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U.S. DISTRICT COURT  
EASTERN DISTRICT OF LA

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA

LORETTO O'REILLY, Jr.,  
KELLY FITZMAURICE, AND  
HAZEL SINCLAIR,

*Plaintiffs,*

v.

UNITED STATES ARMY CORPS  
OF ENGINEERS,

*Defendant.*

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04-0940

SECT. A MAG 5

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Introduction

1. This action is a challenge to the U.S. Army Corps of Engineers' ("Corps") approval of a permit under Section 404 of the Clean Water Act, 33 U.S.C. § 1344, for the destruction of 39.54 acres of wetlands near Covington, St. Tammany Parish, Louisiana. These

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wetlands are an important resource that helps prevent flooding and improve water quality. Additionally, the wetlands provide a high-quality habitat for a rich array of wildlife, including deer as well as resident and migratory waterfowl.

2. As set forth below, the Corps approved the permit without preparing an Environmental Impact Statement, without an adequate Environmental Assessment, and without adequate attention to direct, indirect, and cumulative impacts of such development. The Corps' approval of the permit thus violates the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, and the Administrative Procedure Act ("APA"), 5 U.S.C. § 551.

3. Additionally, the Corps' issuance of a Section 404 permit violates the Clean Water Act because the applicant does not have a valid water quality certification from the Louisiana Department of Environmental Quality. Without a valid water quality certification, the Corps cannot grant a Section 404 permit for this project. *See* 33 U.S.C. §§ 1341 and 1344.

4. Plaintiffs, residents who live, work, and recreate near the proposed development, request declaratory relief and injunctive relief vacating the Corps' approval of the permit, and prohibiting approval of the permit until all legal requirements have been satisfied.

#### **Jurisdiction and Venue**

5. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331, and may issue a declaratory judgment and further relief pursuant to 28 U.S.C. §§ 2201 and 2202. Plaintiffs have a right to bring this action pursuant to, *inter alia*, the APA, 5 U.S.C. §§ 701-706. This action arises under NEPA, 42 U.S.C. § 4321, the Clean Water Act, 33 U.S.C. § 1251, and the APA, 5 U.S.C. § 551.

6. Under 28 U.S.C. § 1391(e), 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.

**Plaintiffs**

7. Plaintiffs Loretto O'Reilly, Jr., Kelly Fitzmaurice, and Hazel Sinclair live, work and recreate in the immediate vicinity of the proposed development.

8. Plaintiffs will suffer direct economic, aesthetic, and environmental injury if the development is allowed to proceed as proposed and approved by the Corps. Plaintiffs Hazel Sinclair and Kelly Fitzmaurice live less than one mile from the proposed project. Plaintiff Loretto O'Reilly, Jr. owns an interest in property located less than one mile from the proposed project. This project will cause Plaintiffs to suffer direct economic injury in the form of decreased property values as a result of the increased risk of flooding, and potentially higher premiums for insurance.

9. The development will impair the Plaintiffs' use and enjoyment of their homes and their neighborhoods. Plaintiffs are residents of Louisiana who have used the Little Tchefuncte River and the Timber Branch Tributary for recreation in the past and intend to do so in the future. The project will impair Plaintiffs' recreational activities, as it will diminish water quality of the Little Tchefuncte and the Timber Branch Tributary.

10. Plaintiffs enjoy observing wildlife including deer, birds and ducks in the area. The proposed project will impair Plaintiffs' enjoyment of observing wildlife, as the project will destroy a significant amount of wildlife habitat.

11. Plaintiffs' injuries will be irreparable if the project proceeds as proposed and approved by the Corps.

12. Plaintiffs' injuries will be redressed if the court enjoins this specific project.

**Defendant**

13. The Corps is responsible for issuing permits under Section 404 of the Clean Water Act, 33 U.S.C. § 1344. The Corps prepared the Environmental Assessment for this project, made a finding of no significant impact declaring that an Environmental Impact Statement was not necessary, and issued the Section 404 permit for the project.

**Overview**

14. In 1999, the Louisiana Department of Environmental Quality (“LDEQ”) and the Corps issued a joint public notice and accepted comments on August J. Hand’s (“Applicant”) proposal to build a subdivision. The Applicant withdrew the project after the comment period. The Applicant then resubmitted the application on August 16, 2001. The agencies re-noticed the project for public comment on August 29, 2001.

15. As proposed in the 2001 application, the project would require dredging and filling approximately 81.39 acres in St. Tammany Parish, of which 39.54 acres are pine flatwood/savannah wetlands, in the vicinity of the Little Tchefuncte River and Timber Branch Tributary.

16. After the second public comment period, the application became inactive until the Applicant provided additional information on December 12, 2002. The Corps reactivated the permit and assigned it to a new reviewer. The Corps did not re-notice the project for public comment.

17. The proposed project is one part of a much larger, three phase project. The Applicant even refers to the current proposal as “Phase I of Timberbranch II.” The envisioned project as a whole is over twice the size of the current project. The three phases of

Timberbranch II will constitute 153 acres, and the entire project will destroy over 96 acres of wetlands.

18. The proposed project lies in an area that is already plagued with flooding problems. The project would involve 47,000 cubic yards of fill material and approximately 60 acres of concrete, which would dramatically increase the threat of flooding in the area.

19. According to the U.S. Environmental Protection Agency (“EPA”), the destruction of the wetlands involved in this project could cause a significant increase in the amount of water pollution in the Little Tchefuncte River and Timber Branch Tributary. In a letter to the Corps, EPA stated “In addition to the direct, large-scale impacts that could occur to these wetlands as a result of construction activities, indirect impacts, such as an expected significant increase in nonpoint source pollution in the general area and the pressure to develop other nearby similarly forested areas with support services for the proposed activity, could be realized.”

20. EPA also expressed a concern that the project could lead to increased flooding in the area. EPA warned the Corps that the area “already experiences occasional severe flooding.”

21. The Corps acknowledged in the Decision Document that over the past seven years, the agency granted 72 permits within a three-mile radius of the project site. These permits “directly affected” over 400 acres of wetlands. Yet, the Corps did not address the impacts that these related projects will have on the environment.

22. LDEQ granted a water quality certification for this project on May 16, 2003. However, on February 9, 2004, the 19th Judicial District Court in Baton Rouge vacated that water quality certification. *O’Reilly v. La. Dep’t of Envtl. Quality*, No. 509564 (19<sup>th</sup> Judicial Dist. Ct. 03/04/04).

23. Plaintiffs Loretto O'Reilly, Jr., Kelly Fitzmaurice, and Hazel Sinclair seek to protect their interests in a safe environment through the promotion of conservation, recreation, and aesthetic values. These interests have been, and will continue to be, directly and irreparably harmed by the Corps' decision to issue this Section 404 permit.

### **Legal Background**

#### ***Section 404 of The Clean Water Act***

24. The Clean Water Act authorizes the Corps to issue permits for the discharge of dredged or fill material into the "navigable waters" of the United States. 33 U.S.C. § 1344(a). Such permits are commonly referred to as Section 404 permits.

25. Under the Clean Water Act, "navigable waters" include wetlands. *See* 33 C.F.R. §§ 328.3(a)(2), 328.3(a)(3), and 328.3(a)(7).

26. According to the regulations that govern the Section 404 permitting process, "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).

27. In cases where the discharge is proposed for "special aquatic sites" and the project is not water-dependent, the regulations provide a presumption that practicable alternatives are available unless clearly demonstrated otherwise. *Id.* § 230.10(a)(3).

28. This presumption of practicable alternatives "is very strong." *Buttrey v. United States*, 690 F.2d 1170, 1180 (5th Cir. 1982); *see also National Wildlife Fed'n. v. Whistler*, 27 F.3d 1341, 1344 (8<sup>th</sup> Cir. 1994).

29. The presumption “create[s] an incentive for developers to avoid choosing wetlands when they could choose an alternative upland site.” *Bersani v. Robichaud*, 850 F.2d 36, 44 (2d Cir. 1988).

***Water Quality Certification Under The Clean Water Act***

30. Congress intended for state and federal coordination and input when it enacted the Clean Water Act. *Keating v. F.E.R.C.*, 927 F.2d 616, 622 (D.C. Cir. 1991).

31. Before the Corps can issue a Section 404 permit under the Clean Water Act, an applicant must first obtain state certification that the proposed project will comply with state water quality standards. 33 U.S.C. § 1341(a)(1) (2004).

32. Section 1341(a) states:

Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate. . . . No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.

33. Louisiana environmental regulations provide that LDEQ is the state agency which administers water quality certification procedures. *See* 33 La. Admin. Code Pt. IX §§ 1501-1507. Therefore, in order for an applicant to obtain a Section 404 permit to dredge and fill wetlands in Louisiana, the applicant must first obtain a valid water quality certification from LDEQ.

***NEPA***

34. NEPA directs that “to the fullest extent possible . . . 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(C).

35. The Council on Environmental Quality, an agency within the Executive Office of the President, has promulgated regulations implementing NEPA. 40 C.F.R. §§ 1500.1517.

These regulations are binding on all federal agencies, including the Corps. 40 C.F.R. § 1500.3.

36. NEPA requires agencies to consider the environmental impacts of the proposed action, any adverse environmental effects that cannot be avoided should the proposal be implemented, and alternatives to the proposed action. *Id.*

37. A federal agency considering a proposal for major federal action may prepare an Environmental Assessment in order to determine whether an Environmental Impact Statement is required. 40 C.F.R. § 1501.3. If the Environmental Assessment indicates that the project will have a significant impact on the human environment, the agency must prepare an Environmental Impact Statement. *Coker v. Skidmore*, 941 F.2d 1306, 1309 (5th Cir. 1991).

38. An agency seeking to determine whether a proposed activity will have a “significant” impact on the environment must consider both the “context” and the “intensity” of the project’s effects. 40 C.F.R. § 1508.27.

39. “Context . . . means that the significance of an action must be analyzed in several contexts such as a society as a whole (human, national), the affected region, the affected interests, and the locality. . . . Both short- and long- term effects are relevant. *Id.* § 1508.27(a).

40. A federal agency seeking to determine whether the proposed project will have a significant impact must consider the “intensity” of the project’s effects. Specifically, an agency must consider the “unique characteristics of the geographic area such as proximity to . . . wetlands . . . or ecologically critical areas,” the degree to which the effects of the project are likely to be “highly controversial,” “the degree to which the action may adversely affect an



endangered or threatened species,” and whether the action “threatens a violation of Federal . . . law or requirements imposed for the protection of the environment.” *Id.* § 1508.27(b).

41. An agency must consider direct, indirect, and cumulative impacts. *Id.* § 1508.25(c). Direct effects are those “caused by the action and occur at the same time and place.” *Id.* § 1508.8.

42. “A cumulative impact is the impact on the environment which results from the incremental impact of the action when added with other past, present or reasonably foreseeable future actions” taken by any agency or individual. *Id.* § 1508.7. “Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.” *Id.*

43. Indirect effects include those “caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.” *Id.* § 1508.8. “Effects includes ecological, aesthetic, historic, cultural, economic, social, or health, whether direct, indirect or cumulative.” *Id.*

#### ***APA***

44. The APA provides for judicial review of federal administrative agency actions. Thus, the APA provides the vehicle for redress of NEPA and Clean Water Act violations.

45. The APA defines a person as “an individual, partnership, corporation, association or public or private organization other than an agency.” 5 U.S.C. § 551(2).

46. Agency means “each authority of the Government of the United States, whether or not it is within or subject to review by another agency.” 5 U.S.C. § 701(b)(1); 5 U.S.C. § 551(1).

47. Agency action includes the whole or a part of an agency order. An order is defined as the whole or part of a final disposition, “whether affirmative, negative, injunctive, or declaratory in form, of an agency.” 5 U.S.C. § 551(6).

48. Any person “adversely affected or aggrieved by agency action” within the meaning of NEPA, is entitled to judicial review thereof. 5 U.S.C. § 702.

### **First Cause of Action**

#### *NEPA: Failure to Complete an Environmental Impact Statement*

49. Plaintiffs hereby incorporate by reference paragraphs 1 through 48.

50. The Corps’ issuance of the Section 404 permit for this project was major federal action as defined under NEPA.

51. The project will have a significant impact on the environment.

52. The Corps did not prepare an EIS before it issued the Section 404 permit for the proposed project.

53. The Corps violated NEPA when it failed to prepare an EIS for this project. 42 U.S.C. § 4332(C)(ii).

### **Second Cause of Action**

#### *NEPA: Failure to Consider Cumulative Impacts*

54. Plaintiffs hereby incorporate by reference paragraphs 1 through 48.

55. In the Decision Document, the Corps acknowledged that this project would cause many changes in the infrastructure of the surrounding areas, including increased traffic flows, as well as the construction of a sewage system, though the Corps failed to address impacts that these changes will have on the environment.

56. The Corps failed to consider future or reasonably foreseeable effects of the proposed project.

57. The Corps failed to consider the cumulative effects resulting from the collectively significant effects of related residential development projects.

58. The Corps' failure to consider cumulative, direct and indirect effects of the proposed project and related projects violates NEPA. 42 U.S.C. § 4332(C)(i); 42 U.S.C. § 4332(C)(ii).

### **Third Cause of Action**

#### *Clean Water Act: Failure to Obtain a Valid Water Quality Certification*

59. Plaintiffs hereby incorporate by reference paragraphs 1 through 48.

60. The Applicant's water quality certification was vacated and remanded on March 9, 2004 by the 19<sup>th</sup> Judicial District Court in Baton Rouge, Louisiana. Accordingly, the Applicant currently does not have a valid water quality certification for this project.

61. The Corps issued a Section 404 permit for this project to the Applicant without a valid water quality certification.

62. The Corps' actions violate the Clean Water Act. 33 U.S.C. § 1341(a).

### **Prayer for Relief**

WHEREFORE, Plaintiffs respectfully pray for judgment as follows:

A. An order enjoining the Corps from issuing a Section 404 permit for this project until:

(1) The Corps prepares an Environmental Impact Statement to address environmental impacts of the project, including an analysis of the cumulative

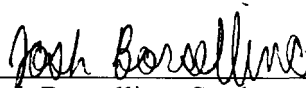
impacts of the project in conjunction with other planned and related residential developments in the immediate vicinity; and

(2) The Applicant receives a valid water quality certification from LDEQ.

- B. A declaration that the Corps violated NEPA by failing to prepare an Environmental Impact Statement.
- C. A declaration that the Corps violated NEPA by failing to adequately address the direct, indirect and cumulative impact that the project and related projects will have on the environment.
- D. A declaration that the Corps violated the Clean Water Act by issuing the Applicant's Section 404 permit based on an invalid water quality certification.
- E. An award for expenses and attorneys fees, pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412(d), and any other applicable laws;
- F. An award of such other relief as the Court deems just and proper.

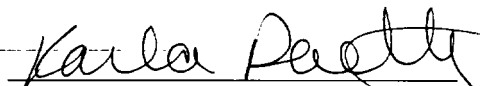
Respectfully submitted this 2nd day of April, 2004

TULANE ENVIRONMENTAL LAW CLINIC



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