



April 11, 2014

Tulane Environmental Law Clinic

Mr. Robert Northey
Office of District Counsel
New Orleans District
U.S. Army Corps of Engineers
7400 Leake Avenue
New Orleans, LA 70118

Mr. Ron Curry
Regional Administrator
U.S. Environmental Protection Agency, Region 6
1445 Ross Avenue, Suite 1200
Dallas, TX 75202

Re: Follow Up on Corps Violation of Internal Policy

Mr. Northey and Mr. Curry:

Two years ago, on March 28, 2012, I wrote to Mr. Northey on behalf of the Atchafalaya Basinkeeper (ABK) about a policy announced to the Basinkeeper by the New Orleans District of the U.S. Army Corps of Engineers ("New Orleans District" or "Corps") which presented serious problems with the Corps' enforcement of Section 404 of the Clean Water Act in the Atchafalaya Basin ("Basin"). I attach that letter for reference as Attachment A.

To reiterate, and as Mr. Northey is no doubt aware, Mr. Dean Wilson of the Atchafalaya Basinkeeper was informed two years ago by Mr. Rob Heffner of the New Orleans District's Enforcement division that the Corps enforcement personnel would no longer accompany the fishermen and/or NGOs in their boats to view violations of Section 404 of the Clean Water Act in the Basin. Ms. Denise Frederick of the Corps' Legal Division later explained to Mr. Wilson, and to other NGOs attending a September 25, 2012, meeting at the Corps (at which I was present), that the decision was based on a Corps policy not to accept anything of value from anyone with an interest in a Corps permitting decision. After the meeting, on October 12, 2012, I wrote a letter to Mr. Ken Holder, the New Orleans District Public Affairs Chief and the organizer of the NGO meeting, confirming the information Ms. Frederick had provided and detailing problems that the policy caused. I have also attached that letter for your reference as Attachment B.

In the October 12, 2012, letter, I referenced a March 30, 2012, incident where the Corps regulatory personnel used boats and ATVs provided by a permit applicant to view a project built without a permit for which the applicant was requesting Corps approval. I expressed concern that the Corps regulatory personnel were willing to violate the Corps policy articulated by Ms. Frederick to use resources provided by Clean Water Act violators and permit applicants but relied on that same policy to refuse to accompany citizens like Mr. Wilson and Cajun fishermen in their boats to investigate violations. I received no response to that letter.

I write now, again on behalf of the Atchafalaya Basinkeeper and the Louisiana Crawfish Producers Association-West (LCPA-West), because Mr. Wilson has learned that the Corps regulatory and enforcement divisions continue to violate the policy expressed by Ms. Frederick in a way that exclusively benefits permit applicants and violators of Section 404. I also write Mr. Curry because Mr. Wilson has learned that EPA apparently has the same policy.

While the Corps continues to cite this policy when refusing to accompany NGOs and fishermen in their boats to view violations, it also continues to accept resources from permit applicants and Clean Water Act violators to view areas and projects they want permitted, violating this same policy. For example, in late May or early June of 2013, Corps regulatory personnel accompanied Shell Pipeline Company personnel to a proposed project area in air boats provided by Shell after it had applied for a permit to dredge wetlands in the Basin for a 204-mile long pipeline, Permit Application MVN-2013-00951-WII.

Again, in the summer of 2013, agency personnel, including Mr. Michael Herrmann and Ms. Angelle Greer of the Corps and Mr. John Ettinger with EPA, accompanied Good Hope logging company to view an area where Good Hope had illegally dredged and filled wetlands to construct a road which also blocked navigation in violation of the Rivers and Harbors Act; the Corps and EPA also viewed areas where Good Hope had logged, to which the illegally-constructed roads gave it access. When the Corps accompanied Good Hope personnel on its site visit, it rode in Good Hope's trucks, driven by Good Hope representatives. This trip occurred during the pendency of Good Hope's after-the-fact permit application, which it had applied for after Mr. Wilson reported its violation to the Corps. This application, which is still pending as far as we know, is Good Hope's third for an after-the-fact permit for unpermitted activity.

Thus, now on at least three occasions, the Corps has violated the policy explained by Ms. Frederick at the NGO meeting. At that meeting, I confirmed with Ms. Frederick that the policy against accepting anything of value from persons or entities with an interest in a Corps permitting decisions does not just encompass Mr. Wilson and citizens, but also includes permit applicants and persons who have allegedly violated the Clean Water Act. Yet, Corps regulatory and enforcement personnel continue to accept resources from permit applicants and alleged violators to view project areas.

At that NGO meeting, and in subsequent letters, I explained why, from the perspective of the Basinkeeper and LCPA-West, the Corps' (and apparently EPA's) policy is so problematic. We discussed at that meeting that the Corps regulatory and enforcement divisions have no boat, and so cannot go in the Basin to either investigate dredging and filling without a permit or to investigate violations of permit conditions. This presents obvious obstructions to the Corps

being able to fulfill its statutory role to enforce Section 404 of the Clean Water Act and Section 10 of the River and Harbors Act. Nor does EPA apparently have a boat, exacerbating the enforcement deficiency. When the Corps and EPA accept resources from violators and permit applicants but refuse to do the same with concerned citizens, this presents an entirely different, but equally problematic, issue with enforcement. By riding in boats, ATVs, trucks, and other vehicles provided by permittees/permit applicants/violators, not only are the agencies violating their own policies, but they are ensuring that they receive a biased perspective in their investigations and creating the appearance that they are biased in favor of permittees/permit applicants/violators. The agencies cannot expect to obtain an objective view of a situation when they only allow one side to a controversy – usually Clean Water Act violators – to present their information “on the ground,” so to speak, but refuse to do the same with the other side – usually fishermen and others who rely on the Basin for their livelihood and who suffer the effects of the illegal activity. More disturbingly, how can the Corps and EPA justify accepting these resources from one side but refusing to accept these same resources from the other?

The Good Hope situation provides a perfect example of the problems that can ensue when the Corps and EPA view a site with only one side to the controversy. According to Mr. Wilson, he visited the Good Hope logging area before the Corps’ visit discussed above and noted that no cypress regeneration had taken place in areas where Good Hope had logged. He presented this information, which included photographs of the logged areas without any regeneration as well as GPS coordinates of where the photos were taken, to the Corps and EPA. But the Corps and EPA refused to accompany him out to the site to see for themselves what the photographs depicted. The Corps did, however, along with EPA, visit the site with Good Hope personnel in Good Hope’s trucks. Good Hope purported to show the Corps and EPA the very same site, but the site it took the Corps and EPA to had cypress trees growing. Because the Corps and EPA apparently did not use GPS to confirm the coordinates, they essentially relied on Good Hope to take them to the same site depicted in Mr. Wilson’s photographs. As a result, the drastic discrepancy between what Mr. Wilson saw and photographed and what the Corps and EPA saw several months later remains unexplained. Had the Corps and EPA agreed to accompany Mr. Wilson and then followed that with a visit with the permit applicants, they would have ensured that they got the full story from both sides to the controversy.

It has been suggested that the Corps’ and EPA’s inconsistent positions are based on the view that boats are different than ATVs and trucks and that riding in a boat is of more value than riding in a truck or ATV. If this is the basis for the Corps’ and EPA’s decision to ride in Good Hope’s trucks, and the Corps’ decision to ride in Atchafalaya Investments’ ATVs, then please state this. And, if this is the case, please provide the monetary limit the Corps and EPA place on the value of the resources they can accept and how they reach this calculation. Also, if this is the case, please explain why the Corps refused to accompany NGOs and Cajun fishermen in their boats but agreed to accompany Shell Pipeline Company and Atchafalaya Investments in their boats. The Shell air boats in particular are many times more valuable than the fishermen and NGO’s boats, and there is surely no reason to believe that Atchafalaya Investments’ boats are less valuable than the fishermen’s and NGO’s.

It has also been suggested, in certain of these instances, that the Corps made an “exception” to its policy. If this is the official explanation, please explain how one goes about

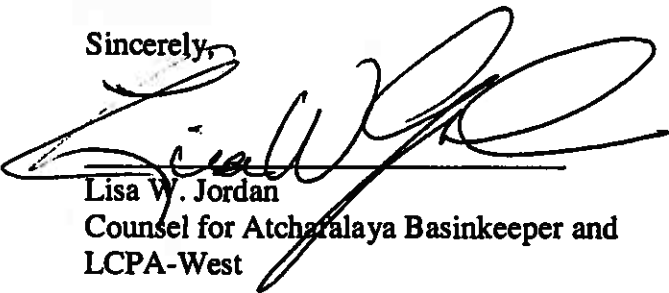
obtaining an exception, and how many "exceptions" the Corps has allowed in the last two years. Please also provide the justification for the exception and explain why, once an "exception" is made to allow the Corps to violate its policy to ride with permit applicants and violators, an exception cannot also be made in that same instance to allow use of fishermen and NGO's boats. If EPA has similar exceptions to its policy, please provide the same information.

If the justification for the exception is that it allows the Corps, and EPA, to view areas of potential violations that they would not otherwise be able to view, then this simply highlights the main problem: that the Corps and EPA's lack of access to their own boats or boats of other agencies threatens their ability to comply with their enforcement duties under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act.

LCPA-West and ABK request that the Corps and EPA apply their policies even-handedly. The agencies should either agree to accompany the people who are victimized by the violators as well as permit applicants/violators in boats to view areas of the Basin or the Corps should follow its policy and refuse to accompany either. This latter option presents issues for the Corps and EPA enforcing Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act, but, as Ms. Frederick suggested, this problem is fixable. In fact, the purpose of my October 12, 2012, letter was to ask what the Corps was doing to fix the problem. Apparently, the Corps is doing nothing to fix the problem caused by the policy because it is violating the policy when violators, permittees and permit applicants' resources are involved. This is unacceptable.

I welcome your written response as well as your corrections if the letter inaccurately reflects the Corps' or EPA's policy or the facts behind the Corps' apparently biased investigations. I also welcome a meeting to discuss this serious issue and to work on resolution.

Sincerely,



Lisa W. Jordan
Counsel for Atcharalaya Basinkeeper and
LCPA-West

cc: John Ettinger, EPA
Denise Frederick, Corps Legal Division
Ms. Gina McCarthy, EPA Administrator
Lieutenant General Thomas P. Bostick, Chief of Engineers, U.S. Army Corps of Engineers
Colonel Richard Hansen, Commander and District Engineer, New Orleans District



March 28, 2012

Tulane Environmental Law Clinic
Mr. Robert Northey
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U.S. Army Corps of Engineers
7400 Leake Avenue
New Orleans, LA 70118

Re: New Corps Policy on Use of Basinkeeper Vessel to Investigate Violations

Dear Mr. Northey:

This letter is to confirm and memorialize the apparent new policy of the U.S. Army Corps of Engineers, New Orleans District ("the Corps"), regarding its investigation of Clean Water Act violations reported by my client Dean Wilson, the Atchafalaya Basinkeeper ("Basinkeeper"). It is also intended to express Mr. Wilson's profound disappointment in both the policy itself and the Corps' refusal to discuss it with him, much less to work cooperatively toward a resolution that makes sense and that allows the Corps to comply with its enforcement obligations under the Clean Water Act.

According to Mr. Wilson, on March 1, 2012, Mr. Robert Heffner of the Corps Enforcement Division informed him that the Corps would no longer continue to accompany him in his boat to investigate violations of the Clean Water Act which he reports to the Corps. Mr. Heffner told Mr. Wilson of this change in policy the day after the February 29, 2012, hearing in federal court, Western District of Louisiana, on the Corps' Motion to Stay and for Remand of the litigation filed against it by the Basinkeeper and others in Case Number 6:11-cv-461. Accordingly, Mr. Heffner cancelled a trip he had scheduled with Mr. Wilson to view an area in the Atchafalaya Basin where Mr. Wilson had observed illegal dredge and fill activity that had not been authorized by a Corps permit.

Mr. Wilson was given no explanation for the abrupt change in policy at that time, and as of this date the Corps still has not explained its policy change. Further, when Mr. Wilson inquired how the Corps would investigate violations of the Clean Water Act which it has a statutory duty to enforce, pointing out that the Corps has no vessel that would allow it to access these areas, he was told the Corps would allow the violator to take its enforcement personnel to the areas where he or she is alleged to be breaking the law.

Further, the Corps has rebuffed Mr. Wilson's subsequent attempts to cooperatively resolve this illogical and problematic change in Corps policy, again with no explanation. Soon after learning of the Corps' policy change, Mr. Wilson arranged a meeting with Corps enforcement personnel and Corps counsel for March 20, 2012, to discuss resolving this issue, as well as to discuss another violation of the Clean Water Act which Mr. Wilson had reported. The Corps agreed to this meeting and to these topics. However, the day before the meeting, Mr.

Wilson was told that the Corps would not discuss the vessel issue with him, and that only the issue of the alleged violation would be open for discussion.

As you are no doubt aware, as the Atchafalaya Basinkeeper, and because he lives and works in the Basin, Mr. Wilson reports to the Corps constantly on violations of the Clean Water Act by parties in the Basin who dredge and fill for their own private interests without following the law by applying with the Corps for a permit. As the Corps has no vessel allowing it to access these areas, it is an understatement to say that the Corps is not a presence in the Basin, and has not been for many years.

In fact, without Mr. Wilson, as well as other members of the public who know the Basin well, like members of the Louisiana Crawfish Producers' Association - West (LCPA), it is difficult to imagine how the Corps could meet its statutory obligations under the Clean Water Act to enforce violations of Section 404 in the Basin. Both Mr. Wilson and members of LCPA have learned through experience that reporting violations of Section 404 to the Corps by telephone nearly always fails to elicit a response. Multiple calls must be made before the Corps takes any action, during which months or even years of time are lost in which the Corps could have addressed the violations before the damage is complete. Then, once the Corps does take action in the form of going out to view the area, it often relies on the alleged violator to access the area and to get information regarding the illegal work.

Mr. Wilson had been encouraged by the Corps' willingness over the last nine years to often work with him directly, and accompany him in his boat to the areas where he sees violations. This removed the delay factor which had proven to be such a problem, as well as the access issue which was likely part of the reason the Corps was so slow to respond to violations. Now, however, without explanation, the Corps has apparently decided to immediately change its policy and to wait to investigate violations until it can contact the alleged violators and make arrangements with them to be taken to the area where they are breaking the law.

At the time Mr. Wilson was told that the Corps would not work with him on resolving the access and enforcement issue, he was also told that the Corps was working on a solution. As a party with more knowledge of the Basin than any Corps personnel, Mr. Wilson reiterates his offer to work cooperatively with the Corps to find solutions other than relying on the alleged violator, as the Corps has done in the past. Thank you.

Sincerely,



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cc: Timothy Holliday, Corps Office of Counsel



Tulane Environmental Law Clinic

October 12, 2012

By Email to: Ken.Holder@usace.army.mil and U.S. Mail
Mr. Ken Holder
Chief, Public Affairs
U.S. Army Corps of Engineers
New Orleans District
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New Orleans, LA 70118

Re: Followup to NGO Meeting

Dear Mr. Holder:

On behalf of the Atchafalaya Basinkeeper, thank you for coordinating the NGO Partnership meeting held at the Corps on September 25, 2012. I write to reflect the discussion of a number of crucial issues raised at the meeting and to follow up on those issues. As was noted by a number of the NGO presenters at the meeting, these issues interrelate, and affect all of the NGOs to one extent or another.

The first issue involves the Corps' change in policy regarding accompanying Dean Wilson, the Atchafalaya Basinkeeper, and other people reporting violations, in their boats, ATVs, etc., to investigate violations in the Atchafalaya Basin which they discover and report. I noted at the meeting that in early March of this year, Mr. Rob Heffner of your Enforcement Division cancelled a trip he had planned with Mr. Wilson to investigate a Clean Water Act Section 404 violation in the Basin which Mr. Wilson reported. He informed Mr. Wilson that the Corps would no longer accompany him or other people reporting violations in their boats, ATVs, etc., to investigate violations in the Basin. At that time, Mr. Heffner indicated that the Corps would investigate the reported violations by accompanying the alleged violators in their vessels or vehicles. Mr. Wilson subsequently made several attempts to meet with Corps personnel on this issue, and it was raised at other meetings he attended, with no resolution.

At the NGO meeting, Ms. Frederick of the Corps' Legal Division affirmed the policy and articulated that the reason for the policy was that Corps personnel cannot accept things of value from people with an interest in its decision. This would include gasoline for a boat trip, use of the boat, etc. Of note was the fact that she confirmed, after clarification by me, that this policy applies equally to anyone with an interest in the Corps' decision, and thus would obviously apply with equal force to the alleged violator as it would to a representative of a citizen group. I invite correction, in writing, if the Corps believes this characterization to be in error.

Thus, the reason for the followup arises. We would like to know what the Corps is doing to resolve this unacceptable situation. As we understand it, absent some significant change in procedure, the Corps cannot accompany either the alleged violator or the citizen reporting the violation in their boats on an investigatory visit to the site to determine the existence and extent of a violation of the law. Yet, at the meeting, Mr. Heffner confirmed that the Corps' Enforcement Division, indeed, its entire Regulatory Division, does not have a boat which it can use to investigate violations. How will the Corps investigate violations of Section 404 of the Clean Water Act, particularly in the Atchafalaya Basin? How has it done so in the last six months since this policy was announced? How does it plan to do so on a going-forward basis?

At the meeting, Ms. Frederick suggested that the problem was one that could be resolved. However, no one at the meeting indicated that the Corps was working toward resolving this issue. I note that, on behalf of the Atchafalaya Basinkeeper, I wrote to the Corps Legal Division on March 28, 2012, about this serious issue and received no response. At the meeting, personnel from other divisions of the Corps commented that they have boats which they could provide to the Enforcement and Regulatory personnel. We would like to know who is working on this issue and when progress toward a resolution can be expected. As noted, it has been half a year since this policy was announced. We would also like to be kept updated on the selection of a resolution, as if the Corps finds a way to use the resources of others without violating its policy we would hope and expect that it would once again accompany Dean and the fishermen, particularly if it resumes or continues accompanying the violators.

In that vein, we are concerned that Corps Regulatory personnel may not have gotten Ms. Frederick's message about use of the violator/permittee's boats, gas, etc., being equally violative of Corps policy as travelling with Dean Wilson or fishermen. We are aware of at least one site visit which has taken place since the policy was announced to Mr. Wilson on March 1, 2012, where the Corps used the permit applicant's boat and ATVs. This involved a March 30, 2012, trip by regulatory personnel to Whiskey Bay in connection with a permit transfer request from Atchafalaya Investments. Corps regulatory personnel conducted the site visit in the current or proposed permittee's ATVs and boats. See Attached. Also, Mr. Heffner had indicated to Mr. Wilson in the beginning of March that he planned to continue to accompany alleged violators in their vessels to investigate, and other Corps personnel at the meeting expressed similar sentiments. We would like to know if the Corps regulatory/enforcement division plans to continue using violators' resources to investigate reported violations despite the policy clarified by Ms. Frederick at the meeting. If so, we would like to be informed of those incidents.

As you are no doubt aware, most or all of the Section 404 violations that take place in the Atchafalaya Basin are detected and reported by the Atchafalaya Basinkeeper, often with the assistance of a member of the Louisiana Crawfish Producers' Association-West (LCPA-West). Thus, Atchafalaya Basinkeeper reiterates his offer and desire to work with the Corps to help develop a resolution to this problem that is consistent with Corps policy and that ensures prompt, fair, objective, and fully-informed investigations of Section 404 violations in the Basin.

The second issue I want to follow up on is extensions on public comment periods for proposed permitting of dredge and fill activities. At the meeting, I discussed the Corps' denial of a 10-day extension request we made on behalf of the Atchafalaya Basinkeeper on an August

2012 dredge and fill application by St. Martin Land Company. As I stated at the meeting, we were told that the reason for the denial was that the Corps only grants extensions when agencies request them. Mr. Pete Serio of the Regulatory Division stated that this was not the case, and that public comment period extensions requested by citizens would be considered in “extenuating circumstances.” Mr. Serio did not clarify what that means with regard to citizen extension requests. On the St. Martin Land Company request, we gave reasons for the initial request at the beginning of the comment period. Subsequently, toward the end of the comment period, we again requested an extension due to Hurricane Isaac hitting during the comment period. We were again denied (though a one-day “extension” from the Sunday due date to the following Monday was granted). It is difficult to envision a more extenuating circumstance than a hurricane, hence our confusion.

Our concern is that, at least with respect to the Atchafalaya Basinkeeper, the Corps appears to have changed its policy to make it much harder to get a comment period extension request approved. Previously, our experience, and the experience of at least one NGO representative who spoke up at the meeting, was that extension requests from 20 to 30 days were routinely granted. This makes sense, and is the fair way to handle extension requests. The Corps’ public notices routinely give only 20 days for comment, and this period of time is nearly always inadequate for submitting well-researched, concise, and relevant comments.

The reasons for the inadequacy of the 20-day comment period are numerous. First, public notices provide little information on the proposed (or completed, in the case of an after-the-fact application) project. 95% of the public notice is boilerplate language, identical in every notice. Thus, commenters cannot rely on the accuracy of the boilerplate statements in the notice, and must research these issues themselves. As merely one example, the notices contain boilerplate language that states: “Our initial finding is that the proposed work is not likely to adversely affect any species listed as endangered by the U.S. Departments of Interior or Commerce, nor adversely affect any habitat designated as critical to the survival and recovery of any endangered species.” We learned just how boilerplate this language is in the case of Mallard Basin’s after-the-fact permit application for dredge and fill activities affecting over 700 acres of wetlands in designated critical habitat for the Louisiana black bear. This public notice contained the same language, and subsequent review of the Corps’ administrative record revealed that the Corps never considered the black bear or its habitat as part of its decision-making.

Further, while the drawings attached to the notices provide more detail on the nature of the project, the permit application is never included as part of the public notice package, but often provides additional information. Commenters require time to get the permit application from the Corps.

Additionally, every Section 404 permit application must be reviewed to determine whether it complies with the Clean Water Act Section 404(b)(1) guidelines as well as the Corps’ regulatory requirements. As the Corps is well aware, these regulations contain numerous detailed considerations and prohibitions, and twenty days is inadequate to fully review them all and determine their applicability to the proposed project.

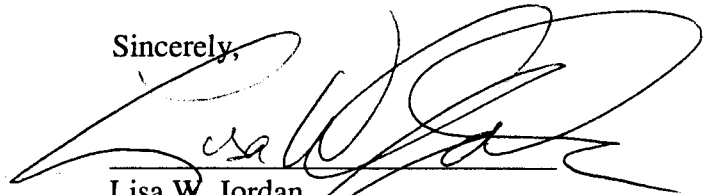
Thus, though at the meeting Mr. Serio indicated that extension requests that are made at the beginning of the comment period will not be granted (and this was the case with the one mentioned above), given the above issues, this is an arbitrary and capricious decision. With respect to our requests, and those of the Atchafalaya Basinkeeper, we make early extension requests because we can quickly determine whether twenty days will provide us enough time (and in nearly every case it will not) and because we do not want to be in an uncertain position with respect to how much time we will have. Citizens and their counsel who are experienced at commenting on Section 404 permit applications should not be penalized or left hanging because they are aware early on that extra time will be required.

Finally, no Corps representative at the meeting expressed a valid reason for requiring “extenuating circumstances” to be demonstrated before a 10-day extension request would be considered. In fact, at the meeting, the Corps acknowledged that only a very small percentage of permit applications are commented on, and a smaller percentage of those include extension requests. Thus, retracting this new policy of requiring “extenuating circumstances” before granting even a 10-day extension request will not impact the Corps’ permitting processes.

Though Mr. Serio reflected the Corps’ desire to timely process permit applications, extending a comment period by ten days (or more in certain cases) to allow effective comment will likewise not represent a burden to the applicant. Regardless, the applicant’s interest in fast-tracking a desire to destroy wetlands pales in comparison to the public interest in effectively commenting on this destruction. Section 101(e) of the Clean Water Act codifies the public’s right to effective participation in enforcement of water laws when it encourages “[p]ublic participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program. . . .” The Corps’ rigid adherence to a 20-day comment period violates this Congressional mandate.

Thank you for your attention to these issues.

Sincerely,



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