

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Holy Cross Neighborhood Association,	*	
Gulf Restoration Network,	*	Case No.:
Louisiana Environmental Action Network,	*	Judge:
Citizens Against Widening the Industrial	*	Magistrate:
Canal, and Sierra Club	*	
<i>Plaintiffs,</i>	*	
	*	
v.	*	
	*	
U.S. Army Corps Of Engineers	*	
	*	
<i>Defendant.</i>	*	

COMPLAINT

INTRODUCTION

1. In 2006, this Court enjoined the U.S. Army Corps of Engineers (“Corps”) from constructing a lock replacement project on the Industrial Canal until it complied with the National Environmental Policy Act (“NEPA”). *Holy Cross v. U.S. Army Corps of Eng’rs*, 455 F. Supp. 2d 532, 541 (E.D. La. 2006).

2. Without complying with NEPA, the Corps is constructing a lock replacement project on the Industrial Canal that will dredge at least three million cubic yards of sediment and dump much of that material into nearby Bayou Bienvenue. The Corps admits that this disposal will violate “applicable water quality criteria and a waiver would be required ...” U.S. Army Corps of Engineers, Supplemental Environmental Impact Statement at 5 (March 2005).

3. The Corps is proceeding with the project without considering the option of reducing the volume and impacts of disposal of dredged material by constructing a “shallow draft” alternative—even though the Corps has assumed there will be “no deep draft benefits associated with the authorized plan over the period of analysis.” INHC Lock Replacement Study, 2008 Updated Economic Analysis p. O-5.

4. Any further investment of time, money, and environmental resources in the Industrial Canal project will probably be wasted. The project is excessively costly (more than \$1 billion) and is unlikely to be fully funded. Indeed, the project has not been fully funded for years and the President’s current budget proposal withholds *all* funding for the project. If funded, the project would divert money from projects necessary to safeguard the residents and coastal resources of southeastern Louisiana.

JURISDICTION AND VENUE

5. This Court has jurisdiction over the action pursuant to the Clean Water Act. 33 U.S.C. § 1365(a) (“The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation....”). This Court also has jurisdiction over the action through federal question jurisdiction, the Administrative Procedure Act, and the Declaratory Judgment Act. 28 U.S.C. § 1331; 5 U.S.C. § 701-706; 28 U.S.C. § 2201.

6. Under 28 U.S.C. § 1391(e) and 33 U.S.C. § 1365(c)(1), venue in this action is proper in the Eastern District of Louisiana because a substantial part of the events or omissions have occurred in this district and because the discharge in violation of an effluent standard or limitation is occurring and will occur in this district.

NOTICE

7. On January 19, 2010, Holy Cross Neighborhood Association, Gulf Restoration Network, Louisiana Environmental Action Network, Citizens Against Widening the Industrial Canal, and Sierra Club sent a Notice of Violation (“Notice”) describing defendant’s Clean Water Act violations to: a) Defendant; b) the U.S. Environmental Protection Agency, federal and regional; and c) the Louisiana Department of Environmental Quality pursuant to 33 U.S.C. § 1365(b)(1)(A) and 40 C.F.R. pt. 135. A copy of the Notice is attached as Exhibit A.

8. More than sixty days have passed since Plaintiffs provided Notice.

PARTIES

9. Plaintiff Holy Cross Neighborhood Association is a non-profit corporation organized under the laws of the State of Louisiana that fits the definition of “person” under the Clean Water Act and the Administrative Procedure Act. *See* 33 U.S.C. § 1362(5); 5 U.S.C. § 551(2). Residents of the historically significant Holy Cross neighborhood of New Orleans comprise the Holy Cross Neighborhood Association. Members of the Holy Cross Neighborhood Association live, work, and recreate in the vicinity of the Industrial Canal and Bayou Bienvenue. The purpose of the Holy Cross Neighborhood Association includes protecting the health, safety, and welfare of its community and the environment. This lawsuit is germane to the Holy Cross Neighborhood Association’s purpose.

10. Plaintiff Gulf Restoration Network (“GRN”) is a 501(c)(3) non-profit corporation that fits the definition of “person” under the Clean Water Act and the Administrative Procedure Act. *See* 33 U.S.C. § 1362(5); 5 U.S.C. § 551(2). GRN is composed of members from Louisiana, Alabama, Florida, Mississippi, and Texas committed to protecting and restoring the valuable resources of the Gulf of Mexico. Members of GRN reside, work, and recreate in the vicinity of

the Industrial Canal and Bayou Bienvenue. GRN serves as a network of citizens and local, regional and national environmental groups committed to protecting the Gulf resources from environmental harm. This lawsuit is germane to GRN's purpose.

11. Plaintiff Louisiana Environmental Action Network ("LEAN") is a non-profit corporation organized under the laws of the State of Louisiana that fits the definition of "person" under the Clean Water Act and the Administrative Procedure Act. *See* 33 U.S.C. § 1362(5); 5 U.S.C. § 551(2). LEAN serves as an umbrella organization for citizens and environmental groups committed to preserving and protecting the state's natural resources. Members of LEAN reside, work, and recreate in the vicinity of the Industrial Canal and Bayou Bienvenue. LEAN works to protect its members from threats of environmental harm throughout the state. This lawsuit is germane to LEAN's purpose.

12. Plaintiff Sierra Club is a non-profit corporation organized under the laws of the State of California that fits the definition of "person" under the Clean Water Act and the Administrative Procedure Act. *See* 33 U.S.C. § 1362(5); 5 U.S.C. § 551(2). Members of Sierra Club live, work, and recreate in the vicinity of the Industrial Canal and Bayou Bienvenue. The Sierra Club's mission is to protect the nation's land, air, water, and other natural resources, including the unique resources of Louisiana. This lawsuit is germane to Sierra Club's purpose.

13. Plaintiff Citizens Against Widening the Industrial Canal ("CAWIC") is a non-profit corporation organized under the laws of the State of Louisiana that fits the definition of "person" under the Clean Water Act and the Administrative Procedure Act. *See* 33 U.S.C. § 1362(5); 5 U.S.C. § 551(2). Members of CAWIC live, work, and recreate in the vicinity of the Industrial Canal and Bayou Bienvenue. CAWIC is committed to rebuilding and protecting the

health, safety, and welfare of the communities surrounding the Industrial Canal and to restoring the surrounding wetlands. This lawsuit is germane to CAWIC's purpose.

14. Defendant U.S. Army Corps of Engineers is an "agency" of the federal government as defined by the Administrative Procedure Act. 5 U.S.C. § 701(b)(1). Defendant Army Corps of Engineers is a "person" under the definition in the Clean Water Act. 33 U.S.C. 1362(5).

15. The Corps' actions in connection with the Industrial Canal project injure plaintiffs' members and threaten further injury to plaintiffs' members.

16. Plaintiffs' members have a legally protected interest in the quality of the environment surrounding their communities. Plaintiffs' members' reasonable concerns about the impact on their communities of the disposal, storage, and release of contaminated sediments into the surrounding wetlands impairs their enjoyment of life in their communities. Further, plaintiffs' members' reasonable concerns that the project will reduce the quality of their lives by imposing annoying and potentially harmful noise and pollution and by reducing the visual beauty of their communities impairs their enjoyment of life in their communities.

17. Plaintiffs' members' injuries are fairly traceable to the Corps' failure to fully assess the environmental impacts of the lock replacement project and to select an alternative with less harmful effects. These injuries are actual, direct, concrete and irreparable, and money damages cannot adequately remedy these injuries once they occur.

II. OVERVIEW

A. The Corps' continued violation of NEPA

18. The Corps prepared an environmental impact statement in 1997 ("1997 EIS") for its lock replacement project on the Industrial Canal.

19. In 2006, this Court rejected the 1997 EIS, finding that “the Corps failed to take a ‘hard look’ at the environmental impacts and consequences of dredging and disposing of the canal’s contaminated sediment” *Holy Cross v. U.S. Army Corps of Eng’rs*, 455 F. Supp. 2d 532, 540 (E.D. La. 2006).

20. In 2009, the Corps issued a supplemental environmental impact statement (“2009 Supplement”) for the Industrial Canal project, supplementing the 1997 EIS.

21. In 2006, this Court found that “the underlying purpose of NEPA will not be served if the Corps moves forward with the Industrial Canal project according to a plan devised almost a decade ago.” 455 F. Supp. 2d at 540.

22. After the 2009 Supplement, the Corps continued its plan to move forward with the Industrial Canal project according to a plan devised more than a decade ago, failing to consider reasonable shallow-draft alternatives to the deep-draft plan that the Corps adopted in 1997.

23. In 2006, this Court noted that “the [1997] EIS does not consider the reasonable dredging and disposal alternatives that the Corps has recently adopted for maintenance dredging of the same waters.” 455 F. Supp. 2d at 540.

24. “[R]easonable dredging and disposal alternatives,” in the Court’s 2006 ruling refers to use of “an environmental clamshell bucket dredge designed to minimize re-suspension of sediment during the dredging operation” and to disposal of “the contaminated sediment into a Louisiana Department of Environmental Quality-permitted Type I landfill rather than at a confined disposal site.” 455 F. Supp. 2d at 540 (internal quotations and citations omitted).

25. The Corps’ 2009 Supplement continues the Corps’ failure to consider the “reasonable dredging and disposal alternatives” that this Court identified. More specifically, the

Corps failed to consider whether adoption of a “shallow draft” plan would make such alternatives practical, since a “shallow draft” plan would reduce the volume of dredged material.

26. In 2006, this Court found that the Corps failed in its 1997 EIS to “adequately address the risks of flooding and hurricanes in general,” and, “[t]herefore, there is no way to know what environmental impacts these [disposal] facilities will have on the ecosystem.” 455 F. Supp. 2d at 539.

27. After the 2009 Supplement, the Corps continues to fail to address risks of flooding and hurricanes. The Corps issued a Record Of Decision to proceed with the Industrial Canal project before completing modeling or quantification of the potential for overtopping of its so-called “confined disposal facility” in the event of widespread flooding.

28. In 2006, this Court “enjoined [the Corps] from continuing with the Project until it complies with NEPA.” 455 F. Supp. 2d at 541.

29. The Corps is continuing with the Industrial Canal project without complying with NEPA.

B. The Corps’ failure to consider a shallow-draft alternative

30. The Industrial Canal project’s planning objectives are to “reduce or eliminate delays to navigation” and “avoid and minimize environmental impacts to the maximum extent possible.” 1997 EIS at 17-18.

31. In its 1997 EIS, the Corps discussed six lock replacement sizes for the Industrial Canal Lock: a) a 900- by 90- by 22-foot shallow-draft lock; b) a 900- by 110- by 22-foot shallow-draft lock; c) a 900- by 110- by 36-foot deep-draft lock; d) a 1200- by 90- by 22-foot shallow-draft lock; e) a 1200- by 110- by 22-foot shallow-draft lock; and f) a 1200- by 110- by 36-foot deep-draft lock. 1997 EIS at 30.

32. The Corps concluded that the alternative for a 900- by 110- by 22-foot, shallow-draft lock (“the Shallow-Draft Lock Alternative”) “produces the greatest net benefits over costs of any of the plans considered in detail.” *See* 1997 EIS at 34.

33. The Corps concluded that the Shallow-Draft Lock Alternative is “a socioeconomically and environmentally acceptable plan.” *See* 1997 EIS at 34.

34. The Shallow-Draft Lock Alternative would meet the Industrial Canal project’s planning objective of “reduc[ing] or eliminate[ing] delays to navigation.” Indeed, the Corps’ 2008 Updated Economic Analysis assumes there will be no additional benefits from a deep-draft lock over the period studied.

35. The Shallow-Draft Lock Alternative would require the Corps to dredge and dispose of an estimated 1.533 million cubic yards of material. *See* 1997 EIS at 85.

36. The Port of New Orleans preferred the largest lock replacement size considered in the 1997 EIS: the 1,200- by 110- by 36-foot deep-draft lock replacement (the “Deep-Draft Lock Alternative”). *See* 1997 EIS at 34.

37. The Deep-Draft Lock Alternative will require the Corps to dredge and dispose of more than 3 million cubic yards of material. *See* 1997 EIS at 85.

38. The Deep-Draft Lock Alternative will require the Corps to dredge and dispose of more than 1.98 times as much material as the Shallow-Draft Lock Alternative.

39. The Corps claimed in its 1997 EIS, “[f]rom the standpoint of impact analysis, locks of various sizes at a given location, and for a given construction scenario, produce very similar impacts.” 1997 EIS at 30. This impact comparison, however, did not consider the impact to wetlands of dumping the dredged material in disposal sites. 1997 EIS at Table 5; *id.* at 79-80.

This impact comparison also did not consider whether adoption of a “shallow draft” plan would make use of a clamshell bucket dredge and landfill disposal of dredged materials practical.

40. The Shallow-Draft Lock Alternative would better meet the Corps’ planning objective of “avoid[ing] and minimiz[ing] environmental impacts to the maximum extent possible” than would the Deep-Draft Lock Alternative.

41. The Shallow-Draft Lock Alternative is a feasible alternative that would serve the basic project purpose.

42. The 2009 Supplement considered only four alternatives: 1) a no-build alternative; 2) the Deep-Draft Lock Alternative; 3) a deep-draft lock constructed by casting in place; 4) and a deep-draft lock constructed in wetlands along the MRGO and floated into place on the Industrial Canal. 2009 Supplement at 39.

43. Each of the three action alternatives that the Corps considered in its 2009 Supplement includes the largest of the deep-draft lock alternatives from the 1997 EIS: a deep-draft lock, 1200- by 110- by 36-feet.

44. The Corps did not consider the Shallow-Draft Lock Alternative in the 2009 Supplement. Indeed, the Corps’s 2009 Supplement did not consider *any* of the shallow-draft lock alternatives from the 1997 EIS.

45. The Corps failed to provide a reasonable explanation of why the 2009 Supplement does not consider the shallow-draft lock alternatives. *See* 2009 Supplement at 39.

46. The Corps’ analysis under Clean Water Act Section 404(b)(1), 33 U.S.C. § 1344(b)(1), only considered the recommended deep-draft lock replacement. It did not weigh the environmental impacts of a deep-draft lock against those of shallow-draft alternatives. *See* 2009 Supplement at Q-66.

47. The Corps issued a Record of Decision on May 20, 2009, approving the Deep-Draft Lock Alternative for construction.

C. The Corps' failure to consider reasonable dredging and disposal alternatives

48. The Corps recommended the deep-draft lock that will be constructed off-site, in wetlands along the MRGO. 2009 Supplement at 56.

49. The Corps has decided to dredge 664,000 cubic yards of material from the off-site construction area, 876,000 cubic yards of material to create a bypass channel at the lock site, and 1.1 million cubic yards of material from the lock footprint. 2009 Supplement at 56-57.

50. The Corps claims that “[b]ecause of the *large volumes of material* that would be dredged for lock construction, hydraulic dredging ... would be necessary to meet the project schedule.” *See* 2009 Supplement at 57 (emphasis added).

51. The Corps did not consider whether hydraulic dredging would be necessary to meet the project schedule for the Shallow-Draft Lock Alternative, which would reduce the volume of materials to be dredged by about half.

52. The Corps’ “project schedule” is neither a reasonable nor an adequate ground for rejecting an alternative to protect the environment because, *inter alia*, the lack of project funding will cause extensive delay in any event.

53. The project is not included in the U.S. Government’s 2010 budget and is also not included in the President’s proposed fiscal year 2011 budget.

54. The 2009 Supplement did not eliminate landfill disposal as a practicable alternative, especially in conjunction with selection of a shallow-draft alternative. *See* 2009 Supplement at 53, 55 and 62.

D. The Corps' failure to analyze flooding and hurricane risks

55. The Corps considered three disposal alternatives for the material dredged by the recommended project: 1) disposal of all material in a so-called confined disposal facility; 2) disposal of some material in a so-called confined disposal facility and the remainder in the Mississippi River; and 3) disposal of some material in a landfill and the remainder in the Mississippi River. 2009 Supplement at 58.

56. The Corps selected the second disposal alternative. 2009 Supplement at 53.

57. The Corps so-called "confined disposal facility" would not, in fact, be confined. Instead, the Corps' decision in favor of the facility is—in essence—a decision to dispose of contaminated material behind a berm in Louisiana's wetlands.

58. In its 2009 Supplement, the Corps stated that "because flooding has occurred in this area [of the proposed confined disposal facility], the conservative approach would be to model the potential for overtopping in the event of widespread flooding." 2009 Supplement at 50.

59. "[T]his modeling effort has not been completed." 2009 Supplement at 50.

60. "The potential for material loss from the [confined disposal facility] as a result of scouring during a catastrophic flood was not quantified." 2009 Supplement at 50.

E. The Corps' failure to consider impacts of disposal facility discharges

61. The Corps has deferred "[d]etailed design" of the confined disposal facility, including height and slope of the containment dikes, analysis of the underlying soil's stability, and construction methods until "resumption of the lock replacement project." 2009 Supplement at 50-51.

62. The Corps has not determined the concentrations of pollutants that it will discharge from the so-called confined disposal facility.

63. Without knowing the concentration of pollutants discharged from the so-called confined disposal facility, it is impossible to assess the facility's impacts on the environment.

LEGAL BACKGROUND

National Environmental Policy Act

64. NEPA provides that "all agencies of the federal government shall ... include in [all] major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official." 42 U.S.C. § 4332. The NEPA process is intended to help public officials make decisions "based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment." 40 C.F.R. § 1500.1(c).

65. NEPA requires agencies to consider "the environmental impact of ... proposed action" that will have a significant effect on the environment and, *inter alia*, "alternatives to the proposed action." 42 U.S.C. § 4332(C)(i) & (iii). Thus, NEPA requires agencies to "take a 'hard look' at the environmental consequences before taking a major action. *See Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 97 (1983).

66. The environmental impact statement must "[r]igorously explore" and evaluate all reasonable alternatives ... and discuss the reasons for eliminating an alternative. 40 C.F.R. § 1502.14. The Fifth Circuit requires that an environmental impact statement allow for a "reasoned choice" between alternatives. *Isle of Hope Historical Ass'n, Inc. v. U.S. Army Corps of Eng'rs*, 646 F.2d 215, 220 (5th Cir. 1981) (per curiam opinion adopting district court order).

67. “The existence of a viable but unexamined alternative renders an environmental impact statement inadequate.” *See NRDC v. U.S. Forest Serv.*, 421 F.3d 797, 813 (9th Cir. 2005) (internal quotation marks and citation omitted).

68. “Although an EIS may be supplemented, the critical agency decision must ... be made after the supplement has been circulated, considered and discussed in the light of the alternatives, not before.” *See NRDC v. Callaway*, 524 F.2d 79, 92 (2d Cir. 1975).

69. An agency has considered an unreasonably narrow range of alternatives when the considered alternatives are too similar. *See Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1038 (9th Cir. 2008) (“Applying the ‘rule of reason’ standard, we find that the range of action alternatives is unreasonably narrow because the alternatives are virtually indistinguishable from each other.”).

70. “[W]here changed circumstances affect the factors relevant to the development and evaluation of alternatives” the agency “must account for such change in the alternatives it considers.” *See Sierra Forest Legacy v. Rey*, 577 F.3d 1015, 1021 (9th Cir. 2009) (internal quotation marks and citations omitted).

Administrative Procedure Act

71. The Administrative Procedure Act entitles a person who is “adversely affected or aggrieved by agency action within the meaning of a relevant statute” to judicial review of the agency action. 5 U.S.C. § 702.

72. Reviewable actions include an agency order, defined as “whole or part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form.” 5 U.S.C. § 551(6).

73. The Corps’ actions taken pursuant to NEPA are reviewable under the Administrative Procedure Act.

Clean Water Act

74. Congress passed the Clean Water Act “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a).

75. Clean Water Act § 301(a) provides that “except as in compliance with ... § 1344 of this title, the discharge of any pollutant by any person shall be unlawful.” 33 U.S.C. § 1311(a).

76. “Discharge of a pollutant” includes “any addition of any pollutant to navigable waters from any point source.” 33 U.S.C. § 1311(a). “Dredged spoil” is a “pollutant.” 33 U.S.C. § 1362(6). “Navigable waters” means “waters of the United States,” 33 U.S.C. § 1362(7), which in turn include wetlands. *See* 40 C.F.R. § 232.2.

77. A “point source” is any “discernible, confined and discrete conveyance ... from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14). The Corps’ equipment for discharging dredged spoil is a point source.

78. When performing a dredge project, the Corps must comply with “all applicable substantive legal requirements, including ... section 404(b)(1) guidelines.” 33 C.F.R. § 336.1(a). Indeed, all Section 404 discharges must comply with guidelines developed pursuant to 33 U.S.C. § 1344(b)(1) (“Section 404(b)(1) Guidelines”).

79. Section 404(b)(1) Guidelines generally prohibit discharge of dredged material 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). Thus, the Guidelines required the Corps “to determine the feasibility of the least environmentally damaging alternatives that serve the basic project purpose” and “[i]f such an alternative exists ... then the CWA compels that the

alternative be considered and selected unless proven impracticable.” *Utahns for Better Transp. v. U.S. Dep’t of Transp.*, 305 F.3d 1152, 1189 (10th Cir. 2002).

80. An alternative is “practicable” if “it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.” 40 C.F.R. § 230.10(a)(2).

81. Under Section 404(b)(1) Guidelines: “[t]he effects of a discharge can be minimized by ... limitations on the material itself, such as: ... Limiting the solid, liquid, and gaseous components of material to be discharged at a particular site” 40 C.F.R. § 230.71.

82. To comply with Section 404(b)(1) Guidelines, “The Corps must adequately explain why there is no less-damaging practicable alternative. If the Corps cannot so explain based on the record before it, 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) (the Corps “must explain fully, based [on] analysis adequate to the task, why other alternatives are either impracticable or more damaging.”).

83. Section 404(b)(1) Guidelines generally prohibit discharge of dredged material if the discharge “[c]auses or contributes, after consideration of disposal site dilution and dispersion, to violations of any applicable State water quality standard.” 40 C.F.R. § 230.10(b)(1).

84. Section 505(a)(1) of the Clean Water Act provides that “any citizen may commence a civil action on his own behalf ... against any person,” including a government agency, that “is alleged to be in violation of ... an effluent standard or limitation.” 33 U.S.C. § 1365(a).

85. Violation of an “effluent standard or limitation” includes “an unlawful act under subsection (a) of section [301].” 33 U.S.C. § 1365(f). Discharging dredged material in violation of Section 404 constitutes a violation of Section 301. *See* 33 U.S.C. § 1311(a).

CAUSES OF ACTION

First Cause of Action

(Violation of Federal Court Injunction)

86. This Court enjoined the Corps from constructing the Industrial Canal project until the Corps complied with NEPA.

87. The Corps is in violation of this Court’s injunction by constructing the Industrial Canal project without complying with NEPA. The Corps violation of the injunction is also a violation of NEPA.

Second Cause of Action

(NEPA: Failure to Prepare a Lawful Environmental Impact Statement)

88. The Corps’ project to construct a new lock on the Industrial Canal, deepen the canal, and dispose of potentially contaminated dredged material in wetlands of the Lake Pontchartrain Basin is a major federal action as defined under NEPA.

89. The Corps’ project to construct a new lock on the Industrial Canal, deepen the canal, and dispose of potentially contaminated dredged material in the Lake Pontchartrain Basin will have a significant impact on the environment.

90. The Shallow-Draft Lock is a reasonable alternative that would reduce the volume of dredged material and therefore reduce the project’s environmental impact.

91. Use of clamshell dredging is a reasonable alternative in conjunction with the Shallow-Draft Lock that would reduce the project’s environmental impact.

92. Landfill disposal of contaminated dredged material is a reasonable alternative in conjunction with the Shallow-Draft Lock that would reduce the project's environmental impact.

93. The Corps failed to explore and evaluate reasonable alternatives and considered an unreasonably narrow range of alternatives.

94. The Corps failed to provide a reasoned explanation for eliminating alternatives, including the Shallow-Draft Lock, clamshell dredging, and landfill disposal.

95. The Corps's 2009 Supplement fails to cure the deficiencies in the 1997 EIS.

96. The Corps is in violation of NEPA because it has failed to produce an EIS that takes a hard look at the environmental impacts of the Industrial Canal project.

Third Cause of Action

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

97. The Industrial Canal, the Mississippi River Gulf Outlet and Bayou Bienvenue and associated wetlands are waters of the United States under the Clean Water Act.

98. The Corps is taking steps to discharge dredged material from a point source to waters of the United States in violation of Section 404(b)(1) Guidelines.

99. The Corps is discharging dredged material from a point source to waters of the United States in violation of Section 404(b)(1) Guidelines.

100. The Corps is in violation of Section 404(b)(1) Guidelines because it has failed to select practicable alternatives that would have less adverse environmental impact than the proposed actions. 40 C.F.R. § 230.10(a).

101. The Corps' discharges will cause or contribute, after consideration of disposal site dilution and dispersion, to violations of an applicable State water quality standard.

102. The Corps' failure to comply with Section 404(b)(1) Guidelines violates Clean Water Act § 404, 33 U.S.C. § 1344, and Clean Water Act § 301, 33 U.S.C. § 1311.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully pray for judgment as follows:

- A. An order enjoining the Corps from further implementation of the Industrial Canal lock replacement project until the Corps complies with NEPA and the Clean Water Act.
- B. Declarations that the Corps is constructing a deep-draft lock in violation of this Court's 2006 order, NEPA and the Clean Water Act.
- C. An award of appropriate attorneys' fees as provided by the Clean Water Act and Equal Access to Justice Act. *See* 28 U.S.C. § 2412.
- D. An award of such other relief as the Court deems just and proper.

Respectfully submitted on June 10, 2010, by:

s/ Adam Babich

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Prepared by:
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Tulane Environmental Law Clinic
Class of 2010

EXHIBIT A



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

Tulane Environmental Law Clinic

Lt. General Van Antwerp
Notice of Violation: Industrial Canal lock replacement project
January 19, 2010
Page 2 of 5

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.*

Lt. General Van Antwerp
Notice of Violation: Industrial Canal lock replacement project
January 19, 2010
Page 3 of 5

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

Lt. General Van Antwerp
Notice of Violation: Industrial Canal lock replacement project
January 19, 2010
Page 4 of 5

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

Lt. General Van Antwerp

Notice of Violation: Industrial Canal lock replacement project

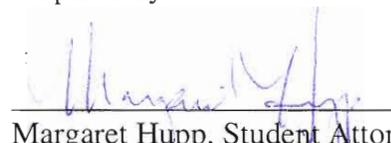
January 19, 2010

Page 5 of 5

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.

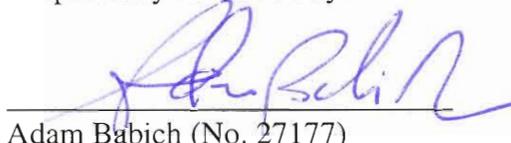
We look forward to discussing how we can work together to resolve the issue.

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 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 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 3330
Ms. Lisa P. Jackson, Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Ave, NW
Washington, DC 20460

7008 1830 0002 8233 3361

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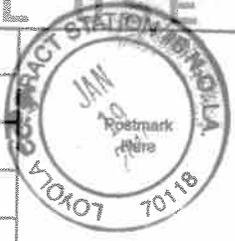
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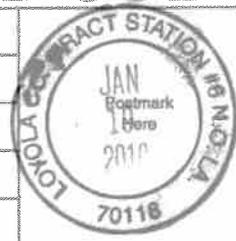
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 Ms. Lisa P. Jackson, Administrator
 Street, Apt. No., or PO Box No. 1200 Pennsylvania Ave. NW
 City, State, ZIP+4 Washington, DC 20460

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 Dr. Alfredo Armendariz
 Street, Apt. No., or PO Box No. Fountain Plaza 12th Fl. Suite 1200
 City, State, ZIP+4 Dallas, TX 75202-2733

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Total Postage & Fees	\$ 5.71

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 Attorney General Eric Holder
 Street, Apt. No., or PO Box No. 950 Pennsylvania Ave. NW
 City, State, ZIP+4 Washington, D.C. 20530-0001

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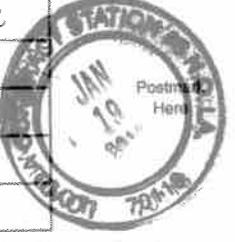
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Total Postage & Fees	\$ 5.71

Sent To
 Lt. Gen. Van Antwerp, USAACE
 Street, Apt. No., or PO Box No. 441 G Street, NW
 City, State, ZIP+4 Washington DC 20314-1000

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- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Lt. Gen Robert L. Van Antwerp
 Commanding General, USACE
 Headquarters, USACE
 411 G Street, NW
 Washington, D.C. 20314-1000

A. Signature Agent Addressee
[Signature]

B. Received by (Printed Name) Agent Addressee
[Signature]

C. Date of Delivery
 3/30/10

D. Is delivery address different from item 1? Yes
 If YES, enter delivery address below: No

3. Service Type
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 Registered Return Receipt for Merchandise
 Insured Mail C.O.D.

4. Restricted Delivery? (Extra Fee) Yes

2. Article Number

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- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Lisa P. Jackson, Administrator
 U.S. EPA
 Ariel Rios Building
 1200 Pennsylvania Ave, NW
 Washington, D.C. 20460

A. Signature Agent Addressee
[Signature]

B. Received by (Printed Name) Agent Addressee
[Signature]

C. Date of Delivery
 1-26-10

D. Is delivery address different from item 1? Yes
 If YES, enter delivery address below: No

3. Service Type
 Certified Mail Express Mail
 Registered Return Receipt for Merchandise
 Insured Mail C.O.D.

4. Restricted Delivery? (Extra Fee) Yes

2. Article Number

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1. Article Addressed to:

Mr. Eric Holder
 Attorney General
 U.S. Department of Justice
 950 Pennsylvania Ave, NW
 Washington, D.C. 20530-0001

A. Signature Agent Addressee
 X

B. Received by (Printed Name) Agent Addressee
[Signature]

C. Date of Delivery

D. Is delivery address different from item 1? Yes
 If YES, enter delivery address below: No

3. Service Type
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 Registered Return Receipt for Merchandise
 Insured Mail C.O.D.

4. Restricted Delivery? (Extra Fee) Yes

2. Article Number

(Transfer from service label) 7008 1830 0002 8233 3354

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- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:
 Dr. Alfredo Armendariz
 Regional Admin. - EPA Region 6
 U.S. EPA
 Fountain Place 12th Floor, Suite 1200
 Dallas, TX 75202-2733

COMPLETE THIS SECTION ON DELIVERY

A. Signature Agent Addressee
[Signature]

B. Received by (Printed Name) C. Date of Delivery
 JAN 22 2010

D. Is delivery address different from item 1? Yes
 If YES, enter delivery address below: No

3. Service Type
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 Registered Return Receipt for Merchandise
 Insured Mail C.O.D.

4. Restricted Delivery? (Extra Fee) Yes

2. Article Number (Transfer from service label) 7008 1830 0002 8233 3347
 PS Form 3811, Feb 7008 1830 0002 8233 3347 102595-02-M-1540

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- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:
 Secretary
 La. Department of Environmental
 Quality
 602 N. Fifth Street
 Baton Rouge, LA 70802

COMPLETE THIS SECTION ON DELIVERY

A. Signature Agent Addressee
[Signature]

B. Received by (Printed Name) C. Date of Delivery

D. Is delivery address different from item 1? Yes
 If YES, enter delivery address below: No

3. Service Type
 Certified Mail Express Mail
 Registered Return Receipt for Merchandise
 Insured Mail C.O.D.

4. Restricted Delivery? (Extra Fee) Yes

2. Article Number (Transfer from service label) 7008 1830 0002 8233 3361
 PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540