



Tulane Environmental Law Clinic

November 5, 2015

The Honorable John McHugh
Secretary of the Army
101 Army Pentagon
Washington, DC 20310-0101

Lieutenant General Thomas P. Bostick
Commanding General and Chief of Engineers
U.S. Army Corps of Engineers
441 G St., NW
Washington, DC 20314

RE: Petition for Rulemaking to Amend 33 C.F.R § 325.2 Governing the Processing of Army Corps Permit Applications

Dear Secretary McHugh and General Bostick,

Pursuant to section 533(e) of the Administrative Procedure Act (APA), 5 U.S.C. § 553(e),¹ Gulf Restoration Network, Atchafalaya Basinkeeper, Missouri Coalition for the Environment, Tennessee Clean Water Network, Kentucky Waterways Alliance, Midwest Environmental Advocates, and Iowa Environmental Council (collectively, “Petitioners”) petition the United States Army Corps of Engineers to amend its regulations under 33 C.F.R. § 325.2 governing the processing of Corps permit applications. Petitioners urge the Corps to amend 33 C.F.R. § 325.2(a)(7)-(8) to require all Corps districts to (1) provide written notice of all final permit decisions to each person who has submitted comments during the public comment period on a permit application and (2) provide substantive information about all permit decisions on the Corps website. The requested amendments are simple changes to existing regulations that would provide a great benefit to the public and would further the Corps’ “regulatory approach” of “involving the consideration of the full public interest” in the permitting process. 33 C.F.R. § 320.1 (providing for the purpose and scope of general Corps regulatory policies). The amendments would also increase the Corps Regulatory Program’s transparency.

I. Petitioners have an interest in the Corps’ permitting activities.

Section 533(e) of the APA, 5 U.S.C. § 553(e), provides: “Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.” Petitioners have an interest in the Corps’ rule governing the processing of permit applications under 33 C.F.R. § 325.2. As demonstrated below, Petitioners participate actively in the application process for Corps permits to discharge dredged or fill material into waters of the United States pursuant to section 404 of the Clean Water Act, 33 U.S.C. § 1344 (“§ 404

¹ “Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.” 5 U.S.C. § 553(e).

permits”) by submitting comments on § 404 permit applications during the public comment period to various Corps districts.

Gulf Restoration Network is a non-profit organization committed to the protection and restoration of the natural resources in the Gulf of Mexico region.² Gulf Restoration Network focuses much of its work on the protection of wetlands in the Gulf Coast region because these wetlands are a critical resource that provide important fish and shellfish habitat, buffer storms, decrease flooding, and protect shorelines.³ One way Gulf Restoration Network works to protect these resources is by participating in public hearings and submitting written comments on § 404 permit applications to assist the Corps in its 404(b)(1) Guidelines review, “public interest review” under 33 C.F.R. § 320.4(a), and reviewing the effect of the proposed activity on the impacted wetlands under 33 C.F.R. § 320.4(b).⁴ Gulf Restoration Network also surveys activities in the Gulf Coast region for Clean Water Act and § 404 permit violations.⁵

The Atchafalaya Basinkeeper is a nonprofit organization, which is part of the Waterkeeper Alliance—a grassroots advocacy organization consisting of more than 200 local Waterkeepers dedicated to preserving and protecting waterways throughout the world.⁶ The Atchafalaya Basinkeeper is dedicated to protecting and restoring the ecosystems within the Atchafalaya Basin, which covers approximately 1.4 million acres in southcentral Louisiana.⁷ Like the name implies, the Atchafalaya Basin is the basin of the Atchafalaya River, a 135-mile long natural tributary of the Mississippi River that empties into the Gulf of Mexico.⁸ The Atchafalaya Basin includes 885,000 acres of forested wetlands, making it the largest river swamp in North America.⁹ It also contains 517 acres of marshland, which is prime habitat for waterfowl and crucial habitat for neotropical land birds and other birds that use the Mississippi Flyway to migrate.¹⁰

The Atchafalaya Basinkeeper participates in public hearings and files written comments on Clean Water Act § 404 permit applications with the Corps’ New Orleans District as part of its efforts to protect the Basin’s wetlands.¹¹ The Atchafalaya Basinkeeper also actively surveys

² See Ex. A, Declaration of Scott Eustis, Wetlands Specialist for Gulf Restoration Network (“Eustis Decl.”), ¶ 2.

³ *Id.*, ¶ 3.

⁴ *Id.*, ¶ 4.

⁵ *Id.*, ¶ 5.

⁶ Ex. B, Declaration of Dean A. Wilson, Executive Director of the Atchafalaya Basinkeeper (“Wilson Decl.”), ¶ 3.

⁷ *Id.*, ¶ 4.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*, ¶ 5.

projects in the basin for compliance with § 404 permit conditions.¹² The Atchafalaya Basinkeeper often conducts these surveys by boat because most areas within the vast Basin are only accessible by water.¹³ The Atchafalaya Basinkeeper is dedicated to this work because it understands that the New Orleans District Enforcement Division does not have a boat and therefore is unable to inspect projects in areas that are only accessible via boat to determine whether the permittee is complying with permit conditions.¹⁴ The Atchafalaya Basinkeeper reports violations in the Basin to the Corps and urges the department to exercise its enforcement powers.¹⁵

Missouri Coalition for the Environment, a nonprofit organization dedicated to protecting and restoring the environment throughout Missouri, frequently comments on Corps § 404 permit applications during the public comment period.¹⁶ Missouri Coalition for the Environment's aim in submitting these comments is to ensure that the Corps only issues permits that fully comply with federal laws and protect water quality.¹⁷ After commenting on permit applications, Missouri Coalition for the Environment tracks final permit decisions.¹⁸ Missouri Coalition for the Environment reviews issued permits to determine whether they comply with the Corps regulations, and it monitors permitted activities to determine whether the permittee is complying with permit conditions.¹⁹

Tennessee Clean Water Network is a nonprofit corporation that seeks to build support among organizations, decision-makers, businesses, and the public about important water resource issues.²⁰ Tennessee Clean Water Network works to ensure meaningful public participation in the protection of Tennessee's waters.²¹ To further this mission, the Tennessee Clean Water Network actively engages in the Corps' permitting process by submitting comments on Clean Water Act § 404 permit applications.²²

The Kentucky Waterways Alliance is a statewide nonprofit organization dedicated to

¹² *Id.*, ¶ 6.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Ex. C., Declaration of Ken Miller, Clinic Scientist for Washington University School of Law Interdisciplinary Environmental Clinic ("Miller Decl."), ¶ 3.

¹⁷ *Id.*

¹⁸ *Id.*, ¶ 4.

¹⁹ *Id.*

²⁰ Ex. D., Declaration of Dana Wright, Water Policy Director of Tennessee Clean Water Network ("Wright Decl."), ¶ 2.

²¹ *Id.*

²² *Id.*, ¶ 3.

protecting and restoring Kentucky waters.²³ The Kentucky Waterways Alliance represents more than 900 members and affiliate organizations united to ensure high quality water resources in Kentucky for diverse recreational activities such as swimming, boating, and fishing as well as reliable drinking water supplies and biological habitat.²⁴ The Kentucky Waterways Alliance's work includes review of regulatory programs and policies.²⁵ The organization works to ensure sufficient protection of waters from unnecessary impacts and the sufficient mitigation of any unavoidable impacts.²⁶ The Kentucky Waterways Alliance regularly submits comments on Clean Water Act § 404 permit applications to ensure compliance with federal regulations.²⁷ The Kentucky Waterways Alliance also reviews issued § 404 permits and associated Clean Water Act § 401 State Water Quality Certifications to assure compliance with mitigation requirements.²⁸

Midwest Environmental Advocates is a nonprofit environmental law center that works for healthy water, air, land and government for this generation and the next.²⁹ Midwest Environmental Advocates specializes in Clean Water Act matters, working to inform public policy and protect water quality.³⁰ To this end, Midwest Environmental Advocates regularly comments on § 404 Clean Water Act permit applications for wetland fill projects and monitors enforcement efforts to protect these resources.³¹

The Iowa Environmental Council is an alliance of diverse organizations and individuals working together to protect Iowa's natural environment.³² The Iowa Environmental Council works to give Iowans a voice on environmental issues, protect Iowa's natural resources, and promote a safe and healthy environment for all Iowans.³³ The Iowa Environmental Council focuses much of its work on the protection of water quality.³⁴ The Iowa Environmental Council submits comments on Clean Water Act § 404 permit applications during public comment periods

²³ Ex. E., Declaration of Tim Joice, Water Policy Director of the Kentucky Waterways Alliance (“Joice Decl.”), ¶ 2.

²⁴ *Id.*

²⁵ *Id.*, ¶ 3.

²⁶ *Id.*

²⁷ *Id.*, ¶ 4.

²⁸ *Id.*, ¶ 5.

²⁹ Ex. F, Declaration of Sarah Geers, Staff Attorney for the Midwest Environmental Advocates (“Geers Decl.”), ¶ 2.

³⁰ *Id.*

³¹ *Id.*, ¶ 3.

³² Ex. G, Declaration of Susan Heathcote, Water Program Director with the Iowa Environmental Council (“Heathcote Decl.”), ¶ 2.

³³ *Id.*

³⁴ *Id.*

as a means to protect water quality.³⁵

Environmental Law & Policy Center is a non-profit public interest legal advocacy organization that works to protect the Midwest's wild and natural heritage.³⁶ ELPC works to preserve wetlands and protect water quality, including monitoring permitting activities for dredging and filling of Waters of the U.S. under the Corps' Section 404 permit authority.³⁷ ELPC regularly submits comments on Clean Water Act § 404 permit application during the public comment periods established by various Corps districts on behalf of several environmental organizations.³⁸

II. The Clean Water Act encourages effective public participation.

Section 404(a) of the Clean Water Act provides that “[t]he Secretary may issue permits, after notice and opportunity for public hearings, for the discharge of dredged or fill material into the navigable waters at specified disposal sites.”³⁹ The Corps must exercise its authority in accordance with the guidelines developed by the Administrator of the U.S. Environmental Protection Agency (“EPA”) and published in 40 C.F.R. Part 230 (“404(b)(1) Guidelines”), as well as in accordance with the Corps' own regulations. 33 C.F.R. § 320.2(f). Congress expressed its policy in favor of public participation in implementation of EPA regulations in Clean Water Act § 101(e): “Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator [of EPA] or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States.” 33 U.S.C. § 1251(e).

III. Failure to require notice of final Corps permit decisions frustrates public participation in the permitting process.

Petitioners' participation in the § 404 permitting process is frustrated when they do not receive notice of final permit decisions after submitting comments during the public comment period.⁴⁰ Failure to provide such notice inhibits public participation in the Corps Regulatory Program and thwarts the Petitioners' work to promote environmental protection.⁴¹ The regulations governing the processing of Corps permit applications do not require the districts to give notice of their final permit decision to those who have submitted comments during the public comment period. Instead, the existing regulations only require the districts to notify the

³⁵ *Id.*, ¶ 3.

³⁶ Ex. H, Declaration of Jessica Dexter, Staff Attorney for the Environmental Law and Policy Center (“Dexter Decl.”) ¶ 2.

³⁷ *Id.* ¶ 3.

³⁸ Dexter Decl., ¶ 3.

³⁹ 33 U.S.C. § 1344(a).

⁴⁰ *See* Ex. A, Eustis Decl., ¶¶ 7-9; Ex. B, Wilson Decl., ¶¶ 7-13; Ex. C, Miller Decl., ¶¶ 6, 8, 12; Ex. E, Joice Decl., ¶¶ 7-9; Ex. F, Geers Decl., ¶¶ 4-5; Ex. H, Dexter Decl., ¶¶ 4-5.

⁴¹ *Id.*

permit applicant of its final permit decision by either providing written reasons for denial if the application is denied or by forwarding the permit to the applicant if the application is approved.⁴² Indeed, the only mandated method for non-applicants to determine whether the Corps has issued a final decision on a permit application is to review the Corps' list of permit decisions, which results in a host of problems explained below.

The regulations merely require the “district engineer [to] publish monthly a list of permits issued or denied during the previous month” and “distribute[] [the list] to all persons who may have an interest in any of the public notices listed.”⁴³ Currently, the districts publish their lists of permits issued or denied during the previous month on the ORM Permit Decisions website.^{44, 45} But because the regulations only require a monthly list of permit decisions from the previous month, a permit decision made on the first of the month may not appear on a published list until the end of the next month—i.e., 60 days after the decision. As a result, the project may be well underway or completed when the public finds out about the permit.⁴⁶ The wetlands at issue could be permanently destroyed by the time the Corps publishes the list. This delay thwarts the work of watchdog groups to ensure that the activities meet permit conditions.⁴⁷ It is sometimes too late to report a permit violation to the Corps so that it can stop the violation before more harm is done.⁴⁸

Furthermore, the current regulations put an undue burden on those who have commented to constantly check the ORM Permit Decisions website to see if the district has made a final permit decision.⁴⁹ If the district has not made a decision, the application will be listed as “pending” on this website. Some permit applications remain on the pending list for years. For example, the New Orleans District issued a notice for public comment for a permit application to expand a landfill into wetlands in May 1996. That application is still pending a final decision.⁵⁰

⁴² See 33 C.F.R. § 325.2(a)(7).

⁴³ 33 C.F.R. § 325.2(a)(8).

⁴⁴ See <http://geo.usace.army.mil/egis/f?p=340:2:0::NO:RP::> On this website under the “home” tab, there is a notation that states that “Final and Pending Individual Permit data . . . data are updated weekly.” But this is not a regulatory mandate. Furthermore, the petitioners find that practices vary greatly from district to district. Moreover, for the reasons explained in this petition, web-based notice is not a sufficient substitute for direct notice by email or U.S. mail to those who submitted comments.

⁴⁵ ORM is an acronym with an embedded acronym. ORM stands for OMBIL Regulatory Module and OMBIL stands for Component of the Operations and Maintenance Business Information Link. ORM is a central database that all Corps districts use to share information pertaining to the Corps Regulatory Program See <http://www.eli.org/sites/default/files/docs/white11.pdf>

⁴⁶ Dexter Decl., ¶ 6.

⁴⁷ See Ex. A, Eustis Decl., ¶ 8; Ex. B, Wilson Decl., ¶¶ 10, 11; Ex., C, Miller Decl., ¶¶ 4, 8; Ex. E, Joice Decl., ¶ 9; Ex. F, Geers Decl., ¶ 5; Ex. H, Dexter Decl., ¶ 5.

⁴⁸ See *id.*

⁴⁹ See Ex. A, Eustis Decl., ¶ 7; Wilson Decl., ¶ 12; Miller Decl., ¶¶ 6, 12; Ex. E, Joice Decl. ¶¶ 10-11.

⁵⁰ See Industrial Pipe Landfill permit application status on ORM Permit Decisions website showing pending applications for the New Orleans District at

This means that anyone who commented on that permit application would have needed to check the ORM Permit Decisions website regularly for more than nineteen years and will need to continue to check the website indefinitely to stay apprised of the district's final decision status for that project. The current system, therefore, places an unrealistic and unduly burdensome duty on the public and significantly erodes the effectiveness of public participation in the Corps' permitting process.

There are other problems with the current system that frustrate public involvement. On occasion, the districts will remove permit applications from the pending list on the ORM Permit Decisions website but not place them on the final decision list for months.⁵¹ Furthermore, sometimes a district fails to ever list a permit application on the pending list.⁵²

IV. Failure to require publication of substantive permit decision information also frustrates public participation in the permitting process.

The current regulation is also inadequate because it only requires the districts to provide the identity of each action by public notice number, name of applicant, and brief description of activity involved on this list of prior-month permit decisions.⁵³ The information that the Corps provides on the ORM Permit Decisions website includes: permit application number, applicant, project name, permit type, public notice date, action taken, date issued/denied, and a link to a map showing the location of the project. The requirements of the current regulation and the information actually provided on the Corps website are inadequate because there is no requirement that the districts provide the actual permit, the reasons for its decision, or its response to comments. There is no requirement to disclose permit conditions, mitigation requirements, or other details, which makes it impossible to determine whether the permittee is complying with the permit.⁵⁴ Indeed, the current regulations do not require the Corps to post any substantive information about the permit decision, but instead only require the list to "note that relevant environmental documents and the SOF's [statement of findings] or ROD's [record of decisions] are available upon written request and, where applicable, upon the payment of administrative fees."⁵⁵

It is necessary, therefore, to submit a formal request for the permit and the reasons for the decision under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552.⁵⁶ Under FOIA, the

http://geo.usace.army.mil/egis/f?p=340:6:9955059451668:fsp_sort_8::RP&fsp_region_id=193756733425210323

⁵¹ See Ex. B, Wilson Decl., ¶ 13; see also Ex. C, Miller Decl., ¶ 8.

⁵² Ex. C, Miller Decl., ¶ 8 (stating that permit application with public comment period in September 2014 was still not listed by the St. Louis District on the pending list as of August 2015).

⁵³ *Id.*

⁵⁴ Ex. C., Miller Decl., ¶ 6.

⁵⁵ 33 C.F.R. § 325.2(a)(8)

⁵⁶ Ex. B., Wilson Decl. ¶ 14; Ex. C, Miller Decl. ¶ 10.

Corps has ten days to forward the FOIA request to the “appropriate component of the agency” and another twenty business days to respond to the request.⁵⁷ Indeed, it often takes longer than the time allowed by law for the Corps to respond to FOIA requests.⁵⁸ Having to submit a FOIA request wastes time and needlessly uses both public and Corps resources.⁵⁹ The permit and the reasons for decision (i.e., the statement of findings or the record of decision) should be available online at the Corps’ website to avoid this waste of public and agency resources.

V. **Simple amendments to the current regulations will ensure timely notice of final permit decisions to those who submit comments during the public comment period and ensure that substantive information about the decisions is available on the Corps’ website.**

The Corps can easily correct the problems explained above by making two simple amendments to its regulations under 33 C.F.R. § 325.2 governing the processing of Corps permit applications. First, the Corps should amend 33 C.F.R. § 325.2(a)(7) as noted in bold typeface so that the districts will be required to send a copy of permit decisions to parties who have commented on that permit application:

(7) If the final decision is to deny the permit, the applicant **and all persons who submitted written comments during the public comment period** will be advised in writing of the reason(s) for denial. If the final decision is to issue the permit and a standard individual permit form will be used, the issuing official will forward the permit to the applicant for signature accepting the conditions of the permit. The permit is not valid until signed by the issuing official. Letters of permission require only the signature of the issuing official. **Once signed by the issuing official, a copy of the permit, the SOF or ROD, and any responses to public comments will be sent to all persons who submitted comments during the public comment period on the application.** Final action on the permit application is the signature on the letter notifying the applicant of the denial of the permit or signature of the issuing official on the authorizing document.

Second, the Corps should amend 33 C.F.R. § 325.2(a)(8) as noted in bold typeface so that the districts will be required to make relevant documents available on its website:

(8) The district engineer will publish monthly a list of permits issued or denied during the previous month. The list will identify each action by public notice number, name of applicant, and brief description of activity involved **and will**

⁵⁷ 5 U.S.C. § 552(a)(6)(A)

⁵⁸ Ex. B., Wilson Decl. ¶ 14; Ex. C, Miller Decl. ¶ 10.

⁵⁹ Ex. B., Wilson Decl. ¶ 14; Ex. C, Miller Decl. ¶ 9; FOIA Administration Costs Report, <http://www.foia.gov/data.html>, (select “FOIA Costs” from “Administration” drop down menu under “Select Report”; Select “Department of Defense” under “Select Agency”; Check “FY 2014” under “Select Fiscal Year”; Select “Create Report”).

include a link to the permit and the SOF or ROD for issued permits. It will also note that relevant environmental documents and the SOF's or ROD's are available upon written request and, where applicable, upon the payment of administrative fees. This list will be distributed to all persons who may have an interest in any of the public notices listed.

VI. The proposed amendments are feasible.

An amendment to 33 C.F.R. § 325.2(a)(7) requiring the Corps to provide a copy of its final decision, along with the permit, statement of findings (SOF) or record of decision (ROD) where the final decision is to issue the permit, to every person who submitted comments during the public comment period is feasible. The Corps has a record of every person who submitted comments during the public comment period on a permit application. This is part of the permit record. It would not take much additional time or resources to send a copy of the permit decision, permit and SOF or ROD to those who have commented—especially via email. Indeed, some Corps districts already notify commenters via email of final permit decisions.⁶⁰ Therefore, the fact that some districts already provide notice of their final permit decisions to commenters demonstrates the feasibility of this rule change.

An amendment to 33 C.F.R. § 325.2(a)(8) requiring the Corps to provide a link to the permit and SOF or ROD on its mandatory monthly list of permit decisions is likewise feasible. Currently, the districts publish their lists of permits issued or denied during the previous month on the ORM Permit Decisions website.^{61, 62} Information provided on this website includes: permit number, applicant, project name, permit type, public notice date, action taken, date issued/denied, and a link to a map showing the location of the project. Just as the ORM Permit Decisions website provides a link to a map showing the location of the project, the Corps can easily include links on this website to the permit and SOF or ROD. And by providing a link to these documents online, the Corps can save money and time by not having to respond to FOIA requests for these documents.

The Corps can look to other federal agencies as examples. The Federal Energy Regulatory Commission (FERC), for instance, has created a system called “FERC Online” which “provides customers with an easy and efficient way to communicate and do business with the

⁶⁰ See Ex. A, Eustis Decl., ¶ 10 (stating that the Corps' Vicksburg District provided notice via email of its final permit decision); Ex. D, Wright Decl., ¶ 4 (stating that the Corps' Nashville District regularly provides notice via email of its final permit decisions); Ex. G, Heathcote Decl., ¶ 4 (stating that the Corps Rock Island District typically provides timely notice via U.S. Mail of its final permit decision).

⁶¹ See <http://geo.usace.army.mil/egis/f?p=340:2:0::NO:RP::>

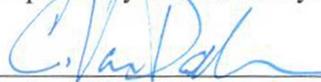
⁶² ORM is an acronym with an embedded acronym. ORM stands for OMBIL Regulatory Module and OMBIL stands for Component of the Operations and Maintenance Business Information Link. ORM is a central database that all Corps districts use to share information pertaining to the Corps Regulatory Program See <http://www.eli.org/sites/default/files/docs/white11.pdf>

Commission.”⁶³ The system allows individuals to file electronic comments on projects and to subscribe to receive electronic notification when FERC issues additional documents in a proceeding.⁶⁴ The system also grants, upon registration, access to all public information related to the permit decision process, including final decisions.⁶⁵ Other examples are <http://www.regulations.gov>, which covers several agencies, and <http://www2.epa.gov/dockets>. The judiciary is also using the internet to expand access to public documents with the “PACER” system (<https://www.pacer.gov>).

In sum, tools are available for the Corps to expand public participation and access to information on its ORM Permit Decisions website.

For the foregoing reasons, Petitioners urge the Corps to the make the recommended amendments to its regulations under 33 C.F.R. § 325.2 governing the processing of permit applications.

Respectfully submitted by:



Corinne Van Dalen, Supervising Attorney
Tulane Environmental Law Clinic
6329 Freret Street
Tel. (504) 862-8818
Fax (504) 862-8721
E-mail: cvandale@tulane.edu
*Counsel for Gulf Restoration Network,
Atchafalaya Basinkeeper, Missouri
Coalition for the Environment, Tennessee
Clean Water Network, Kentucky Waterways
Alliance, Midwest Environmental
Advocates, and Iowa Environmental Council*

⁶³ FERC: Documents and Filing, <https://www.ferc.gov/docs-filing/docs-filing.asp>.

⁶⁴ Your Guide to Electronic Information at FERC, <https://www.ferc.gov/docs-filing/elec-info-guide.pdf>.

⁶⁵ *Id.*