN serves as an umbrella organization for citizens and environmental groups committed to preserving and protecting the state's natural resources. Members of LEAN live, work, and recreate in the vicinity of the Atchafalaya Basin. LEAN works to protect the state of Louisiana's natural resources, endangered species, and critical habitat from threats of environmental harm. Neither the claims asserted nor the relief requested in this case require the participation of any of LEAN's members. This lawsuit is germane to LEAN's purpose.

18. LCPA, Atchafalaya Basinkeeper, and LEAN are corporations, and therefore meet the definition of "person" under the Endangered Species Act and APA. 16 U.S.C. §1532(13); 5

U.S.C. §§ 551(2) and 701(b)(2).

19. The violations alleged in this Complaint injure the Plaintiffs' members.

20. The Corps' failure to consult with the U.S. Fish and Wildlife Service prior to issuing the permits injures the Plaintiffs' members because that failure puts the black bear in jeopardy and its critical habitat at risk of destruction and adverse modification.

21. The Corps' permitting decisions injure the Plaintiffs' members by allowing Mallard Basin, Inc.'s new water control structures, along with Mallard Basin, Inc.'s dredging, pumping, and spoil placement, to alter the hydrology of this portion of the Atchafalaya Basin, making it impossible for commercial fishermen (including the Plaintiffs' members) to make use of previously available areas for commercial fishing.

22. The Corps' permitting decisions injure the Plaintiffs' members by allowing alterations to Atchafalaya Basin that impair the Plaintiffs' members' aesthetic enjoyment of the Atchafalaya.

23. The injuries complained of are actual, concrete, and irreparable. Plaintiffs' members' injuries are fairly traceable to the Corps' conduct and redressable by this Court.

Defendants

24. Defendant Lieutenant General Robert L. Van Antwerp is the U.S. Army Chief of Engineers and Commanding General of the U.S. Army Corps of Engineers. Plaintiffs sue Lieutenant General Antwerp in his official capacity. Lieutenant General Antwerp (or his successors in office) is the federal officer personally responsible for compliance with any injunction that this Court issues.

25. Defendant, the Corps, is a federal agency as defined by the Endangered Species Act. 16 U.S.C. § 1532(7). It is also an administrative agency of the federal government as

defined by the Administrative Procedure Act. 5 U.S.C. § 701(b)(1). The Corps is responsible for issuing permits under Clean Water Act § 404, 33 U.S.C. § 1344.

LEGAL BACKGROUND

Endangered Species Act

26. Under Endangered Species Act § 7(a)(2), 16 U.S.C. § 1536(a)(2), federal agencies must, “in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical”

27. The Secretary of the Interior is responsible for administering the Endangered Species Act as it relates to the black bear. 16 U.S.C. § 1532(15). The Secretary delegated this authority to U.S. Fish and Wildlife Service. 50 C.F.R. § 402.01(b).

28. Federal agencies must, “in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of [the Endangered Species Act] by carrying out programs for the conservation of endangered species and threatened species listed.” 16 U.S.C. § 1536(a)(1). In this context, “conservation” is “the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to [the Endangered Species Act] are no longer necessary.” 16 U.S.C. § 1532(3).

29. An agency must complete interagency consultation under Endangered Species Act section 7 before it, or the permit applicant, “make[s] any irreversible or irretrievable

commitment of resources with respect to the agency action” that “foreclos[es] . . . any reasonable and prudent alternative measures.” 16 U.S.C. § 1536(d).

30. Under the Endangered Species Act, agencies must “conduct a biological assessment for the purpose of identifying any endangered species or threatened species which is likely to be affected” by agency action. 16 U.S.C. § 1536(c)(1). This requirement applies to issuance of permits. 50 C.F.R. § 402.02(c).

31. The Endangered Species Act empowers “any person” to sue “to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of [the Act] or regulation issued under the authority thereof.” 16 U.S.C. § 1540(g)(1)(A).

National Environmental Policy Act

32. The National Environmental Policy Act (NEPA) requires that “all agencies of the Federal Government . . . 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 the environmental impacts of and alternatives to the proposed action. 42 U.S.C. § 4332(C). This detailed statement is called an Environmental Impact Statement. 40 C.F.R. § 1508.11.

33. The challenged permits are “major Federal actions.” *See* 40 C.F.R. § 1508.18(b)(4); *see Stewart v. Potts*, 996 F. Supp. 668, 672 (S.D. Tex. 1998).

34. NEPA requires agency consideration of “(i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, [and] (iii) alternatives to the proposed action” before approval of

major Federal actions significantly affecting the quality of the human environment. 42 U.S.C. § 4332(C).

35. The Council on Environmental Quality promulgates regulations to implement NEPA. 40 C.F.R. § 1500.1, *et seq.* The regulations are binding upon all federal agencies. 40 C.F.R. § 1500.3.

36. If a “major Federal action” will “significantly affect the quality of the human environment,” the federal agency must prepare an Environmental Impact Statement. 42 U.S.C. § 4332(C). To determine whether a proposed project will “significantly” impact the human environment, the agency must consider both the “context” and “intensity” of the proposed action. 40 C.F.R. § 1508.27. “Context” means that an action’s significance “must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality.... Both short- and long-term effects are relevant.” 40 C.F.R. § 1508.27(a). “Intensity” refers to the “severity of impact.” 40 C.F.R. § 1508.27(b).

37. To properly evaluate the intensity of a proposed action in determining whether an Environmental Impact Statement is necessary, an agency must consider the degrees “to which the action may establish a precedent for future actions with significant effects” and “to which the action may adversely affect an endangered or threatened species or its [critical] habitat.” 40 C.F.R. § 1508.27(b)(6)&(9).

38. “A significant effect may exist even if the Federal agency believes that on balance the effect may be beneficial.” 40 C.F.R. § 1508.27(b)(1).

39. To determine whether an Environmental Impact Statement is necessary, agencies may conduct an Environmental Assessment to “[b]riefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no

significant impact.” 40 C.F.R. § 1508.9(a). An Environmental Assessment must “include brief discussions of the need for the proposal, of alternatives . . . [and] of the environmental impacts of the proposed action and alternatives.” 40 C.F.R. § 1508.9(b).

40. NEPA requires examination of direct, indirect, and cumulative impacts. 40 C.F.R. § 1508.25(c). A cumulative impact is an “impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.” 40 C.F.R. § 1508.7.

41. For an agency to conclude that action is not significant, its environmental assessment must “provide sufficient evidence and analysis for . . . a finding of no significant impact.” 40 C.F.R. § 1508.9(a)(1).

Administrative Procedure Act

42. The Administrative Procedure Act (APA) provides for judicial review of final agency actions. 5 U.S.C. § 704.

43. The APA provides that courts must “hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (D) without observance of procedure required by law . . .; or (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.” 5 U.S.C. § 706(2).

The Clean Water Act

44. The Corps issues permits for the discharge of dredge or fill material into navigable waters pursuant to the Clean Water Act § 404, 33 U.S.C. § 1344.

45. The Clean Water Act defines “navigable waters” as “waters of the United States... .” 33 U.S.C. § 1362(7). This definition includes wetlands. 33 C.F.R §§ 328.3(a)(2), 328.3(a)(3), and 328.3(a)(7).

46. The Corps’ permitting authority under Section 404 of the Clean Water Act is subject to EPA guidelines, known as “404(b)(1) guidelines.” 33 U.S.C. § 1344(b)(1). *See also* 40 C.F.R. § 230.2(a), and 33 C.F.R. §§ 320.4(a)(1) (“a permit will be denied if the discharge . . . would not comply with the [EPA]’s 404(b)(1) guidelines”) & 323.6(a).

47. The 404(b)(1) guidelines provide 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).

48. The 404(b)(1) guidelines provide that “where a discharge is proposed for a special aquatic site [*i.e.*, wetlands], all practicable alternatives to the proposed discharge which do not involve a discharge into a special aquatic site are presumed to have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise.” 40 C.F.R. § 230.10(a)(3).

49. The 404(b)(1) guidelines provide: “No discharge of dredged or fill material shall be permitted if it . . . jeopardizes the continued existence of species listed as endangered or threatened under the Endangered Species Act of 1973, as amended, or results in likelihood of the destruction or adverse modification of a habitat which is determined . . . to be a critical habitat.” 40 C.F.R. § 230.10(b)(3).

50. The 404(b)(1) guidelines provide that “no discharge of dredged or fill material shall be permitted which will cause or contribute to significant degradation of the waters of the United States.” 40 C.F.R. § 230.10(c). The guidelines provide that “effects contributing to

significant degradation [] include . . . [s]ignificantly adverse effects of the discharge of pollutants on aquatic ecosystem diversity, productivity, and stability. Such effects may include, but are not limited to, loss of fish and wildlife habitat or loss of the capacity of a wetland to assimilate nutrients, purify water, or reduce wave energy. . . .” *Id.* at § 230.10(c)(3). Effects contributing to degradation also include “[s]ignificantly adverse effects of discharge of pollutants on recreational, aesthetic, and economic values.” *Id.* at § 230.10(c)(4).

51. The 404(b)(1) guidelines provide that “no discharge of dredged or fill material shall be permitted unless appropriate and practical steps have been taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystem.” 40 C.F.R. § 230.10(d). Such steps include “[d]esigning the discharge to avoid a disruption of periodic water inundation patterns” and “[d]esigning the discharge of dredged or fill material to minimize or prevent the creation of standing bodies of water in areas of normally fluctuating water levels, and minimize or prevent the drainage of areas subject to such fluctuations.” 40 C.F.R. § 230.70(b) & (f).

52. The Corps has guidelines (in addition to EPA’s 404(b)(1) guidelines) which apply to its evaluation of permit requests under Clean Water Act § 404. 33 C.F.R. pts. 320 & 323 (“the Corps Regulations”).

53. The Corps Regulations require its decision on issuance of a 404 permit to be based on an evaluation of whether the permit is in the public interest. 33 C.F.R. § 320.4(a)(1). Among the public interest factors the Corps must consider are the extent of the public and private need for the work and the extent of detrimental effect the work would have on public uses of the area. *Id.* at § 320.4(a)(2)(i) & (iii).

54. The Corps Regulations discourage the unnecessary alteration and destruction of wetlands as contrary to the public interest. 33 C.F.R. § 320.4(b)(1). The regulations also

provide that “[n]o permit will be granted which involves the alteration of wetlands identified as important . . . unless the district engineer concludes . . . that the benefits of the proposed alteration outweigh the damage to the wetlands resource.” *Id.* at § 320.4(b)(4).

FACTUAL BACKGROUND

The Louisiana Black Bear

55. The Louisiana black bear (*U. luteolus*) is a federal threatened species. 50 C.F.R. § 17.11(h); 57 Fed. Reg. 588 (Jan. 7, 1992).

56. U.S. Fish and Wildlife Service has designated the Louisiana black bear’s critical habitat, pursuant to Endangered Species Act § 4(a)(3)(A)(i), 16 U.S.C. § 1533(a)(3)(A)(i). *See* 74 Fed. Reg. 10350 (Mar. 10, 2009) (codified at 50 C.F.R. § 17.95(a)). That designation covers portions of the Upper and Lower Atchafalaya River Basins.

The Project and the Challenged Permits

57. This case challenges two after-the-fact permits issued by the Corps to Scott Sebastian, DBA Mallard Basin, and Mallard Basin for a project located in an area known as Fisher Lake/Fisher Bottoms (“Fisher Lake”) in the Atchafalaya Basin.

58. The Corps issued the first permit, an authorization under Nationwide Permit 7, MVN-2010-1032-WLL (the “NWP Authorization”), on July 6, 2010, granting after-the-fact approval to “install a water pump with intake and outfall pipes off the Whiskey Bay Pilot Channel . . . located in the Atchafalaya Basin.”

59. The Corps issued the second after-the-fact permit, Permit MVN 2010-01080-WLL (the “Individual Permit”), on October 6, 2010, to Mallard Basin, Inc., authorizing it to “Excavate a water conveyance ditch, clean out an existing ditch and replace/upgrade existing water control structures”

60. The “existing water control structures” which the challenged permits allowed Mallard Basin, Inc. to replace consisted of a “deteriorated wooden water control structure.” Department of the Army Permit Evaluation and Decision Document (Oct. 6, 2010) (“Decision Document”) at 1.

61. The Corps described Mallard Basin, Inc.’s replacement for the deteriorated wooden water control structure as “an earthen dam” and “a variable crested metal structure” and “water conveyance system.” Decision Document at 1, 2. The Corps concluded that the water conveyance ditch, which Mallard Basin, Inc. dug through two miles of Atchafalaya Basin wetlands, includes “1878 linear feet of new ditch” and “9,019 feet of existing ditch.” May 24, 2010, Joint Public Notice (“Public Notice”) at 1-2.

62. Upon information and belief, there is no basis in the record for the Corps’ characterization of the 9,019 foot ditch as an existing ditch.

63. The area affected by the project generally (“project area”) is at least “600 acres of high quality swamp and bottomland hardwoods.” *See* Decision Document at 2.

64. Upon information and belief, the project area is in designated critical habitat for the black bear.

65. Upon information and belief, Mallard Basin, Inc. performed the activities for which the challenged permits purport to provide after-the-fact authorization in 1999 and 2000. At that time, Mallard Basin, Inc. had no permit or authorization from the Corps. Likewise, it had no permits or authorization of any kind from the U.S. Fish and Wildlife Service, the Louisiana Department of Environmental Quality, or the Louisiana Department of Wildlife and Fisheries.

66. Mallard Basin, Inc.’s project significantly altered the hydrology of the Atchafalaya Basin in the project area.

67. Mallard Basin, Inc.'s project hydraulically disconnected the Fisher Lake area from the rest of the Atchafalaya Basin.

68. Before Mallard Basin, Inc.'s project work, the project area was navigable and accessible during ordinary high water.

69. Mallard Basin, Inc.'s project obstructs navigation.

70. Before Mallard Basin, Inc.'s project work, the high water mark in Fisher Lake provided fish habitat during low water periods.

71. Since the project was completed, the Fisher Lake area is now completely dry during several months of the year.

72. Mallard Basin, Inc.'s project reduced or eliminated Fisher Lake's ability to support a significant fish population.

73. The Corps described Mallard Basin, Inc.'s project purpose as "to provide for the private recreational use by the landowners through the management of approximately 600 acres of forested swamp and bottomland hardwoods." The private recreational use by the landowners is "waterfowl hunting." See May 3, 2010, Mallard Basin, Inc., Application for Department of the Army Permit at ¶18.

74. The Corps' decision to issue the challenged permits relied, in part, on the following findings: "Approximately 50 years ago, a water management plan was developed at the project site to ensure preservation of approximately 600 acres of quality flooded swamp and bottomland hardwoods. The aforementioned property has been under this plan to maintain optimum water levels in Fisher Bottoms, during times when water was not available. The current property owners are seeking authorization to continue water management activities necessary to implement a moist soil management plan developed by the Louisiana Department of

Wildlife and Fisheries . . . so as to continue water availability at low water events”

Decision Document at 2.

75. Upon information and belief, until July 2010, no Louisiana Department of Wildlife and Fisheries management plan existed for Fisher Lake/Fisher Bottoms or the project property.

76. Upon information and belief, until Mallard Basin, Inc. began the activities for which the challenged permits purport to provide after-the-fact authorization, any previous water management activities which may have been conducted by previous landowners served to either improve or maintain water availability for Fisher Lake during low water events.

77. Mallard Basin, Inc.’s activities for which the challenged permits purport to provide after-the-fact authorization do not “continue water availability at low water events.” Instead, they dry the Fisher Lake area out entirely for several months a year.

78. The July 2010 management plan developed by the Louisiana Department of Wildlife and Fisheries at Mallard Basin, Inc.’s request was developed to comply with Mallard Basin, Inc.’s goal of establishing optimal conditions for duck hunting. The July 2010 plan discusses the plan’s “emphasis on waterbirds.” Management Plan for Fisher Bottom, July 2010 (“LDWF Plan”) at 3.

79. The LDWF Plan also advocates draining Fisher Lake completely for parts of the year to spray herbicides. LDWF Plan at 3, 5.

Permitting Procedures

80. Though it had received previous complaints of illegal dredge and fill activity on the project site, the Corps first began investigating Mallard Basin, Inc.’s illegal activity in March 2010. On March 31, 2010, Mallard Basin, Inc. applied to the Corps for an after-the-fact permit.

81. On May 24, 2010, the Corps issued a Public Notice inviting comment on Mallard Basin, Inc.'s application for an after-the-fact permit under Section 404 of the Clean Water Act for part of the illegal work it had already performed. The notice described the work as "Conduct dredging operations to construct 1,878 linear feet of new ditch and to maintain 9,019 feet of existing ditch used to convey water from the Atchafalaya River, replace a deteriorated wooden water control structure with a new variable crest, four-barreled, metal structure and remove a non-functioning water control structure and replace with an earthen dam" May 24, 2010, Joint Public Notice at 1-2.

82. Upon information and belief, the Corps did not employ public notice and comment procedures on the pump and pipes aspect of Mallard Basin, Inc.'s project. It instead permitted this aspect of the project through the Nationwide Permit authorization process.

83. On June 4, 2010, the Atchafalaya Basinkeeper and LCPA timely filed comments opposing Mallard Basin, Inc.'s permit application for after-the-fact authorization for its illegal activities, advocating full restoration, and putting the Corps on notice that permitting the activities at issue would be illegal. See June 4, 2010, Comments by Leigh Haynie ("Comments").

84. On July 6, 2010, the Corps granted the NWP after-the-fact Authorization for Mallard Basin, Inc.'s pump and intake/outfall pipes. It issued no Decision Document in connection with this decision, nor did it consider, on the record, the environmental impacts of this aspect of Mallard Basin, Inc.'s illegal activities.

85. On October 6, 2010, the Corps issued Mallard Basin, Inc.'s after-the-fact Individual Permit. On that same date, the Corps issued its Decision Document supporting its grant of the Individual Permit.

86. The Corps found that “[i]mplementation of the proposed project is not likely to adversely impact any known species considered to be endangered or threatened, or the habitat critical to the survival of such.” Decision Document at 7.

87. Upon information and belief: In reaching its conclusions, the Corps failed to perform a good faith analysis of the effect of the project on the black bear or its critical habitat. Indeed, the Corps performed no analysis related to the black bear whatsoever. The Decision Document contains no mention of the black bear.

88. The Corps did not consult with the U.S. Fish and Wildlife Service prior to issuing its decision. Upon information and belief, during the pendency of the Corps decision, the U.S. Fish and Wildlife Service was unaware of the project.

89. The Corps’ record contains no reliable evidence to support its conclusion that the project was not likely to adversely impact any threatened species or its critical habitat with respect to the black bear.

90. Upon information and belief, the Corps has no program to govern consideration of the effect of its permitting actions on the black bear.

91. During its alternatives analysis under NEPA and under the 404(b)(1) guidelines, the Corps dismissed the “no action” alternative because it concluded that “[w]ith the no action alternative, Fisher Bottoms would dry out when flood waters annually recede, for approximately 7-8 months of the year,” removing benefits of optimum water levels like biodiversity, elimination of suitable habitat for fish, and loss of location for the recreational and regional commercial fishing industries. Decision Document at 2.

92. Upon information and belief, the Corps' record contains no reliable support for its conclusion that implementation of the no action alternative would result in Fisher Bottoms drying out when flood waters annually recede for approximately 7-8 months of the year.

93. Mallard Basin, Inc.'s project in fact dries out Fisher Bottoms/Fisher Lake for many months of the year, and itself removes benefits of optimum water levels.

94. In the comment response section of the Decision Document, the Corps admitted that Mallard Basin, Inc.'s water control structures and dam prevent commercial fishing interests from accessing parts of the Basin during low water periods. Decision Document at 13-14.

95. Upon information and belief, the Corps' record contains no reliable evidence to support its conclusion that the no action alternative would result in Fisher Bottoms drying out for 7-8 months of the year.

96. During its alternatives analysis under NEPA and the 404(b)(1) guidelines, the Corps dismissed the "other project designs" alternative because it concluded that the Mallard Basin, Inc.'s project design best achieves the objective of assuring "appropriate, annual water levels" consistent with a "water conveyance and management infrastructure that has been in place for 50 years." Decision Document at 2-3.

97. Mallard Basin, Inc.'s project design does not achieve appropriate annual water levels in Fisher Lake.

98. Mallard Basin, Inc.'s project is inconsistent with any infrastructure previously in place.

99. Upon information and belief, the Corps' record contains no reliable evidence to support its conclusion that a water conveyance and management infrastructure consistent with Mallard Basin, Inc.'s was in place previously.

100. During its alternatives analysis under NEPA and the 404(b)(1) guidelines, the Corps dismissed alternative sites because it concluded that “[u]tilization of other sites would not meet the overall project purpose” of upgrading the alleged 50-year existing water conveyance infrastructures to provide high quality wetland habitat that would support fish and wildlife. Decision Document at 3.

101. Existing water conveyance infrastructures at the project site were either nonexistent or deteriorated to the point of irrelevance.

102. Upon information and belief, the Corps’ record contains no reliable evidence to support its conclusion that utilization of other sites would not meet the overall project purposes. Indeed, the Corps did not consider or analyze any other sites besides Mallard Basin, Inc.’s private property.

103. The Corps did not apply the presumption that a practicable alternative was available.

104. The Corps found that the wetland area of the project was “important.” Decision Document at 4.

105. In its consideration of the public interest, the Corps failed to consider Mallard Basin, Inc.’s statement that “the applicant purchased this land solely to provide recreation for family and friends. Everything that has been done on this land was done to enhance that recreational experience.” Tim Morton letter to Mike Herrmann with Mallard Basin, Inc. (July 15, 2010).

106. The Corps did not require any mitigation due to its finding that the project has “no adverse, project related impacts” and that “[a]ll affected areas within the project site remained a functioning wetland with obvious benefits therefrom.” Decision Document at 14.

107. Upon information and belief, the Corps' record contains no reliable evidence to support its conclusion that the project has no adverse impacts or that all affected areas remain a functioning wetland.

108. The Corps found that the project would have no significant impact on the quality of the human environment. Decision Document at 17.

109. Upon information and belief, the Corps' record contains no reliable evidence to support its conclusion that the project would have no significant impact on the quality of the human environment.

110. The Corps' grant of after-the-fact permits for the project establishes a precedent for future actions that will have significant effects by encouraging unpermitted destruction of wetlands that will, in turn, have significant effects on the Atchafalaya Basin, the Louisiana black bear, and the Louisiana black bear's critical habitat.

111. Upon information and belief, the Corps failed to consider whether the challenged permits may establish a precedent for future actions with significant effects on the Atchafalaya Basin and that may adversely affect a threatened species or its critical habitat.

FIRST CAUSE OF ACTION
(Violation of the Endangered Species Act)

112. In issuing the challenged permits, the Corps violated Endangered Species Act § 7(a)(2), 16 U.S.C. § 1536(a)(2), by failing to consult with the U.S. Fish and Wildlife Service to insure that issuing the challenged permits would not likely jeopardize the continued existence of the Louisiana black bear or result in the destruction or adverse modification of critical habitat of the Louisiana black bear.

113. In issuing the challenged permits, the Corps violated Endangered Species Act § 7(c)(1), 16 U.S.C. § 1536(c)(1), by failing to conduct a biological assessment on the effect of the project on the Louisiana black bear.

114. In issuing the challenged permits, the Corps violated Endangered Species Act § 7(a)(1), 16 U.S.C. § 1536(a)(1) by failing to carry out a program for the conservation of the black bear in conjunction with its permitting authority under Section 404 of the Clean Water Act.

115. In issuing the challenged permits, the Corps violated Endangered Species Act § 7(a)(2), 16 U.S.C. § 1536(a)(2) by failing to ensure that the challenged permits were not likely to jeopardize the continued existence of the black bear or result in the destruction of the black bear's critical habitat.

SECOND CAUSE OF ACTION

(Violation of the Administrative Procedure Act)

116. Because the Corps' decision to issue the challenged permits is based on conclusions that lack reliable or substantial support in the record and are, in fact, contrary to facts in the record, the decision to issue the permits is arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law, and unwarranted by the facts and violates 5 U.S.C. § 706(2).

THIRD CAUSE OF ACTION

(Violation of the National Environmental Policy Act)

117. The Corps' decision to issue the challenged permits is a major federal action that has a significant impact on the human environment.

118. The Corps' conclusion that the permit action would not have a significant impact on the quality of the human environment is arbitrary, capricious, an abuse of discretion,

otherwise not in accordance with law, and unwarranted by the facts and violates 5 U.S.C. § 706(2).

119. The Corps' failure to complete an Environmental Impact Statement on the project violated the National Environmental Policy Act at 42 U.S.C. §4332(C) and is arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law, and unwarranted by the facts and violates 5 U.S.C. § 706(2).

120. The Corps' failure to adequately consider the environmental impacts of the project, including cumulative impacts, is arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law, and unwarranted by the facts and violates 5 U.S.C. § 706(2).

121. The Corps' failure to adequately consider alternatives to the project is arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law, and unwarranted by the facts and violates 5 U.S.C. § 706(2).

122. The Corps' failure to consider the environmental impacts of the pump—including the pump's effects together with the dredging and water control structures—is arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law, and unwarranted by the facts and violates 5 U.S.C. § 706(2).

FOURTH CAUSE OF ACTION

(Violation of Clean Water Act Section 404(b)(1) Guidelines)

123. The Corps' failure to adequately consider practicable alternatives which would have less adverse impacts than the project as permitted violates the 404(b)(1) guidelines and 5 U.S.C. § 706(2).

124. The Corps' failure to apply the presumption that practicable alternatives exist other than special aquatic sites violates the 404(b)(1) guidelines and 5 U.S.C. § 706(2).

125. The Corps' finding that the project did not jeopardize the continued existence of any endangered or threatened species or result in the likelihood of the destruction or adverse modification of critical habitat is arbitrary and capricious and unwarranted by the facts and violates 5 U.S.C. § 706(2).

126. The Corps' finding that the project would not cause or contribute to significant degradation of the waters of the United States is arbitrary and capricious and unwarranted by the facts and violates 5 U.S.C. § 706(2).

127. The Corps' finding that appropriate and practical steps had been taken which would minimize potential adverse impacts of the discharge on the aquatic ecosystem is arbitrary and capricious and unwarranted by the facts and violates 5 U.S.C. § 706(2).

PRAYER FOR RELIEF

WHEREFORE, PLAINTIFFS pray that the Court award the following relief:

- A. An order declaring the challenged permits invalid;
- B. An order declaring that the Corps' practice of issuing after-the-fact permits is illegal under the facts of this case and inappropriate for the Atchafalaya Basin;
- C. An order vacating and remanding the challenged permits and the Corps' associated finding of no significant impact;
- D. An award of costs of litigation (including reasonable attorney and expert witness fees), in accordance with 16 U.S.C. § 1540(g)(4) and attorney fees in accordance with 28 U.S.C. § 2412.
- E. Such other relief as this Court may deem appropriate.

Respectfully submitted on March 22, 2011,

TULANE ENVIRONMENTAL LAW CLINIC

s/Thomas L. Sharp

Thomas L. Sharp, Student Attorney
Tulane Environmental Law Clinic
New Orleans, LA 70118
ph: (504) 865-5789

s/ Lisa W. Jordan

Lisa W. Jordan, La. Bar #20451 (T.A.)
Adam Babich, La. Bar # 27177
Tulane Environmental Law Clinic
New Orleans, LA 70118
ph: (504) 865-5789, dir: (504) 314-2481
fax: (504) 862-8721
email: lwjordan@tulane.edu

*Counsel for the Louisiana Crawfish Producers – West
Atchafalaya Basinkeeper, and the
Louisiana Environmental Action Network*