UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF LOUISIANA

ATCHAFALAYA BASINKEEPER,         )

and LOUISIANA CRAWFISH               ) Civ. Action No.

PRODUCERS ASSOCIATION-WEST    )

                                                                    )                   Judge:

*Plaintiffs*                 )

)                   Magistrate:

v.                 )

)

LIEUTENANT GENERAL SCOTT )

A. SPELLMON, in his official capacity as  )

Chief of Engineers, U.S. Army Corps        )

of Engineers, and the U.S. ARMY CORPS   )

OF ENGINEERS,                                       )

                                 )

*Defendant*s.             )

**COMPLAINT**

**INTRODUCTION**

1. Plaintiffs Atchafalaya Basinkeeper and the Louisiana Crawfish Producers Association-West bring this suit against Defendants Lieutenant General Scott Spellmon and the U.S. Army Corps of Engineers (“Defendants” or “Corps”), for their after-the-fact authorization of the illegal dam of a navigable waterway of the United States, across the Pat’s Throat Bayou within the Atchafalaya Basin (the “Basin”) under Nationwide Permit 14 (“NWP 14,” or the “General Permit”). The dam completely blocks a previously-navigable waterway, spanning it bank to bank, altering the natural flow and volume of water and barring any navigation through Pat’s Throat.
2. The dam was built without a permit or authorization, and granted after-the-fact authorization by the Corps after little more than a cursory investigation, despite the fact that NWP 14 does not authorize activity that has more than a minimal adverse impact on navigation. Before the construction of the dam, Pat’s Throat was a regular means by which local crawfishermen, including Plaintiffs’ members, engaging in interstate commerce could navigate to and access the commercially-lucrative, culturally-significant, traditional fishing waters of Billy Littles Lakes and surrounding swampland. Further, the dam prevents the natural flow of water through Pat’s Throat Bayou, which is necessary to sustain the area's native aquatic populations, particularly its crawfish population.
3. By misapplying the NWP 14 to this dam, the Corps has exceeded its statutory authority under the Clean Water Act and the Rivers and Harbors Act and has acted arbitrarily and capriciously in issuing this after-the-fact authorization.

**JURISDICTION AND VENUE**

1. This Court has subject matter jurisdiction under 28 U.S.C. § 1331 because this case concerns federal questions arising under the Clean Water Act and the Rivers and Harbors Act of 1899. 33 U.S.C. § 1251, *et seq*.; 33 U.S.C. § 401, *et seq*.
2. Further, Plaintiffs have a right to bring this case under 5 U.S.C. § 702 because this case involves judicial review of final agency action under the Administrative Procedure Act.
3. Venue is proper in this Court under 28 U.S.C. § 1391(b)(2) and § 1391(e)(1), which provide that a civil action brought in district court may be brought in a judicial district in which “a substantial part of the events or omissions giving rise to the claim occurred.” The dam is in Pat’s Throat Bayou, which is located within Iberville Parish, to the east of the Whiskey Bay Pilot Channel. Iberville Parish is within the territory of the District Court of the Middle District of Louisiana.

**PLAINTIFFS**

1. The Atchafalaya Basinkeeper (“Basinkeeper”) is a non-profit corporation organized under the laws of Louisiana. Basinkeeper meets the definition of a “person” under the Administrative Procedure Act (“APA”).5 U.S.C. §§ 551(2); 701(b)(2).
2. Basinkeeper is committed to protecting and restoring the bayous, wetlands, and greater ecosystems within the Atchafalaya Basin. Basinkeeper advocates for agency oversight and enforcement of state and federal laws relating to navigation and protection of the Basin’s natural resources.  This lawsuit is germane to Basinkeeper’s mission and purpose.
3. Basinkeeper has approximately 700 members, including recreational and commercial fishermen, hunters, outdoor recreationists, birdwatchers, and nature photographers who live, work, and recreate in and around the Atchafalaya Basin. Members of Basinkeeper regularly use the Basin, including the area in and around Pat’s Throat Bayou, in pursuit of these interests, and they intend to continue to use the area.
4. Basinkeeper’s members include commercial crawfishermen and recreational fishermen who use Pat’s Throat to reach and fish in the Billy Littles Lakes area. Basinkeeper members use Pat’s Throat for navigation and crawfishing and would regularly clear the bayou of debris that could hinder navigation, such a fallen tree branches. Basinkeeper members who used to use Pat’s Throat to access the Billy Littles Lakes area can no longer get to those areas to fish because they cannot navigate their boats past the dam.
5. The Louisiana Crawfish Producers Association-West (“LCPA”) is a non-profit corporation organized under the laws of Louisiana.  LCPA meets the definition of a “person” under the APA.5 U.S.C. §§ 551(2), 701(b)(2).
6. One of the purposes for which the LCPA was organized is to protect water quality in the Basin in order to promote a healthy habitat for crawfish and other wildlife which the Basin supports. LCPA is also concerned with protecting public access and ensuring the navigability of waters of the United States within the Basin. For these reasons, the LCPA advocates for agency oversight and enforcement of state and federal laws relating to navigation and protection of the Basin’s natural resources. As such, this lawsuit is germane to the LCPA’s purpose.
7. The LCPA has approximately 500 members, including commercial and recreational crawfishermen, who live, work, and recreate in and around the Basin.  Its members regularly navigate the Basin in pursuit of these interests, including those bayous and wetlands affected by the damming of Pat’s Throat. LCPA members intend to continue navigating and conducting interstate commerce in the Basin, including Pat’s Throat.
8. LCPA members include commercial crawfishermen and recreational fishermen who used Pat’s Throat to reach and fish in the Billy Littles Lakes area. LCPA members used Pat’s Throat for navigation and crawfishing and would regularly clear the bayou of debris that could hinder navigation, such as fallen tree branches. LCPA members who used to use Pat’s Throat to access the Billy Littles Lakes area can no longer get to those areas to fish because they cannot navigate their boats past the dam.
9. Additionally, the violations alleged in this Complaint have harmed Plaintiffs’ members by impairing or preventing their commercial, recreational, cultural, and aesthetic use and enjoyment of the Atchafalaya Basin and its resources in the area around the dam.  Plaintiffs’ members have a legally protected interest in preserving the integrity of the Basin. They are people who have and will continue to suffer harm as a result of the commercial, aesthetic, environmental, and recreational degradation of the Basin as a result of the Corps’ authorization of the dam.
10. Since the illegal dam was constructed, there have been several crawfish seasons. Crawfish catch in the area previously fed by the waters travelling through the Bayou has been significantly reduced. The crawfish season in the area affected by the dam is starting later than it did before construction of the dam. The historically abundant fishing waters of Billy Littles Lakes have been consistently less productive since construction of the dam.
11. These injuries are actual and concrete. The requested relief will redress these injuries.

**DEFENDANTS**

1. Defendant Lieutenant General Scott Spellmon is the U.S. Army Chief of Engineers and Commanding General of the U.S. Army Corps of Engineers. Plaintiffs sue Lieutenant General Spellmon only in his official capacity. Lieutenant General Spellmon is the federal officer responsible for compliance with any relief that this Court may issue in connection with this suit.
2. Defendant U.S. Army Corps of Engineers is an administrative agency of the federal government as defined by the APA. 5 U.S.C. § 701(b)(1).
3. Section 404 of the Clean Water Act designates the Corps as the Agency responsible for the issuance of individual and general permits for the discharge of dredge and fill into navigable waters. 33 U.S.C. § 1344.
4. The Corps is also the agency responsible for issuing permits for dredge and fill projects and dams under Sections 9 and 10 of the Rivers and Harbors Act of 1899 (the “RHA”). 33 U.S.C. §§ 401, 403.
5. The Corps issued Nationwide Permit 14 pursuant to its regulations at 33 C.F.R. § 330.6.
6. The Corps issued NWP authorization # MVN-2021-01131-CF to Benjamin Miller/Miller Hunting Club, LLC—the authorization at issue in this case.

**LEGAL BACKGROUND**

***Administrative Procedure Act***

1. The Administrative Procedure Act (“APA”) authorizes judicial review of final agency action. 5 U.S.C. § 704. The Corps’ March 28, 2022, authorization # MVN-2021-01131-CF to Benjamin Miller/Miller Hunting Club, LLC is a final agency action.
2. Under the APA, “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.” 5 U.S.C. § 702.
3. The APA authorizes courts to “hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law... in excess of statutory jurisdiction, authority, or limitations... [or] without observance of procedure required by law.” 5 U.S.C. § 706(2).

***Clean Water Act***

1. Section 301 of the Clean Water Act (the “CWA”) prohibits the discharge of pollutants into the waters of the United States unless authorized by a permit, such as a discharge permit for dredged or fill material under Section 404. 33 U.S.C. §§ 1311, 1344.
2. A “pollutant” within the meaning of the CWA includes “dredged spoil . . . rock, [and] sand.”  33 U.S.C. § 1362(6).
3. The discharge of a pollutant is defined as “any addition of any pollutant to navigable waters from any point source.” 33 U.S.C. § 1362(12).
4. For purposes of the Department of the Army permits, waters of the United States include those waters which are “currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide.” 33 C.F.R. § 328.3(a)(1)(i).
5. Department of the Army (“DA”) permits are “required for the discharge of dredged or fill materials into waters of the United States.” 33 C.F.R. § 323.3(a); 33 U.S.C. § 1344(a).
6. Through the promulgation of regulations, the Secretary of the DA has granted the Chief of Engineers of the Army Corps the authority to issue or deny permits for the discharge of dredged or fill materials into waters of the United States under section 404 of the CWA. 33 U.S.C. 1344(a); 33 C.F.R. §§ 325.8, 323.6.
7. In addition to this authority, Section 404 of the CWA also authorizes the issuance of general permits by the Corps “on a State, regional, or nationwide basis [“Nationwide Permits” or “NWPs”] for any category of activities involving discharges of dredged or fill material if the Secretary determines that the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment.” 33 U.S.C § 1344(e)(1).
8. If a discharge of dredged or fill material is not authorized by a NWP or otherwise exempt by law, “an individual or regional Section 404 permit will be required for the discharge of dredged or fill materials into waters of the United States.” 33 C.F.R. § 323.3(a).

***Section 10 of the Rivers and Harbors Act of 1899***

1. Section 10 of the RHA prohibits the obstruction of the navigable capacity of any waters of the United States, except as authorized by the Department of the Army. 33 U.S.C. § 403.
2. Section 10 of the RHA provides that “[i]t shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of . . . the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.” 33 U.S.C. § 403.
3. “[Department of the Army] permits are required under section 10 for structures and/or work in or affecting navigable waters of the United States,” subject to certain exceptions, none of which apply here. 33 C.F.R. § 322.3(a).
4. A “structure” for section 10 purposes includes “without limitation, any pier, boat dock, boat ramp, wharf, dolphin, weir, boom, breakwater, bulkhead, revetment, riprap, jetty, artificial island, artificial reef, permanent mooring structure, power transmission line, permanently moored floating vessel, piling, aid to navigation, or any other obstacle or obstruction.” 33 C.F.R. § 322.2(b).
5. “Work” includes “without limitation, any dredging or disposal of dredged material, excavation, filling, or other modification of a navigable water of the United States.” 33 C.F.R. § 322.2(c).
6. The Chief of Engineers and his authorized representatives may issue or deny permits for construction or other work in or affecting navigable waters of the United States under section 10 of the RHA. 33 C.F.R. § 325.8(a).
7. Pursuant to the Corps’ regulations, “navigable waters” under the RHA are “those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce.” 33 C.F.R. § 329.4.
8. The “capability of use” of a waterbody for the transportation of commerce is “the determinative factor... not the time, extent or manner of that use... it is sufficient to establish the potential for commercial use at any past, present, or future time.” 33 C.F.R. § 329.6(a).
9. Once a determination of navigability has been made, it applies laterally over the entire surface of the waterbody and the waterbody maintains its navigable status despite any later actions that impede or destroy navigability. 33 C.F.R. § 329.4.
10. Section 10 of the RHA does not authorize the issuance of nationwide permits, unlike section 404 of the CWA.
11. No other section of the RHA authorizes or mentions nationwide permits.
12. The language of Section 10 of the RHA precludes issuance of after-the-fact permits. *See* 33 U.S.C. § 403.

***Nationwide Permit Program***

1. The Corps claims it may authorize activities otherwise prohibited by the Clean Water Act and section 10 of the Rivers and Harbors Act of 1899 under a Nationwide Permit, but “only if that activity and the permittee satisfy all of the NWP’s terms and conditions.” 33 C.F.R. § 330.1(c).
2. NWP terms and conditions include general conditions applicable to all NWPs, regional conditions applicable only to NWPs issued for projects in Louisiana, and specific terms applicable to all NWP 14 authorizations. 33 C.F.R. § 330.2(h).
3. If an activity or permittee fails to satisfy any general or regional condition of a NWP, then the Corps may not authorize that activity under an NWP. 33 C.F.R. §§ 330.1(c), 330.2(c).
4. “The terms of an NWP are the limitations and provisions included in the description of the [particular] NWP itself.” 33 C.F.R. § 330.2(h).
5. The Corps issued Nationwide Permit 14 on December 27, 2021, pursuant to its regulations at 33 C.F.R. § 330.6, and it became effective on February 25, 2022. Reissuance and Modification of Nationwide Permits, 86 Fed. Reg. 73522 (Dec. 27, 2021).
6. NWP 14 authorizes “[a]ctivities required for crossings of waters of the United States associated with the construction, expansion, modification, or improvement of linear transportation projects . . . in waters of the United States.” Reissuance and Modification of Nationwide Permits, 86 Fed. Reg. at 73574.

*General Conditions Applicable to all NWPs, Including NWP 14*

1. NWP General Condition 1, applicable to all NWPs, provides that “[n]o activity may cause more than a minimal adverse effect on navigation.” Issuance and Reissuance of Nationwide Permits, 86 Fed. Reg. 2744, 2867 (Jan. 13, 2021).
2. NWP General Condition 2, applicable to all NWPs, provides that “[n]o activity may substantially disrupt the necessary life cycle movements of species of aquatic life indigenous to the waterbody, including those species that normally migrate through the area, unless the activity’s primary purpose is to impound water,” and requires that “[a]ll permanent and temporary crossings of waterbodies shall be suitably culverted, bridged, or otherwise designed and constructed to maintain low flows to sustain the movement of those aquatic species.” Issuance and Reissuance of Nationwide Permits, 86 Fed. Reg. at 2868.
3. NWP General Condition 8, applicable to all NWPs, requires that when an activity creates an impoundment of water, “adverse effects to the aquatic system due to accelerating the passage of water, and/or restricting its flow, must be minimized to the maximum extent practicable.” *Id.*
4. NWP General Condition 9, applicable to all NWPs, prohibits any activity from restricting or impeding the normal flow of water, “unless the primary purpose of the activity is to impound water or manage high flows.” *Id.*
5. NWP General Condition 27, applicable to all NWPs, requires that the activity comply with any regional and case-specific conditions added by the Corps or by the state. *Id.* at 2872.
6. NWP General Condition 30, applicable to all NWPs, requires certification of the completion of required compensatory mitigation. This certification was never provided by Miller. *Id.*

*Regional Conditions Applicable to Nationwide Permit 14*

1. The Mississippi Valley Division of the Corps is responsible for the issuance of the NWP Regional Conditions that are applicable to all Nationwide Permits issued for projects in Louisiana.
2. Regional Condition 7 requires that “culverts must be sufficiently sized to maintain expected high-water flows and be installed at a sufficient depth to maintain low flows to sustain the movement of aquatic species.” U.S. Army Corps of Engineers, Mississippi Valley Division, *State of Louisiana 2021 Nationwide Permit (NWP) Regional Conditions*, \*2, available at https://www.mvn.usace.army.mil/Portals/56/docs/regulatory/permits/nationwidepermits/2021\_Final\_Louisiana%20RCs\_December\_2021.pdf.

**FACTUAL BACKGROUND**

*Pat’s Throat Bayou*

1. Pat’s Throat Bayou is a navigable water of the United States.
2. Pat’s Throat Bayou is subject to the ebb and flow of the tide.
3. Pat’s Throat Bayou is presently used, has been used in the past, and is susceptible for use to transport interstate or foreign commerce including the harvesting and sale of crawfish.
4. The Corps has determined that Pat’s Throat Bayou is a navigable waterway.
5. As a navigable water, Pat’s Throat Bayou is within the Corps’ regulatory jurisdiction.
6. Pat’s Throat Bayou is located within the Atchafalaya Basin in Iberville Parish, Louisiana, between the Whiskey Bay Pilot Channel to the west and the Billy Littles Lakes to the east, as shown in Figure 1, below.

A map of a field

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*Figure 1, Pat’s Throat Bayou location (source: Corps After-the-Fact Application materials, p.4).*

1. The Atchafalaya Basin is a watershed in Central Louisiana which extends north from the Gulf of Mexico for 140 miles. The region encompasses nearly one million acres of wetlands and waterways.
2. Congress has recognized the Atchafalaya Basin as a nationally important landscape of distinct natural, cultural, and historic value. Atchafalaya National Heritage Act, Pub. L. No. 109-338 (Section B), 120 Stat, 1783 (2006).
3. For over 100 years, Pat’s Throat Bayou has been navigated by local crawfishermen to access the Billy Littles Lakes area and surrounding swamps for crawfishing. Commercial crawfishing is a primary use of the Pat’s Throat Bayou.
4. Crawfish caught in the Basin are sold both in Louisiana and throughout the country.
5. The area of the Basin around Pat’s Throat Bayou consists of concentrated shellfish populations.
6. Today, Pat’s Throat Bayou is one of the few remaining waterways providing navigation access from the Whiskey Bay Pilot Channel to the Billy Littles Lakes and surrounding commercially productive swampland.
7. In addition to providing fishermen with access to lucrative and culturally significant traditional fishing grounds, Pat’s Throat Bayou supports necessary life cycle movements of aquatic species by providing native and migratory species, including native crawfish, with access to feeding and spawning grounds.
8. Historically, the bayou is navigated during crawfish season. While peak season traditionally falls between February and April in some areas of the Basin, fishing in the Billy Littles Lakes area is productive as early as December and as late as August.
9. The crawfishermen who navigate through the bayou periodically clear fallen branches and other debris to ensure continued access to Billy Littles Lakes throughout the crawfishing season.

*The Illegal Dam in Pat’s Throat Bayou*

1. On or about August 2021, without having acquired a permit, Benjamin Miller discharged approximately 130 cubic meters of fill and spoil material into Pat’s Throat, a blockage measuring approximately 32 feet long, 17 feet wide, and about 10 feet tall (the “Dam”).
2. The Dam is located at Pat’s Throat Bayou at Latitude N 30.288339, Longitude W 91.575489.
3. **The Dam completely spans Pat’s Throat Bayou and prevents all navigation through the waterway. *See* Figure 2, below.

*Figure 2, Pat’s Throat dam; Photograph from After-the-Fact Application (p. 9).*

1. On October 17, 2021, the Corps was notified by letter of the “illegal dam . . . across Pat’s Throat . . . [which] completely stops all navigation through the bayou.” The letter included photographs and informed the Corps that “Pat’s Throat is a very important access route from the Atchafalaya River into the Billy Little Lakes area of the Atchafalaya Basin East of the Atchafalaya River,” and that because “[a] significant amount of rivers water flows through Pat’s Throat into the Billy Little Lakes area, the damming of Pat’s Throat will increase sedimentation[, will alter] sedimentation patters by reducing the water flow speed . . . [and] forever alter the hydrology of the area if allowed to remain into the high-water season.”
2. On October 29, 2021, the Corps issued Miller a Notice of Violation for the unauthorized discharge of fill material “in waters of the United States.”
3. The Corps stated on the violation form that Pat’s Throat was a navigable water of the United States, subject to the CWA and RHA.
4. In the Notice of Violation issued to Miller, the Corps invited Miller to submit an after-the-fact permit application to authorize the work.
5. On January 6, 2021, Miller of Miller Hunting Club LLC submitted an after-the-fact application (the “After-the-Fact Application”) to the Corps, asking the Corps to authorize its illegal activity.
6. Miller admitted in the After-the-Fact Permit Application that the Dam was not an extension of an existing road project.
7. In the After-the-Fact Permit Application Miller stated the Dam would be used as a means to “create access” to a hunting area where the hunting club previously “had no access.”
8. Miller’s After-the-Fact Application was incomplete.
9. Miller failed to complete Block 20 of the After-the-Fact Application, which requires the permit applicant to describe the reason(s) for the discharge.
10. Miller also failed to complete Block 23 of the After-the-Fact Application, which requires the permit applicant to describe avoidance, minimization, and compensation measures.
11. In correspondence with the Corps, Miller represented that the waterway was not used for navigation.
12. The Corps made no independent attempt to investigate or verify Miller’s representation that no one used the waterway for navigation.
13. The Corps was aware, from the October 17, 2021, letter reporting the Dam, that claims were made of Pat’s Throat being an important access route to Billy Littles Lakes.
14. On March 28, 2022, the Corps authorized the Dam at Pat’s Throat Bayou under NWP 14 (the “Corps’ Authorization”).
15. The Corps did not visit the site of the Dam at any point between receiving notice of the Obstruction and issuing the after-the-fact NWP 14 authorization of the Dam.
16. The Obstruction remains in place and has been modified at least one time.
17. Upon information and belief, Miller added new materials and altered the Dam’s design not included in his original application to the Corps.
18. Upon information and belief, Miller did not notify the Corps regarding these modifications or new materials.
19. The culverts Miller installed (and modified) in the Dam sit above the water level during most of the year.
20. The culverts do not allow for the continued flow of water through the area in most conditions, as illustrated in Figure 3, below.A drainage pipe in the woods

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*Figure 3, Photograph demonstrating condition of dam and location of culverts (credit: Jody Meche; taken Nov. 2023).*

1. Therefore, in addition to blocking all navigation at all times, the Dam also completely blocks water flow during low water conditions in the Basin.
2. The Dam also completely blocks the movement of aquatic species including native crawfish during low water conditions in the Basin.
3. Crawfish rely on natural stream patterns and temperatures to survive, reproduce and grow.
4. Dams and reservoirs can restrict crawfish dispersal and gene flow, genetically fragmenting populations.
5. The Dam interferes with these conditions and disrupts the lifecycle and growth of a healthy crawfish population in the bayou.
6. Plaintiffs have directly observed decreased crawfish catch in and near the bayou since installation of the Dam.
7. On September 16, 2022, Plaintiffs sent a letter to the Corps requesting that it consider revoking the authorization. Plaintiffs did not receive a response from the Corps.

**CLAIMS FOR RELIEF**

**CLAIM 1: Defendants’ Authorization of an Activity with a Significant Impact on Navigation was Arbitrary and Capricious.**

1. The Dam is in violation of Nationwide Permit 14 General Condition 1 because the Dam spans the entire waterway, bank to bank, destroying the navigable quality and actual navigation of Pat’s Throat. A complete alteration of the nature of Pat’s Throat, a historic navigation corridor, far exceeds the “minimal adverse impacts” to navigation allowed by any Nationwide Permit.
2. The Corps’ decision to authorize the Dam pursuant to NWP 14 despite its violation of General Condition 1, which protects navigation of waterways, was arbitrary and capricious and in violation of law.

**CLAIM 2: Defendants’ “After the Fact” Authorization of an Activity under NWP 14 was Arbitrary and Capricious and in Excess of Statutory Authority.**

1. Section 10 of the RHA makes it illegal to fill or modify a channel of any navigable water of the United States unless the Department of the Army authorizes the work “prior to beginning the same.” 33 U.S.C. § 403.
2. After-the-fact permits authorize work after the work has begun.
3. The Corps’ after-the-fact authorization to Miller authorized work Miller had already begun and completed.
4. The statutory text of Section 10 of the RHA precludes issuance of after-the-fact permits.
5. The Corps’ authorization of an after-the-fact permit to Benjamin Miller was arbitrary and capricious, in excess of its statutory authority, and in violation of law.

**CLAIM 3: Defendants’ Authorization of a “Section 10” Work in Waters of the U.S. Under a Nationwide Permit was in Excess of Its Statutory Authority.**

1. Section 10 of the Rivers and Harbors Act does not authorize the Corps to issue nationwide permits, nor does it provide statutory authority for the Corps to enact a regulatory scheme to avoid the individualized permitting requirements of Section 10.
2. The Corps lacks jurisdiction under the Rivers and Harbors Act Section 10 to issue nationwide permits for work regulated by the Rivers and Harbors Act.
3. The Corps’ authorization of the Dam under NWP 14 is in excess of the Corps’ statutory authority under the Rivers and Harbors Act.

**CLAIM 4: Defendants’ Authorization of the Dam in Waters of the U.S. Without an Individual Permit was in Excess of Its Statutory Authority.**

1. Section 9 of the Rivers and Harbors Act of 1899 prohibits “the construction of any. . . dam . . . over or in any . . . navigable river, or other navigable water of the United States” without a permit that is approved by both Congress and the Secretary of the Army. 33 U.S.C. § 401.
2. Pursuant to the Corps’ regulations, a “dam” for purposes of section 9 is “any impoundment structure that completely spans a navigable water of the United States.” 33 C.F.R. § 321.2.
3. The Dam, as a structure that completely spans a navigable water of the U.S., falls under the authority of RHA Section 9, which governs the construction of dams. The Corps’ authority to permit Section 9 dams is different from and more limited than its Section 10 authority to permit obstructions to navigation and, as such, the Corps’ attempt to authorize the construction of this dam under RHA Section 10 is in excess of its statutory authority.

**CLAIM 5: Defendants’ Authorization of Activity that Harms Shellfish and Aquatic Species under NWP 14 was Arbitrary and Capricious.**

1. Several conditions of Nationwide Permit 14 require that activity authorized under this permit does not impact shellfish or restrict the movement of aquatic species.
2. The Dam impacts a concentrated shellfish population and restricts the movement of aquatic species, such that the Corps’ authorization of the Obstruction under Nationwide Permit 14 was arbitrary and capricious.

**CLAIM 6: Defendants’ Authorization of the Dam under NWP 14 Despite Numerous Other Violations of General and Regional Conditions was Arbitrary and Capricious.**

1. Nationwide Permit 14 includes nonwaivable general and regional conditions that this activity plainly violated.
2. General Condition 8, which requires that the activity’s effect on waterbodies be limited to the maximum extent possible, and General Condition 9, which prohibits activities restricting the normal flow of water, are violated by this Dam.
3. Regional Condition 7, which requires that culverts be constructed to sustain low-water flows sufficient to sustain the movement of aquatic species, is violated by this Dam, as is General Condition 27, which incorporates Regional Conditions into the General Conditions.
4. General Condition 30, which requires that permittees provide a signed certification of completion, and which was specifically set out with a copy of the certification form in the Corps’ letter of authorization to Miller, was not complied with; the Corps’ continued authorization of this Dam is in violation of this condition.
5. These combined violations of the conditions of NWP 14 establish that the Corps’ authorization of the Dam under NWP 14 is arbitrary and capricious.

**PRAYER FOR RELIEF**

WHEREFORE, PLAINTIFFS pray for judgment as follows:

A. An order declaring the Corps’ Authorization of the Dam to be illegal and invalid;

B. An order vacating the Corps’ NWP authorization # MVN-2021-01131-CF to Benjamin Miller/Miller Hunting Club, LLC for the Dam;

D. An order enjoining the application of Nationwide Permit 14 or any other Nationwide Permit to the Dam;

E. An order declaring the Corps' issuance of nationwide permits authorizing activity under Section 10 of the Rivers and Harbors Act to be illegal and enjoining all Corps nationwide permits that authorize activity under the Rivers and Harbors Act;

F. An order declaring that use of Nationwide Permit 14 for after-the-fact authorizations is illegal under the Rivers and Harbors Act and enjoining such uses;

E. An award of costs of litigation (including reasonable attorney fees) in accordance with 28 U.S.C. § 2412; and

G. All such other relief this Court may deem appropriate.

Respectfully submitted,

TULANE ENVIRONMENTAL LAW CLINIC

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*Student-Attorney Thomas Miller*

*\_/s/ Tanner Bryant*

Tanner Bryant, Student Attorney

*\_/s/ Matthew Gaar*

Matthew Gaar, Student Attorney

*\_/s/ Thomas Miller* \_

Thomas Miller, Student Attorney

**INTRODUCTION OF STUDENT ATTORNEYS**

The undersigned counsel respectfully introduces law student practitioners Tanner Bryant, Matthew Gaar and Thomas Miller, to this Court pursuant to Local Rule 83.2.13. These student practitioners are duly enrolled in Tulane Law School, a law school approved by the American Bar Association. The student practitioners have completed four full-time semesters of legal studies and have taken the oath set forth in Local Rule 83.2.13. As the student practitioners’ supervising attorney, I approve of the student practitioners’ appearance in this case. Further, a Dean's certification relating to the student practitioners, filed with this Court’s clerk’s office on August 24, 2023, is attached as Exhibit A. The clients’ written statements of consent to appearances by student practitioners on their behalf are attached as Exhibit B.

TULANE ENVIRONMENTAL LAW CLINIC

*\_/s/ Lauren E. Godshall*

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