

# EXHIBIT A



Tulane Environmental Law Clinic

January 19, 2010

**Via Certified Mail, Return Receipt Requested**  
**No. 7008 1830 0002 8233 3378**

*Ref # 112-004.1*

Lieutenant General Robert L. Van Antwerp  
Commanding General of the US Army Corps of Engineers  
Headquarters, US Army Corps of Engineers  
441 G Street, NW  
Washington, DC 20314-1000

**Re: Industrial Canal Lock Replacement Project  
Notice of Intent to File Citizen Suit for Failure to Comply with Clean Water  
Act Section 404**

Dear Lt. General Van Antwerp:

This letter constitutes notice pursuant to Clean Water Act § 505(b)(1)(a), 33 U.S.C. § 1365(b)(1)(a), and in accordance with 40 C.F.R. § 135, that Holy Cross Neighborhood Association, Gulf Restoration Network, Louisiana Environmental Action Network, Sierra Club, and Citizens Against Widening the Industrial Canal intend to file a citizen suit pursuant to Clean Water Act § 505(a)(1) against the U.S. Army Corps of Engineers and Lt. General Van Antwerp, in his official capacity as Commanding General of the Corps. These parties are taking this action because of the Army Corps of Engineers' failure to comply with Section 404 of the Clean Water Act. Holy Cross Neighborhood Association, Gulf Restoration Network, Louisiana Environmental Action Network, Sierra Club, and Citizens Against Widening the Industrial Canal are sending you this letter to preserve their rights under the Clean Water Act, but would welcome the opportunity to resolve these issues out of court.

## I. BACKGROUND

In 2006, the Eastern District of Louisiana found that the Corps violated the National Environmental Policy Act because it "failed to take a 'hard look' at the environmental impacts ...." *Holy Cross v. U.S. Army Corps of Eng'rs*, 455 F. Supp. 2d 532, 540 (E.D. La. 2006). The court found that the Corps' analysis in its 1997 environmental impact statement was inadequate even before the events following Hurricane Katrina revealed deficiencies. The court noted the Corps failed even to "consider the reasonable dredging and disposal alternatives that the Corps has recently adopted for maintenance dredging of the same waters." *Id.* The court enjoined the

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project, stating that “[w]ithout further study and planning, the project cannot be considered ‘environmentally conscious.’” *Id.*

Despite the court’s instructions to the Corps to reconsider the Industrial Canal lock replacement project, the Corps has again failed to take a hard look at the project as a whole, including reasonable alternatives, and instead prepared a limited “supplemental” impact statement that considered only a deep-draft lock alternative—the project recommended in 1997. Michael Walsh, Brigadier General, U.S. Army Division Commander, signed the Record of Decision approving the Corps’ lock replacement plan for a deep-draft lock on May 20, 2009.

## **II. CLEAN WATER ACT**

The Clean Water Act provides that “any citizen may commence a civil action on his own behalf – against any person (including ... (ii) any other governmental instrumentality or agency) ... who is alleged to be in violation of ... an effluent standard or limitation under this chapter.” CWA § 505(a)(1)(A), 33 U.S.C. § 1365(a)(1)(A).

The Clean Water Act requires a sixty (60) day waiting period upon providing notice of intent to sue. 33 U.S.C. § 1365(b)(1)(A); 40 C.F.R. §135.3. This waiting period gives the parties a reasonable time to resolve the matter cooperatively, without litigation.

## **III. GENERAL STATEMENT OF VIOLATIONS**

The Army Corps of Engineers (“Corps”) proposes to dredge the Industrial Canal and destroy wetlands during its proposed lock replacement project on the Inner Harbor Navigation Canal (“Industrial Canal”). Because the project involves filling wetlands, the Clean Water Act mandates that the Corps choose the least environmentally harmful alternative. Because the Corps has not done so and has begun constructing the project, the Corps is violating the Clean Water Act.

### **A. The Clean Water Act Requires the Corps to Select the Practicable Alternative Having the Fewest Impacts on the Environment When it Authorizes Projects That Will Destroy Wetlands.**

Clean Water Act § 404 authorizes the Corps to issue permits for the discharge of dredge or fill material at “specified disposal sites.” *See* 33 U.S.C. § 1344(a). The Act mandates that “each such disposal site [for dredge and fill material] shall be specified... through the application of guidelines developed by” EPA. *See* 33 U.S.C. § 1344(b); *see also* 40 C.F.R. § 230.12. Though the Clean Water Act does not explicitly allow dredging without a permit, the Corps does not issue permits for its own dredge and fill projects pursuant to federal regulations. *See* 33 C.F.R. § 336.1(a). Federal regulations require the Corps to comply with “all applicable substantive legal requirements, including... the section 404(b)(1) guidelines.” *Id.*

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EPA's § 404(b)(1) guidelines state that "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) (emphasis added). In other words, the guidelines require the Corps to select the practicable alternative to a proposed action that has the least adverse impact on the environment. *Id.*

An alternative is "practicable" if "it is available and capable of being done," considering cost, technology, logistics, and project purposes. *See* 40 C.F.R. § 230.10(a)(2). The guidelines recognize that the impact of dredged material can be minimized by limiting the amount of material discharged at a disposal site. *See* 40 C.F.R. § 230.71(b).

If the Corps cannot explain why there is no practicable alternative with less adverse environmental impact, it must "reconsider its determination based on an adequate analysis of the alternatives." *See Alliance to Save the Mattaponi v. U.S. Army Corps of Eng'rs*, 606 F. Supp. 2d 121, 130 (D.D.C. 2009). "It must explain fully, based [on] analysis adequate to the task, why other alternatives are either impracticable or more damaging." *Id.*

**B. The Corps is Building a Deep-Draft Lock Even Though A Shallow-Draft Lock Would Meet the Project's Needs, is Practicable, and Would Have Fewer Impacts on the Environment.**

The Corps' construction of the project violates the Clean Water Act because the Corps selected a deep-draft alternative instead of a shallow-draft alternative for the lock replacement project. The shallow draft lock is a practicable alternative because it meets the project's needs and would cost less than building a deep-draft lock. A shallow-draft lock will require the Corps to dredge less sediment and, in turn, destroy fewer acres of wetlands when it dumps that dredged spoil in wetlands. A shallow draft lock, by reducing the amount of dredged material, makes clamshell dredging and landfill disposal—two dredging alternatives that have fewer environmental impacts than the Corps' planned methods—practicable dredging and disposal alternatives.

The Corps' §404(b)(1) analysis falls short because it does not even consider building a shallow-draft lock. The Corps failed to explain why a shallow draft lock is not practicable, and the Corps failed to explain why there is no alternative to a deep-draft lock replacement that has less adverse environmental impact. Not only is the analysis arbitrary and capricious in violation of the Administrative Procedures Act, but it violates the Clean Water Act.

**C. The Corps Has Begun Constructing the Industrial Canal Project and Is Violating the Clean Water Act.**

The Clean Water Act prohibits any discharge of dredge or fill material except in compliance with § 404 of the Act. *See* 33 U.S.C. § 1311. The Corps' lock replacement project

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violates this provision because, as noted above, the Corps failed to select the least damaging practicable alternative when authorizing the project. *See* 33 U.S.C. §1326(a). Here, the Corps has commenced a project to dredge the Industrial Canal and deposit the dredged spoil in wetlands along the Mississippi River Gulf Outlet and the Gulf Intercoastal Waterway—wetlands that are waters of the United States—without selecting the least damaging practicable alternative. Each discharge of dredged material from the project constitutes an additional violation of the Act.

#### **IV. PERSONS GIVING NOTICE**

The name, address, and phone number of persons giving notice is:

Louisiana Environmental Action Network  
P.O. Box 66323  
Baton Rouge, LA 70896  
(225) 928-1315

Holy Cross Neighborhood Association  
P.O. Box 3417  
New Orleans, LA 70177  
(504) 324-9955

Sierra Club  
5534 Canal Blvd.  
New Orleans, LA 70124  
(504) 427-1885

Gulf Restoration Network  
P.O. Box 2245  
New Orleans, LA 70176  
(504) 525-1528

Citizens Against Widening the Industrial Canal  
4442 Arts Street  
New Orleans, LA 70122  
(504) 615-7266

#### **V. IDENTIFICATION OF COUNSEL**

Adam Babich (No. 27177)  
Tulane Environmental Law Clinic  
6329 Freret Street  
New Orleans, LA 70118  
Phone: (504) 862-8800  
Fax: (504) 862-8721

#### **VI. RELIEF SOUGHT**

The U.S. Army Corps of Engineers and Lt. General Van Antwerp, in his official capacity as Commanding General of the Corps, is responsible for these violations of the Clean Water Act. *See* 33 U.S.C. § 1365. This letter gives the Corps and Lt. General Van Antwerp notice of Holy Cross Neighborhood Association, Gulf Restoration Network, Louisiana Environmental Action

Lt. General Van Antwerp

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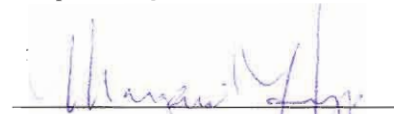
January 19, 2010

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Network, Sierra Club, and Citizens Against Widening the Industrial Canal's intent to sue if this violation cannot be remedied through negotiation. If a lawsuit is necessary to resolve this issue, Holy Cross Neighborhood Association, Gulf Restoration Network, Louisiana Environmental Action Network, Sierra Club, and Citizens Against Widening the Industrial Canal may seek declaratory and injunctive relief.

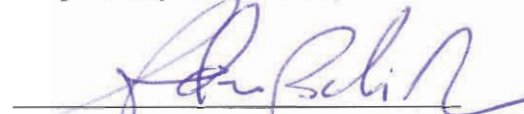
We look forward to discussing how we can work together to resolve the issue.

Prepared by:



Margaret Hupp, Student Attorney  
Tulane Environmental Clinic

Respectfully submitted by:



Adam Babich (No. 27177)  
Tulane Environmental Clinic  
6329 Freret St.  
New Orleans, LA 70118  
Tel. No. (504) 862-8800  
Fax No. (504) 862-8721

*Counsel for Holy Cross Neighborhood  
Association, Gulf Restoration Network,  
Louisiana Environmental Action Network,  
Sierra Club, and Citizens Against Widening the  
Industrial Canal*

cc:

Via Certified Mail  
No. 7008 1830 0002 8233 3361  
Secretary  
Louisiana Department of Environmental  
Quality  
602 N. Fifth Street  
Baton Rouge, LA 70802

Via Certified Mail  
No. 7008 1830 0002 8233 3354  
Mr. Eric Holder  
Attorney General  
U.S. Department of Justice  
950 Pennsylvania Ave, NW  
Washington, DC 20530-0001

Via Certified Mail  
No. 7008 1830 0002 8233 3347  
Dr. Alfredo Armendariz  
Regional Administrator - EPA Region 6  
U.S. Environmental Protection Agency  
Fountain Place 12th Floor, Suite 1200  
Dallas, TX 75202-2733

Via Certified Mail  
No. 7008 1830 0002 8233 3330  
Ms. Lisa P. Jackson, Administrator  
U.S. Environmental Protection Agency  
Ariel Rios Building  
1200 Pennsylvania Ave, NW  
Washington, DC 20460

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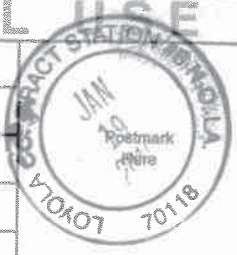
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 Ms. Lisa P. Jackson, Administrator  
 Street, Apt. No., or PO Box No. 1200 Pennsylvania Ave. NW  
 City, State, ZIP+4 Washington, DC 20460

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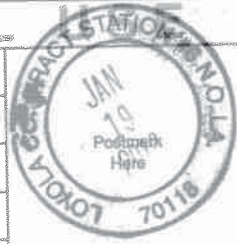
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<b>Total Postage &amp; Fees</b>	<b>\$ 5.71</b>

Sent To  
 Dr. Alfredo Armendariz  
 Street, Apt. No., or PO Box No. Fountain Place 12th Fl. Suite 1200  
 City, State, ZIP+4 Dallas, TX 75202-2733

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Sent To  
 Attorney General Eric Holder  
 Street, Apt. No., or PO Box No. 950 Pennsylvania Ave. NW  
 City, State, ZIP+4 Washington, D.C. 20530-0001

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Sent To  
 Lt. Gen. Van Antwerp, USAACE  
 Street, Apt. No., or PO Box No. 441 G Street, NW  
 City, State, ZIP+4 Washington DC 20314-1000

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Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.  
 Print your name and address on the reverse so that we can return the card to you.  
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1. Article Addressed to:

Lt. Gen Robert L. Van Antwerp  
 Commanding General, USACE  
 Headquarters, USACE  
 411 G Street, NW  
 Washington, D.C. 20314-1000

A. Signature  Agent  Addressee  
*[Signature]*  
 B. Received by (Printed Name)  Agent  Addressee  
*[Signature]*  
 C. Date of Delivery  
 3/30/10  
 D. Is delivery address different from item 1?  Yes  
 If YES, enter delivery address below:  No

3. Service Type  
 Certified Mail  Express Mail  
 Registered  Return Receipt for Merchandise  
 Insured Mail  C.O.D.  
 4. Restricted Delivery? (Extra Fee)  Yes

2. Article Number (Transfer from service label) 7008 1830 0002 8233 3372  
 PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540

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1. Article Addressed to:

Lisa P. Jackson, Administrator  
 U.S. EPA  
 Ariel Rios Building  
 1200 Pennsylvania Ave, NW  
 Washington, D.C. 20460

A. Signature  Agent  Addressee  
*[Signature]*  
 B. Received by (Printed Name)  Agent  Addressee  
*[Signature]*  
 C. Date of Delivery  
 1-26-10  
 D. Is delivery address different from item 1?  Yes  
 If YES, enter delivery address below:  No

3. Service Type  
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 Registered  Return Receipt for Merchandise  
 Insured Mail  C.O.D.  
 4. Restricted Delivery? (Extra Fee)  Yes

2. Article Number (Transfer from service label) 7008 1830 0002 8233 3330  
 PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540

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1. Article Addressed to:

Mr. Eric Holder  
 Attorney General  
 U.S. Department of Justice  
 950 Pennsylvania Ave, NW  
 Washington, D.C. 20530-0001

A. Signature  Agent  Addressee  
 X  
 B. Received by (Printed Name)  Agent  Addressee  
 C. Date of Delivery  
 010796  
 D. Is delivery address different from item 1?  Yes  
 If YES, enter delivery address below:  No

3. Service Type  
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 Registered  Return Receipt for Merchandise  
 Insured Mail  C.O.D.  
 4. Restricted Delivery? (Extra Fee)  Yes

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1. Article Addressed to:  
 Dr. Alfredo Armendariz  
 Regional Admin. - EPA Region 6  
 U.S. EPA  
 Fountain Place 12<sup>th</sup> Floor, Suite 1200  
 Dallas, TX 75202-2733

**COMPLETE THIS SECTION ON DELIVERY**

A. Signature  Agent  Addressee

B. Received by (Printed Name) C. Date of Delivery

D. Is delivery address different from item 1?  Yes  
 If YES, enter delivery address below:  No

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3. Service Type  
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4. Restricted Delivery? (Extra Fee)  Yes

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- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:  
 Secretary  
 La. Department of Environmental  
 Quality  
 602 N. Fifth Street  
 Baton Rouge, LA 70802

**COMPLETE THIS SECTION ON DELIVERY**

A. Signature  Agent  Addressee

B. Received by (Printed Name) C. Date of Delivery

D. Is delivery address different from item 1?  Yes  
 If YES, enter delivery address below:  No

3. Service Type  
 Certified Mail  Express Mail  
 Registered  Return Receipt for Merchandise  
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