

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

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FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF LA

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LORETTA G. WHYTE
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LOUISIANA ENVIRONMENTAL
ACTION NETWORK and CITIZENS
FOR A STRONG NEW ORLEANS
EAST

Plaintiffs,

v.

U.S. ARMY CORPS OF ENGINEERS
COL. RICHARD P. WAGENAAR, in his
official capacity as District Engineer of the
United States Army Corps of Engineers,
New Orleans Division

Defendant.

CIVIL ACTION NO:

06-2020
SECT. F MAG.5

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

This action involves the U.S. Army Corps of Engineers summary issuance of an "emergency" permit under Section 404 of the Clean Water Act, 33 U.S.C. § 1344, to allow construction in waters of the United States of a dump for hurricane debris at 16600 Chef Menteur Highway in Easter New Orleans. This site, managed by Waste Management of Louisiana, is directly adjacent to the Bayou Sauvage National Wildlife Refuge and the Vietnamese community centered around Mary Queen of Vietnam Catholic church. This "emergency landfill" is being permitted without the public notice and involvement required by state and federal law.

Much of this site is, according to the Corps' own documents, comprised of waters of the United States. Any action to dredge or fill these areas is subject to regulation under Section 404

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of the Clean Water Act, 33 U.S.C. § 1344, to protect the public interest and the environment. Under this statute and the Corps' own regulations, any decision to allow placement of fill material such as hurricane debris in waters of the United States requires review and analysis of the impacts on public resources, water quality, wildlife, and reasonable alternatives. The law also requires that the public receive notice and the opportunity to comment. In addition, any federal permit allowing placement of fill material in these areas – including placement of hurricane debris – is subject to review and analysis under the National Environmental Policy Act, 42 U.S.C. § 4332(2)(C).

LEAN and Citizens for a Strong New Orleans East seek declaratory relief that the Corp' actions are in violation of the Clean Water Act and the National Environmental Policy Act, and temporary and permanent injunctive relief prohibiting the Corps issuing an emergency permit for this site without compliance with federal law.

JURISDICTION AND PARTIES

1. The Louisiana Environmental Action Network (LEAN) is a Baton Rouge based umbrella organization established to promote and protect the health of Louisiana's natural environment for the use and enjoyment of the people of Louisiana. In executing its purpose, LEAN ensures that the laws and regulations of the State, intended to preserve and enhance its natural resources and environmental quality of the State, are diligently followed in letter and in spirit and that all agencies acting as trustees of these resources discharge this duty diligently and effectively. LEAN has a particular interest in the preservation and restoration of water quality in the rivers and streams of Louisiana, including the Mississippi River. LEAN has been designated as the Lower Mississippi Riverkeeper by the Waterkeeper Alliance, a national alliance of grassroots organizations aimed at protecting the ecological integrity of America's lakes, rivers and coastal

waters. As Lower Mississippi Riverkeeper, LEAN acts as an advocate for the waters of the Mississippi Basin. LEAN is also vitally interested, and for many years has advocated, for responsible disposal of waste and responsible landfill siting and management. The actions of the Corps in this matter have damaged LEAN and its members.

2. Citizens for a Strong New Orleans East is an unincorporated, grassroots citizen's group composed of individuals who live and are attempting to rebuild their homes in New Orleans East. The members of Citizens for a Strong New Orleans East are damaged by the push to site "emergency" dumps, including the one at issue here, in their neighborhoods.

3. Defendant U.S. Army Corps of Engineers is an agency of the United States Government and Colonel Richard P. Wagenaar, in his official capacity as District Engineer of the New Orleans District, are responsible for the issuance of the "emergency" Section 404 permit at issue here.

III. JURISDICTION AND VENUE

4. The Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question jurisdiction).

5. Venue is appropriate in this judicial district and in this court pursuant to 28 U.S.C. § 1391, in that the violations of the law giving rise to the claims in this suit occurred in the Eastern District of Louisiana.

IV. BACKGROUND

6. On or about Friday, April 14, 2006, the Corps of Engineers issued an "emergency" permit to a company called Waste Management of Louisiana, allowing dredge and fill activities in waters of the United States at a site located at 16600 Chef Menteur Highway in Eastern New Orleans. According to the Corps determination, a 404 permit will be required for this site,

because several ponds on the site are waters of the United States. The parcel lies directly adjacent to Bayou Maxent, which drains to the Gulf Intracoastal Waterway and borders the Bayou Sauvage National Wildlife Refuge. It is less than one mile from the nearest resident in the predominantly Vietnamese community in New Orleans East.

7. Section 404(a) of the Clean Water Act, 33 U.S.C. § 1344(a), prohibits the discharge of dredged or fill materials into waters of the United States, including impounded waters which are otherwise defined as waters of the United States, except pursuant to a permit issued by the Secretary of the Army, acting through the Corps. Further, under its own regulations the Corps is required to consider the impact of issuance of a Section 404 permit on the public interest. 33 C.F.R. § 320(a) (“The decision whether to issue a permit will be based on an evaluation of the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest.”). The public interest factors include items such as fish and wildlife, water resources, and economics. Id.

8. The Corps of Engineers regulations also require that the public receive notice and the opportunity to comment on Section 404 permits. 33 C.F.R. § 325.3 provides that “the public notice is the primary method of advising all interested parties of the proposed activity for which a permit is sought and of soliciting comments and information necessary to evaluate the probable impact on the public interest.”

9. The Corps’ “emergency” action violated these provisions by depriving the citizens of their right to notice, comment and the opportunity to participate without valid justification under any regulation or law. Plaintiffs allege that the Corps has had more than adequate opportunity to make its reasoning public, and allow the public an opportunity to provide information and participate in the decision making. The issuance of this “emergency” permit without compliance

with law and without adequate finding of fact is arbitrary, capricious and contrary to law, and violated the Clean Water Act and the Administrative Procedure Act, 5 U.S.C. § 701, et seq.

10. The National Environmental Policy Act requires that all federal agencies – including the Corps - prepare an environmental impact statement on "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C.A. 4332(2)(C). In order to determine whether a given federal action is likely to have "significant" impacts, and therefore require an EIS, an agency like the Corps will ordinarily prepare an environmental assessment. If the agency determines that the impacts of the action are not significant, it will prepare a "Finding of No Significant Impact" (FONSI) which is a document "presenting the reasons why an action . . . will not otherwise have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared." *Id.* § 1508.13. Like Section 404, the NEPA process requires public notice and public involvement. *E.g. Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961, 970 (9th Cir. 2003); 40 C.F.R. § 1401.4(b).

11. The Corps has prepared no NEPA documentation of any kind on its issuance of a 404 permit for the 16600 Gentilly site, and its failure is not excused by any law or regulation. Its failure to prepare NEPA documentation and allow the public to participate in the decision making process is arbitrary, capricious and contrary to law, and in violation of NEPA and the Administrative Procedure Act.

PRAYER FOR RELIEF

WHEREFORE, the Louisiana Environmental Action Network respectfully prays that this Court grant it the following relief:

(1) A declaration that the Corps' actions described above constitute violations of the Clean Water Act and the National Environmental Policy Act and their implementing regulations;

(2) Award preliminary and permanent injunctive relief prohibiting the Corps issuing any permit under Section 404 for the 16600 site until it complies with the Clean Water Act and the National Environmental Policy Act; the 1;

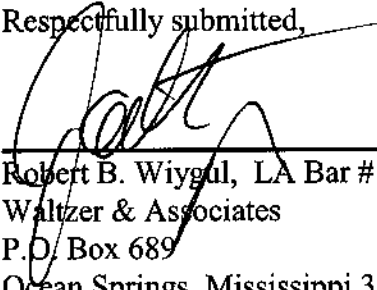
(3) Retain jurisdiction of this matter to ensure compliance with its decree;

(5) An award of plaintiffs' attorneys' fees, expert fees, and other costs; and

(6) Such other and further relief as the Court finds proper in the premises.

Dated this 18th day of April, 2004.

Respectfully submitted,



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