

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

OUACHITA RIVERKEEPER, INC. )  
2610 Washington Street )  
Monroe, Louisiana 71201 )

and SAVE THE OUACHITA, INC. )  
3114 North West Avenue )  
El Dorado, Arkansas 71730 )

*Plaintiffs,* )

v. )

MAJOR GENERAL MERDITH W.B. )  
TEMPLE (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.* )

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**COMPLAINT**

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**INTRODUCTION**

1. The U.S. Army Corps of Engineers’ (“Corps”) decision to authorize the El Dorado Pipeline Project under a general permit violates federal law, which restricts such authorizations to projects that damage less than half an acre of wetlands. In contrast, the El Dorado Pipeline Project will injure or destroy at least twenty-nine wetland areas, thirteen of which are each—standing alone—larger than half an acre. Additionally, the Corps’ failure to complete an environmental impact statement violates federal law. The Corps’ violations sidestep

legal requirements for public notice and opportunity to comment on wetlands destruction permits and deny the Plaintiffs and Plaintiffs' members their rights to participate in the decision.

### **JURISDICTION**

2. This Court has subject matter jurisdiction under 28 U.S.C. § 1331 because this case concerns federal questions under the Clean Water Act, 33 U.S.C. § 1251, *et seq.* and the National Environmental Policy Act, 42 U.S.C. § 4321, *et. seq.* and because the Plaintiffs sue under the Administrative Procedure Act (APA), 5 U.S.C. § 702, *et seq.* and the Declaratory Judgment Act, 28 U.S.C. § 2201.

### **VENUE**

3. Venue in this Court is proper under 28 U.S.C. § 1391(e) because the Corps' headquarters are located in this judicial district and under 5 U.S.C. § 703 because this is a Court of competent jurisdiction.

### **PARTIES**

#### *Plaintiffs*

4. The Ouachita Riverkeeper, Inc. is a non-profit corporation organized under the laws of Louisiana. The Ouachita Riverkeeper meets the definition of "person" under the APA. 5 U.S.C. §§ 551(2) and 701(b)(2).

5. The Ouachita Riverkeeper is part of the Waterkeeper Alliance, which is a grassroots advocacy organization consisting of more than 200 Waterkeeper programs dedicated to preserving and protecting the nation's waters.

6. The Ouachita Riverkeeper is dedicated to protecting and preserving the Ouachita River, its watershed, and the surrounding wetlands from its source in the Ouachita Mountains and throughout its course in both Arkansas and Louisiana. To this end, the Ouachita

Riverkeeper helps to ensure compliance with the laws and regulations of the State of Arkansas and the United States that are intended to preserve and enhance natural resources and environmental quality. This lawsuit is germane to the Ouachita Riverkeeper's purpose.

7. The Ouachita Riverkeeper's members include recreational hikers, fishermen, hunters, and nature photographers who use and enjoy the Ouachita River and its surrounding wetlands in pursuit of these activities. Ouachita Riverkeeper members intend to continue using the Ouachita River and its surrounding wetlands including those in the area around the proposed El Dorado Pipeline Project (the "Proposed Project").

8. Save the Ouachita, Inc. is a non-profit corporation organized under the laws of Arkansas. Save the Ouachita meets the definition of "person" under the APA. 5 U.S.C. §§ 551(2) and 701(b)(2).

9. Save the Ouachita is dedicated to protecting and preserving the Ouachita River, its watershed, and the surrounding wetlands from its source in the Ouachita Mountains and throughout its course in both Arkansas and Louisiana. To this end, Save the Ouachita helps to ensure compliance with the laws and regulations of the State of Arkansas and the United States that are intended to preserve and enhance natural resources and environmental quality. This lawsuit is germane to Save the Ouachita's purpose.

10. Save the Ouachita's members include men and women who regularly use and enjoy the Ouachita River and its surrounding wetlands, including those in the area around the Proposed Project. Save the Ouachita members intend to continue using the Ouachita River and its surrounding wetlands.

11. The Corps' action and the violations alleged in this Complaint injure the Plaintiffs' members by impairing their enjoyment of the area around the Proposed Project and by

denying them their rights to participate in a federal decision that affects the quality of their lives. These injuries are actual, concrete and irreparable. They cannot be redressed by monetary damages. The requested relief will redress these injuries.

12. Neither the claims asserted nor the relief requested in this case requires the participation of any of the Plaintiffs' members in this lawsuit.

*Defendants*

13. Defendant Major General Merdith W.B. Temple is the U.S. Army Chief of Engineers and Commanding General of the U.S. Army Corps of Engineers. Plaintiffs sue Major General Temple in his official capacity only. Major General Temple is the federal officer personally responsible for compliance with any injunction that this Court issues.

14. Defendant, the U.S. Army Corps of Engineers, is an administrative agency of the federal government as defined by the Administrative Procedure Act. 5 U.S.C. § 701(b)(1). The Corps is the agency responsible for issuing permits under Clean Water Act § 404, 33 U.S.C. § 1344.

**LEGAL BACKGROUND**

*Administrative Procedure Act*

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

16. Under the APA, “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.” 5 U.S.C. § 702.

17. The APA authorizes courts to “hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or

otherwise not in accordance with law” or “without observation of procedure required by law.” 5 U.S.C. § 706(2).

*The Corps’ Permitting Authority*

18. The Corps may issue wetlands destruction permits, *i.e.*, permits for the discharge of dredge or fill material into navigable waters, under Clean Water Act § 404, 33 U.S.C. § 1344.

19. 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), (3), (7).

20. Clean Water Act § 404 allows the Corps to issue individual permits or general permits. 33 U.S.C. §§ 1344(a), (e).

21. Individual permits require the Corps to provide public notice and an opportunity for public participation in the permit decision process. 33 U.S.C. § 1344(a).

22. General permits may be issued for “any category of activities . . . that . . . are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment.” 33 U.S.C. § 1344(e)(1).

*Nationwide Permits*

23. “Nationwide Permits (NWP) are a type of general permit issued by the Chief of Engineers . . . .” 33 C.F.R. § 330.1(b).

24. Nationwide permits may apply to any “single and complete project” that meets their terms and conditions. 33 C.F.R. §§ 330.1(c); 330.6(c). A “single and complete project means the total project proposed or accomplished by one owner/developer or partnership or other association of owners/developers.” 33 C.F.R. § 330.2(i).

25. Any “single and complete project must have independent utility.” Reissuance of Nationwide Permits, 72 Fed. Reg. 11,092, 11,197 (March 12, 2007). “The use of more than one NWP for a single and complete project is prohibited, except when the acreage loss of waters of the United States authorized by the NWPs does not exceed the acreage limit of the NWP with the highest specified acreage limit.” *Id.* at 11,194; NWP General Condition No. 24.

26. “The ‘terms’ of an NWP are the limitations and provisions included in the description of the [nationwide permit] itself. The ‘conditions’ of NWPs are additional provisions which place restrictions or limitations on all of the [nationwide permits]. These are published with the [nationwide permits].” 33 C.F.R. § 330.2(h). The Corps may impose other conditions “on a geographic, category-of-activity, or activity-specific basis.” *Id.*

27. Under its terms, Nationwide Permit No. 7 applies to “[a]ctivities related to the construction or modification of outfall structures and associated intake structures, where the effluent from the outfall is” in compliance with Section 402 of the Clean Water Act. Reissuance of Nationwide Permits, 72 Fed. Reg. at 11,182; NWP No. 7 Special Condition ¶ 1.

28. Under its terms, Nationwide Permit No. 12 applies to “[a]ctivities required for the construction, maintenance, repair, and removal of utility lines and associated facilities in waters of the United States, provided the activity does not result in the loss of greater than 1/2 acre of waters of the United States.” *Id.*; NWP No. 12 Special Conditions. Nationwide permit No. 12’s terms define utility line as, among other things, “any pipe or pipeline for the transportation of any gaseous, liquid, liquescent, or slurry substance, for any purpose . . . .” *Id.* The phrase also applies “to pipes conveying drainage from another area.” *Id.*

29. Between Nationwide Permit Nos. 7 and 12, Nationwide Permit No. 12 has the highest specified acreage loss limit; loss of no greater than half an acre of waters of the United States. *Id.*

30. Any single and complete project authorized by Nationwide Permit Nos. 7 and 12 cannot result in greater than half an acre of loss of waters of the United States. *Id.* at 11,182 - 94.

31. A project results in loss if there are “[w]aters of the United States that are permanently adversely affected by filling, flooding, excavation, or drainage because of the regulated activity. Permanent adverse effects include permanent discharges of dredged or fill material that change an aquatic area to dry land, increase the bottom elevation of a waterbody, or change the use of a waterbody.” 72 Fed. Reg. at 11,196. Loss also “includes the linear feet of stream bed that is filled or excavated.” *Id.*

32. “The acreage of loss of waters of the United States . . . is not a net threshold that is calculated after considering compensatory mitigation that may be used to offset losses of aquatic functions and services.” *Id.*

33. “Compensatory mitigation will not be used to increase the acreage losses allowed by the acreage limits of the NWP. For example, if an NWP has an acreage limit of 1/2 acre, [compensatory mitigation] cannot be used to authorize any project resulting in the loss of greater than 1/2 acre of waters of the United States, even if compensatory mitigation is provided that replaces or restores some of the lost waters.” *Id.* at 11,193; NWP General Condition 20(e).

*National Environmental Policy Act*

34. 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(2)(C). This detailed statement is known as an Environmental Impact Statement. 40 C.F.R. § 1508.11.

35. 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)(1). 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 . . . .” *Id.* at § 1508.9(b).

36. “Major Federal action includes actions with effects that may be major and which are potentially subject to Federal control and responsibility. Major reinforces but does not have a meaning independent of significantly.” 40 C.F.R. § 1508.18. “Federal actions” include “[a]pproval of specific projects, such as construction . . . activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision.” *Id.* at § 1508.18(b)(4).

### **FACTUAL BACKGROUND**

37. On June 15, 2010, El Dorado Water Utilities submitted an application (the “Application”) for a Clean Water Act § 404 dredge and fill permit for the El Dorado Pipeline Project (the “Proposed Project”), which Corps documents identify as MVK-2009-1236.

38. “The purpose of the [Proposed Project] is to connect three industries and El Dorado Water Utilities to a combined pipeline in order to transport treated wastewater to a discharge point at the Ouachita River.” Application, § 19 (*Project Purpose*).

39. The Proposed Project's "pipeline will cover approximately 23.5 miles and will require a 50 ft wide right-of-way clearing." Application, § 18 (*Nature of Activity*).

40. "An effluent diffuser will be installed at the eastern terminus of the pipeline on the bottom of the Ouachita River . . ." *Id.*

41. One owner/developer or partnership or other association of owners/developers proposed, and intends to accomplish, both the pipeline and the effluent diffuser. No distinct subsection of the Proposed Project will have independent utility.

42. The Proposed Project is a single and complete project under 33 C.F.R. § 330.2(i).

43. The Proposed Project's "right-of-way will require complete vegetation clearing along the entire length of the pipeline." Letter from El Dorado Water Utilities to the Corps, dated June 14, 2010.

44. "[F]orested wetlands will sustain permanent impact" as a result of the Proposed Project. Application, § 18 (*Nature of Activity*).

45. The Proposed Project will convert "a large amount of Bottomland hardwood forest and Pine Flatwood wetlands to an emergent wetland [and] will reduce habitat for wildlife and increase evapotranspiration, thus increasing levels of run-off in the watershed." Application, Appendix B (*Mitigation Plan for Ouachita Pipeline. El Dorado, Arkansas, Union County*).

These changes are permanent adverse effects on waters of the United States.

46. "[N]ew different fill material [will be] placed below the [ordinary high water] level" during construction of the Proposed Project. Application, § 21 (*Type(s) of Material Being Discharged and the Amount of Each Type in Cubic Yards*). Placement of new and different fill material in waters of the United States creates permanent adverse effects.

47. The Proposed Project will cross at least thirty-seven identified wetland areas. Application, Appendix Aa (*Jurisdictional Determination*) Pt. 4.0 & Table 1 (*All Wetland Areas Identified*), Appendix B (*Mitigation Plan*) at 1.a.

48. At least twenty-eight of the identified wetland areas require mitigation. Application, Appendix Aa (*Jurisdictional Determination*) Pt. 4.0 & Table 2 (*Wetland Areas Requiring Mitigation*), Appendix B (*Mitigation Plan*) at 1.a.

49. The total acreage of identified wetland areas requiring mitigation is 16.62 acres. *Id.*; Corps' Project Evaluation, dated July 30, 2010, at 7.

50. The Corps identified the 16.62 acres of identified wetland areas requiring mitigation as "total impacts requested" and "total impacts permitted." Corps' Project Evaluation, dated July 30, 2010, at 7, 8.

51. The 16.62 acres of wetlands that the Proposed Project impacts are "palustrine wetlands." *Id.* (describing impacted wetlands as "forested scrub shrub").

52. As many as thirteen of the identified wetland areas requiring mitigation are each individually larger than half an acre. Application, Appendix Aa (*Jurisdictional Determination*) Table 2 (*Wetland Areas Requiring Mitigation*).

53. On July 30, 2010, the Corps issued a single authorization for the Proposed Project, authorizing the pipeline under Nationwide Permit No. 12 and the diffuser under a Nationwide Permit No. 7 (the "Authorization").

54. The Corps' authorization was "contingent upon the successful completion of the [proposed] mitigation," *id.* at 1, which would "mitigate for the loss of wetland functions and services by purchasing 163.0 mitigation credits or 36.98 acres from the Lower Cut-Off Creek

Mitigation Bank, prior to construction,” Corps’ Project Evaluation, dated July 30, 2010, at 9 (*Project Description*).

55. The Corps’ decision to authorize the Proposed Project is a major federal action that has a significant impact on the human environment.

56. The Corps did not conduct an Environmental Assessment to determine whether the Proposed Project has a significant impact on the human environment.

57. The Corps did not make a finding of no significant impact.

58. The Corps did not complete an Environmental Impact Statement.

59. The environmental impacts of the Proposed Project are outside the scope of any EA or EIS completed for Nationwide Permits No. 7 and No. 12.

60. The Corps’ decision to authorize the Proposed Project allows a wetland loss of 16.12 acres more than Nationwide Permit Nos. 7 and 12’s combined half an acre wetland loss limitation.

61. Thirteen identified wetland areas requiring mitigation are each individually larger than Nationwide Permit Nos. 7 and 12’s combined half an acre wetland loss limitation.

62. The Proposed Project does not meet Nationwide Permit Nos. 7 and 12’s terms and conditions.

63. The Corps’ calculation of wetland loss resulting from the Proposed Project does not include the impacts created by the permanent presence of the subsurface pipeline on waters of the United States.

64. The permanent presence of the subsurface pipeline is a permanent adverse effect on waters of the United States.

65. The Corps' decision did not calculate the impacts of placing "new different fill material . . . below the [ordinary high water] level" of waters of the United States. *See* Application, § 21 (*Type(s) of Material Being Discharged and the Amount of Each Type in Cubic Yards*).

66. Waters of the United States will be permanently adversely affected by placement of new different fill material in waters of the United States.

67. The Proposed Project has significant adverse impacts on the environment.

68. The Proposed Project has significant cumulative effects.

69. The Corps did not articulate an explanation for its action when it authorized the Proposed Project.

70. The Corps did not provide a rational connection between the facts found and the choice made when it authorized the Proposed Project.

71. The Corps did not require public notice for the Proposed Project.

72. The Corps did not provide an opportunity for public participation in the permitting process for the Proposed Project.

#### **FIRST CAUSE OF ACTION**

73. The Corps' decision to authorize the Proposed Project under Nationwide Permit Nos. 7 and 12 is arbitrary, capricious, an abuse of discretion, unwarranted by the facts, otherwise not in accordance with law and violates 5 U.S.C. § 706(2)(A), because the Corps violated the restrictions of the Clean Water Act, violated the restrictions of Nationwide Permit Nos. 7 and 12, failed to provide a rational connection between the facts found and the choice made, failed entirely to consider an important aspect of the problem, offered an explanation for the decision

that runs counter to the evidence before the agency, and is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

74. The Corps' decision to authorize the Proposed Project under Nationwide Permit Nos. 7 and 12 lacks substantial support in the administrative record.

75. The Corps' decision to authorize the Proposed Project under Nationwide Permit Nos. 7 and 12 without public notice and participation is without observance of procedure required by law, and violates 5 U.S.C. 706(2)(D).

### **SECOND CAUSE OF ACTION**

76. The Corps' failure to consider whether the Proposed Project would have a significant impact on the quality of the human environment is arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law, unwarranted by the facts, and violates 5 U.S.C. § 706(2).

77. The Corps' failure to conduct an Environmental Assessment or to complete an Environmental Impact Statement on the project violates 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, 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 Corps' authorization of the Proposed Project is illegal and invalid;
- B. An order vacating and remanding the Corps' authorization of the Proposed Project and the associated approval of construction under NWP No. 7 and 12;

- C. An order enjoining the application of Nationwide Permits No. 7 and 12 to the Proposed Project;
- D. An award of costs of litigation (including reasonable attorney fees) in accordance with 28 U.S.C. § 2412; and
- E. Such other relief as this Court may deem appropriate.

Dated: May 17, 2012

Respectfully submitted by:

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