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U.S. DISTRICT COURT  
EASTERN DISTRICT OF LA

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LORETTA G. WHYTE  
CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA

SAVE OUR WETLANDS,

*Plaintiff,*

v.

TERREBONNE LEVEE &  
CONSERVATION DISTRICT,

*Defendant.*

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Case No:

08-2159

Judge:

Magistrate:

SECT F MAG 2

Ref: 131-004.1

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COMPLAINT

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INTRODUCTION

1. Plaintiff Save Our Wetlands brings this civil action against the Terrebonne Levee & Conservation District ("Levee District") pursuant to Clean Water Act § 505, 33 U.S.C. § 1365(a)(1) and 40 C.F.R. §§ 135.1 – 135.4, for violations of the Clean Water Act, 33 U.S.C. §§ 1251 – 1376.

2. The Levee District is building Reach J1 of the Mississippi River and Tributaries – Morganza, Louisiana to the Gulf of Mexico Hurricane Protection Project ("Morganza to the Gulf Project") without first obtaining a Clean Water Act § 404 dredge and fill permit from the U.S. Army Corps of Engineers. See 33 U.S.C. § 1344; 33 C.F.R. § 323.3(a). Because the Levee

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District's levee construction involves filling wetlands, building Reach J1 of the Morganza to the Gulf Project without a § 404 permit violates Clean Water Act § 301(a), 33 U.S.C. § 1311(a).

3. Instead of applying for a Clean Water Act permit, which would allow for public comment and plans to mitigate damage to sensitive wetlands, the Levee District has begun construction without the required § 404 permit.

### **JURISDICTION AND VENUE**

4. This Court has jurisdiction over the subject matter of this case pursuant to its federal question jurisdiction under 28 U.S.C. §1331, the citizen suit provision of the Clean Water Act §505(a)(1), 33 U.S.C. § 1365(a)(1), and the Declaratory Judgment Act, 28 U.S.C. § 2201.

5. Venue is proper in this Court under Clean Water Act § 505(c), 33 U.S.C. § 1365(c), because the Levee District is constructing Reach J1 of the Morganza to the Gulf Project in south Terrebonne Parish, which lies within the geographical region encompassed by the United States District Court for the Eastern District of Louisiana.

### **NOTICE**

6. On or about November 27, 2007, Save Our Wetlands provided notice of the violations alleged in this complaint to the Levee District, pursuant to Clean Water Act § 505(b)(1), 33 U.S.C. § 1365(b)(1). Save Our Wetlands provided copies to EPA Administrator Stephen Johnson, Louisiana Department of Environmental Quality Secretary Mike McDaniel, EPA Region 6 Administrator Richard Greene, and Attorney General Michael Mukasey on November 27, 2007. A copy of this notice letter is attached as "Exhibit A" and incorporated by reference.

7. More than sixty days have passed since Save Our Wetlands provided its November 27, 2007 notice.

## **PARTIES**

8. Save Our Wetlands is a Louisiana non-profit corporation whose mission is to protect Louisiana lakes and wetland areas through education and litigation. Save Our Wetlands has more than 200 members statewide, including members who live, work, or recreate in Terrebonne Parish in the area of the Reach J1 levee. Save Our Wetlands brings this action on behalf of itself and its members.

9. The mission of Save Our Wetlands and its members is to protect wetlands, including those imperiled by the construction of Reach J1. Members use the wetlands for fishing, boating, bird watching, and for their aesthetic appeal. The Levee District's construction of Reach J1, and the illegal discharge of fill material into the marsh that it requires, directly harms and threatens these wetlands and Save Our Wetlands' members' enjoyment of those wetlands. Save our Wetlands and its members have been, are being, and will continue to be injured by the illegal discharge of fill material into the wetlands surrounding the project site. These injuries are actual and concrete and the relief sought in this action would redress them.

10. Save Our Wetlands is a "person" and a "citizen" as defined by Clean Water Act § 502(5), 33 U.S.C. § 1362(5).

11. The Levee District, a political subdivision of the State of Louisiana, is the parish agency charged with maintaining Terrebonne Parish's levee systems. The Levee District engages in the construction, operation, and maintenance of flood control works related to hurricane protection, tidal and riverine flooding, and saltwater intrusion and conservation.

12. The Levee District is a "person" as defined by Clean Water Act § 502(5), 33 U.S.C. § 1362(5), which includes political subdivisions of the state.

## **STATUTORY BACKGROUND**

13. The Clean Water Act prohibits “the discharge of any pollutant by any person,” except when those discharges are allowed pursuant to a Clean Water Act permit. 33 U.S.C. § 1311(a).

14. The Clean Water Act defines the term “discharge of a pollutant” to include “any addition of any pollutant to navigable waters from any point source.”

15. The Clean Water Act defines the term “pollutant” to include “dredged spoil,” “biological materials,” “rock,” “sand,” and “dirt.” 33 U.S.C. § 1362(6).

16. The term “point source” means any “discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14).

17. Clean Water Act § 404 establishes a permitting program that allows permit holders to discharge dredged or fill material into “navigable waters.” 33 U.S.C. § 1344(a). Additionally, 33 C.F.R. § 323.3(a) authorizes the Corps to issue § 404 permits “for the discharge of dredged or fill material into waters of the United States.”

18. “Navigable waters” includes wetlands that directly abut traditional navigable waters or have a significant nexus with traditional navigable waters. *See* Memorandum from U.S. Army Corps of Engineers and U.S. EPA, “Clean Water Act Jurisdiction Following U.S. Supreme Court Decision in Rapanos v. United States & Carabel v. United States,” *available at* [http://www.usace.army.mil/cw/cecwo/reg/cwa\\_guide/rapanos\\_guide\\_memo.pdf](http://www.usace.army.mil/cw/cecwo/reg/cwa_guide/rapanos_guide_memo.pdf)

19. Clean Water Act § 505 authorizes “any citizen” to bring suit “against any person... who is alleged to be in violation of (A) an effluent standard or limitation under this chapter” and grants district courts jurisdiction “to enforce such effluent standard of limitation...”

and to apply any appropriate civil penalties under section [309(d)] of this title.” 33 U.S.C. § 1365(a).

20. Clean Water Act § 505 defines “effluent standard or limitation” to include “an unlawful act under subsection (a) of section 1311.” 33 U.S.C. § 1365(f); see also 33 U.S.C. § 1311(a) (prohibiting unpermitted discharges).

21. The Clean Water Act defines “citizen” as “a person or persons having an interest which is or may be adversely affected.” 33 U.S.C. § 1365(g).

22. Under Clean Water Act § 309(d), “Any person who violates [Clean Water Act § 301] . . . shall be subject to a civil penalty,” which 40 C.F.R. § 19.4 caps at \$32,500 per day for each violation. 33 U.S.C. § 1319(d).

23. The Clean Water Act defines “person” to include corporations and political subdivisions of the state. 33 U.S.C. § 1362(5).

#### **GENERAL ALLEGATIONS**

24. The Morganza to the Gulf Project is a proposed flood control project, covering portions of both Terrebonne and Lafourche Parishes and affecting over 1,700 square miles. Final Programmatic Environmental Impact Statement for Morganza to the Gulf, May 3, 2002 at 1.

25. On March 13, 2006, sixteen coastal scientists and engineers wrote to Governor Blanco to warn that the current proposed project plans “rely on an engineering approach that carries high economic, structural and environmental risk, and threatens the sustainability of the very ecosystem we are all trying to save.”

26. Reach J1 of the Morganza to the Gulf Project is located on the west-descending bank of Bayou Pointe-aux-Chenes, on the west side of Louisiana Highway 665 in south

Terrebonne Parish, approximately 16 miles southeast of Houma. Environmental Assessment and Draft Finding of No Significant Impact for Reach J, Segment 1, April 15, 2005 at 3.

27. All of the project area is low-lying coastal marsh with only a slight rise to form the ridge upon which the highway is built. The coastal marsh provides important winter habitat for migratory birds, because it is on the southern end of the Mississippi Flyway, as well as nursery habitat for larval fish species. Environmental Assessment and Draft Finding of No Significant Impact for Reach J, Segment 1, April 15, 2005 at 5.

28. These marshes are subject to the Clean Water Act's protections because they directly abut the Gulf Intracoastal Waterway, a traditional navigable water and significantly affect the physical, chemical, and biological integrity of the Gulf Intracoastal Waterway..

29. The Levee District is using soils from an adjacent and off-sit borrow pit to build Reach J1. Environmental Assessment and Draft Finding of No Significant Impact for Reach J, Segment 1, April 15, 2005 at 6.

30. The Levee District will use machinery to place the soil into the wetlands to build Reach J1. *See* Environmental Assessment and Draft Finding of No Significant Impact for Reach J, Segment 1, April 15, 2005 at 1. Such machinery discharging pollutants into the wetlands constitutes a point source under the Clean Water Act.

31. The Final Programmatic Environmental Impact Statement for the Morganza to the Gulf Project states: "If the local T[errebonne] L[evee and] C[onservation] D[istrict] desires to implement any specific part or parts of the project, permits would still be required from the Corps of Engineers." Final Programmatic Environmental Impact Statement for Morganza to the Gulf Project, May 3, 2002 at 25.

32. On November 6, 2007, Save Our Wetlands, through counsel, submitted a public records request to the Levee District seeking a copy of the § 404 permit for Reach J1. In its response, dated November 8, 2007, the Levee District stated that “because the project was authorized [by Congress] for construction, there is no Clean Water Act Permit for the project you referenced.”

33. On November 9, 2007, Save Our Wetlands submitted a Freedom of Information Act request to the Corps, again asking for a copy of the Levee District’s § 404 permit for Reach J1. The Corps has yet to produce said permit.

#### **CAUSE OF ACTION**

##### *Clean Water Act: Filling Navigable Waters Without a § 404 Permit*

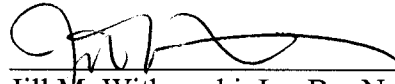
34. Plaintiff realleges and incorporates by reference paragraphs 1 through 33.
35. The Levee District began construction of Reach J1 on or about March 24, 2006.
36. The Levee District’s construction includes discharge of pollutants into navigable waters from point sources.
37. Constructing Reach J1 involves filling in wetlands that are “navigable waters” subject to the Clean Water Act’s protections.
38. The Levee District is using soils to fill in the wetlands to build Reach J1. These soils qualify as a “pollutant” under the Clean Water Act.
39. The machinery the Levee District is using to build Reach J1 is a “point source” under the Clean Water Act.
40. The Levee District must obtain a § 404 permit in order to lawfully build Reach J1.
41. The Levee District has not obtained a § 404 permit prior to constructing Reach J1.
42. The continued presence of fill at Reach J1 without a § 404 permit constitutes a continuing violation of Clean Water Act § 301.

**PRAYER FOR RELIEF**

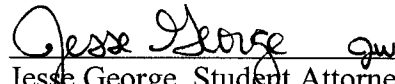
WHEREFORE, Save Our Wetlands prays for judgment as follows:

- A. A declaratory judgment that the Levee District has violated and continues to violate the Clean Water Act and its implementing regulations;
- B. An injunction requiring the Levee District to abate its violation and to stop construction of Reach J1 of Morganza to the Gulf until and unless the U.S. Army Corps of Engineers issues the Levee District a § 404 permit for Reach J1;
- C. A civil penalty in the amount of \$32,500 for each day of violation of the Clean Water Act pursuant to 33 U.S.C. § 1319(d) and 40 C.F.R. § 19.4, totaling approximately \$24,440,000 since March 24, 2006;
- D. An award for expenses and attorneys fees, pursuant to 33 U.S.C. § 1365(d) and any other applicable laws; and
- E. An award of such other relief as the Court deems just and proper.

Respectfully submitted on April 29, 2008



Jill M. Witkowski, La. Bar No. 30121  
Tulane Environmental Law Clinic  
6329 Freret Street  
New Orleans, LA 70118  
Telephone: (504) 862-8814  
Fax: (504) 862-8721  
jwitkows@tulane.edu



Jesse George, Student Attorney  
Tulane Environmental Law Clinic