UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Holy Cross Neighborhood Association,	*	
Gulf Restoration Network, and	*	Case No.: 03-0370
Louisiana Environmental Action Network,	*	Section: L
Plaintiffs,	*	Judge: Fallon
	*	Magistrate: 4
v.	*	
	*	
United States Army Corps of Engineers,	*	
Defendant.	*	

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS RCRA CAUSE OF ACTION

Plaintiffs Holy Cross Neighborhood Association, Gulf Restoration Network, and Louisiana Environmental Action Network respectfully submit their opposition to Defendant U.S. Army Corps of Engineers' ("the Army's") Motion to Dismiss RCRA Cause of Action (dated July 31, 2003).

INTRODUCTION

It is beyond dispute that 42 U.S.C. § 6972(a)(1)(B) of the Resource Conservation and Recovery Act ("RCRA") uses the same standard of liability as 42 U.S.C. § 6973 and, thus, that "§ 6972(a)(1)(B) and § 6973 are to be similarly interpreted." Cox v. City of Dallas, 256 F.3d 281, 294 n.22 (5th Cir. 2001) (noting congressional intent that "private parties may sue under the citizen suit provision [of § 6972(a)(1)(B)] 'pursuant to the standards of liability established

under [§ 6973]'"). This is important because there is a substantial body of law interpreting § 6973. But the Army's Brief ignores and contradicts this body of law and contradicts EPA's interpretations of that law. EPA, however – not the Army – is the agency Congress charged with RCRA implementation. In its Brief, the Army forgets that 42 U.S.C. § 6972(a)(1)(B) "was designed to provide a remedy that ... obviates the risk of ***future*** 'imminent' harms." Meghrig v. KFC, Inc., 516 U.S. 479, 485 (1996) (emphasis added). The Army ignores the fact that "the very existence of ... precautionary legislation would seem to demand that regulatory action precede, and, optimally, prevent, the perceived threat." Ethyl Corp. v. EPA, 541 F.2d 1, 13 (D.C. Cir. 1976), cert denied, 426 U.S. 941 (1976).

The following table shows how the Army's positions depart from EPA's approach to RCRA by contrasting the Army's positions with EPA policy and with the law:

The Army invokes "sovereign immunity" to imply that it has more latitude to create endangerments than other members of the regulated community. (Army Brief at 8)	Substantive and procedural RCRA requirements apply to the Army "in the ***same manner, and to the same extent, as any person***" and the federal government "expressly ***waives any immunity*** otherwise applicable to the United States with respect to any such substantive or procedural requirement..." 42 U.S.C. § 6961(a) (emphasis added).
The Army claims that ongoing management of the canal and its decision to dredge contaminated sediments cannot – as a matter of law – constitute "handling" of those sediments. (Army Brief at 6)	EPA interprets "handling" as follows: "'to deal with or have responsibility' for something." EPA, Guidance on the Use of Section 7003 of RCRA 13 (1997), http:// www.epa.gov/Compliance/ resources/ policies/cleanup/ rcra/971020.pdf (Ex. A). The Justice Department has acknowledged that "the term 'handling' appears to include virtually anyone dealing with hazardous waste." DOJ, Hazardous Waste Memorandum 79 (Jan. 31, 1979) (Ex. B).
The Army claims that courts cannot use § 6972 to avoid risks of "future events," even where it has already decided to dredge contaminated sediments without adequate studies and is "taking steps" to do so. (Army Brief at 6)	EPA explains that § 6973 may "be used in appropriate circumstances to impose controls on future operations ...." EPA, Guidance on the Use of Section 7003 of RCRA 21 (1997); *see also* Meghrig, 516 U.S. at 485 (RCRA "was designed to provide a remedy that ... obviates the risk of future 'imminent' harms.").
The Army asserts it is protected by 40	EPA has long recognized that "broad statutory

C.F.R. § 261.4(g) – a regulatory exemption from the "Subtitle C" hazardous waste regulatory program for "dredged materials." (Army Brief at 12)	definitions, ***not*** the regulatory definitions govern [§ 6973] actions." EPA, Guidance on the Use of Section 7003 of RCRA 14 (1997) (emphasis added). 40 C.F.R. § 261.1(b) clarifies that Part 261 "applies only to wastes that also are hazardous for purposes of the regulations implementing subtitle C of RCRA."

The Army's Brief also ignores the procedural posture of its Motion. The Army filed a Motion to Dismiss and, thus, may prevail only if "it appears beyond doubt that [the Plaintiffs] can prove ***no set of facts*** in support of [their] claim" entitling them to relief." Tanglewood East Homeowners Ass'n v. Charles-Thomas, Inc., 849 F.2d 1568, 1572 (5th Cir. 1988) (emphasis added). The following table shows how the Army's arguments fail to come to grips with the Tanglewood East standard:

The Army argues that activities "regulated by the Clean Water Act ... are ... not subject to RCRA." Army Brief at 3, 9-11. Under the Army's theory, ***any*** project funded by Congress would apparently be immune from suit – regardless of the underlying facts or the scope of the endangerment involved. *But see* 42 U.S.C. § 6961(a) (requiring federal agencies to comply with RCRA).	42 U.S.C. § 6905(a) does not apply where RCRA "is not inconsistent with the requirements of [the Clean Water Act]." But the Army has not even tried to show a conflict and has not, *e.g.*, proven that all reasonable injunctions would conflict with the Clean Water Act. Indeed, nothing in the Clean Water Act requires the Army to dredge without appropriate sampling or study. The Army has not shown that its plan to deepen the canal is necessary to the lock replacement project that Congress authorized.
Reaching beyond the four corners of the Plaintiffs' second amended complaint, the Army asserts the complaint is a "collateral attack" on an unspecified "permit" and "on the siting of a hazardous waste storage and disposal facility." (Army Brief at 7, 11.) The Army does not explain why this case is a "collateral attack" or what the case is "collateral" to.	The Plaintiff's second amended complaint does not purport to challenge "a siting or permitting" decision. Indeed, the Army has not cited a single paragraph of the second amended complaint that challenges the siting of a hazardous waste facility. Yet the Army argues for protection from "collateral attack on [EPA] decisions or those of state agencies." (Army Brief at 11.) Even if there were an EPA or state permit at issue, the Army would still not have shown that this case challenges that permit.
The Army asserts that the Plaintiffs have not pled in enough detail to show that the Army is contributing to handling, storage,	Federal Rule of Civil Procedure 8(a) provides for "notice pleading." The second amended complaint puts the Army on fair notice that it is responsible for

and disposal of waste that may pose an imminent and substantial hazard. (Army Brief at 13.)	maintaining a public waterway that contains contaminated sediments (violating health-based screening criteria), in the Holy Cross neighborhood and the Lake Pontchartrain ecosystem, which sediments may present and imminent and substantial endangerment to the public and environment.
The Army seeks dismissal of a cause of action based on an argument that the prayer for relief "focuses on" future dredging. (Army Brief at 19.)	The Army must show that no set of facts would entitle the Plaintiffs to relief – not that it disagrees with the "focus" of the Plaintiffs' prayer for relief.

The Plaintiffs have squarely alleged that the Army "is taking steps" to dredge the Inner Harbor Navigational Canal as part of the Inner Harbor Navigational Canal Lock Replacement Project, Second Am. Compl. ¶ 67, and that the dredging endangers Lake Pontchartrain and the surrounding ecosystem by stirring up, releasing, and disposing of hazardous waste-contaminated sediments. *Id.* ¶¶ 38, 41, 42, 71. The Plaintiffs have also alleged that the Army owns and operates a canal containing sediments with contamination that exceed standards for non-industrial sites and for industrial sites, yet it is located in a public waterway adjacent to a New Orleans neighborhood and in the Lake Pontchartrain ecosystem. (E.g., Second Am. Compl. ¶ 38.) This Court should therefore deny the Army's Motion because the Plaintiffs have alleged facts which, taken as true, establish that the Army "has contributed or is contributing to the past or present handling, storage, treatment, transportation, or disposal of ... solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(B).

STANDARD OF REVIEW

A motion to dismiss challenging a court's jurisdiction under Rule 12(b)(1) and for failure to state a claim under Rule 12(b)(6) "is viewed with disfavor and is rarely granted." Tanglewood

East Homeowners Association v. Charles-Thomas, Inc., 849 F.2d 1568, 1572 (5th Cir. 1988) (denying a Rule 12(b)(6) motion in a RCRA/CERCLA case). When a court reviews a 12(b)(6) motion, all doubts must be resolved in favor of the Plaintiffs, and the court must accept all well pled allegations as true. Tanglewood East, 849 F.2d at 1572. Thus the Court should grant a 12(b)(6) motion only if "it appears beyond doubt that [plaintiffs] can prove no set of facts in support of [their] claim" entitling them to relief." *Id.* (emphasis added). When such a motion is granted, courts generally afford plaintiffs an opportunity to amend.

BACKGROUND

In this case, the Plaintiffs have brought related claims under both the National Environmental Policy Act ("NEPA") and RCRA. Congress intended NEPA to ensure that federal agencies did not blunder – through lack of information – into endangering the public's health or welfare by failing to consider environmental implications of agency decisions. Robertson v. Methow Valley Citizens Council, 490 U.S 332, 349 (1989) ("Simply by focusing the agency's attention on the environmental consequences of a proposed project, NEPA ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast."). Thus, NEPA requires agencies to assess environmental impacts of major federal actions ***before*** deciding to go ahead with those actions. The NEPA process culminates in a "Record of Decision." 40 C.F.R. § 1505.2.

In this case, the Plaintiffs allege that the Army has made its decision, *i.e.*, that it now "plans to dredge the Canal" (Second Am. Compl. ¶ 36) without "sufficient sampling to determine the full nature and extent of contamination in Canal sediments" (*id.* ¶ 44), and without developing "plans and alternatives for safe dredging, storage, and disposal of contaminated sediments." (*Id.* ¶ 45.) The second amended complaint does not allege that the project must be

cancelled or that safe dredging is impossible – rather, the Plaintiffs' allegations find fault with the Army's means, rather than its ends. A victory for the Plaintiffs would mean that the Army would be required to conduct adequate analyses and planning for a safe project before proceeding. In other words, nothing in the Plaintiffs' second amended complaint asks this Court to second guess the Army's fundamental decision about whether the project is a good use of public funds.

RCRA § 7002(a)(1)(B), 42 U.S.C. § 6972(a)(1)(B), is a 1984 addition to RCRA's Citizen Suit provision. Much of the RCRA statute concerns a complicated, cradle-to-grave permitting system for "Subtitle C" hazardous wastes. But § 6972(a)(1)(B) is a straightforward, stand-alone provision. In essence, § 6972(a)(1)(B) is a federal statutory version of the common law of public nuisance. Cox v. City of Dallas, 256 F.3d 281, 291-92 (5th Cir. 2001) ("Congress indicated that the statute embodied common law concepts of nuisance .... [But some] terms and concepts ... are meant to be more liberal than their common law counterparts." (citation omitted)). One court explained: "The legislative history notes that the amendment [i.e., § 6972(a)(1)(B)] was meant ... to act as a codification of 'common law public nuisance remedies." Middlesex City Board of Chosen Freeholders v. New Jersey, 645 F. Supp. 715, 721-22 (D.N.J. 1986) (citing Sen. R. No. 96-172 at 5, *reprinted in* 1980 U.S.C.C.A.N. 5019, 5023).

42 U.S.C. § 6972(a)(1)(B) provides:

> [A]ny person may commence a civil action ... against any person, including the United States ... and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment."

42 U.S.C. § 6972(a)(1)(B). The provision "contains essentially three elements." Cox v. City of Dallas, 256 F.3d 281, 292 (5th Cir. 2001). A plaintiff must show "(1) that the defendant is a person, including, but not limited to, one who was or is a generator or transporter of solid or hazardous waste or one who was or is an owner or operator of a solid or hazardous waste treatment, storage, or disposal facility; (2) that the defendant has contributed to or is contributing to the handling, storage, treatment, transportation, or disposal of solid or hazardous waste; and (3) that the solid or hazardous waste may present an imminent and substantial endangerment to health or the environment." *Id.* (footnotes omitted).[1] Congress modeled the provision after EPA's "imminent hazard" authority in 42 U.S.C. § 6973. *See* Cox, 256 F.3d at 294 n.22; Conn. Coastal Fishermen's Ass'n v. Remington Arms Co., 989 F.2d 1305, 1315 (2d Cir. 1993) ("[R]egulatory language referring to [§ 6973] must also apply to [§ 6972(a)(1)(B)] because the two provisions are nearly identical."); EPA, Guidance on the Use of Section 7003 of RCRA 5 (1997) (Ex. A) ("Because [§ 6972(a)(1)(B)] contains an endangerment standard and many terms that are identical to those used in [6973(a)], [EPA has determined that] some court decisions addressing [§6972(a)(1)(B)] may assist the Regions in interpreting [§ 6973].").

On its face, § 6972(a)(1)(B) looks broad and open-ended. But the provision is pitched squarely to courts' equitable jurisdiction. In other words, a plaintiff will only obtain relief when it can demonstrate, based on the facts and circumstances surrounding the alleged endangerment, that an injunction would be appropriate. Therefore, this is a fact-driven lawsuit.

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[1] "Handling, storage, treatment, transportation, or disposal" includes acts *or omissions* associated with these activities: "[A]ny affected citizen may bring suit against any [individual or entity] whose waste-related *acts or omissions* present an imminent and substantial endangerment to health or the environment." Wilson v. Amoco Corp., 989 F. Supp. 1159, 1172 (D. Wyo. 1998). (Emphasis added).

ARGUMENT

I. THE ARMY'S DECISION TO DREDGE CONTAMINATED WASTES IS SUBJECT TO RCRA'S IMMINENT & SUBSTANTIAL ENDANGERMENT CITIZEN SUIT PROVISIONS.

The Army argues that planning and deciding to dredge and "taking steps" to dredge – all without adequate sampling and plans – is not "present tense" enough to allow the Plaintiffs to sue. This argument is inconsistent with EPA's interpretations of RCRA, misinterprets the Plaintiffs' factual allegations, and misrepresents the legal requirements imposed by § 6972(a)(1)(B).

A. Plaintiffs' Factual Allegations Establish an Imminent Threat.

The Army wrongly assumes that, until dredging commences, the Army will not have engaged in activities covered by § 6972(a)(1)(B). However, the Army currently "controls, operates, and maintains" the Canal. (Second Am. Compl. ¶ ¶ 62–63.) Further, the Plaintiffs allege that Canal sediments currently contain toxins such as Polycyclic Aromatic Hydrocarbons ("PAHs"), as well as toxic metals such as arsenic, barium, chromium, and lead. (Second Am. Compl. ¶¶ 38–39.) These levels of metals exceed standards for non-industrial sites and the PAHs currently exceed the higher industrial screening standard. (Second Am. Compl. ¶ 38.) Assuming all of these allegations are true for purposes of the Rule 12 motion, the Army currently owns, operates, controls, and maintains a site already contaminated with a panoply of toxins and metals. (Second Am. Compl. ¶ 66 ("Defendant is contributing to the past or present handling, storage .... and disposal of solid and hazardous waste ***by maintaining the canal.***") (emphasis added).

The Plaintiffs allege that the Army has "announced plans for construction of a new

Lock," Second Am Compl. ¶¶ 15–16, and that the Army plans to conduct "extensive dredging of the contaminated sediment" and to "store the hazardous waste-contaminated sediments in an uncapped confined disposal facility." (Second Am Compl. ¶¶ 36, 67.) The Army's environmental impact statement, however, fails to assess the environmental impacts of dredging these contaminated sediments, and the Army has failed to provide for safe disposal or storage of the sediments. (Second Am Compl. ¶¶ 37, 45–47, 75–79.) Nonetheless, the Army "is taking steps" to dredge the canal. (Second Am. Compl. ¶ 67.)

Once a defendant is maintaining hazardous and solid waste in a public waterway, has decided to dredge those materials, and has taken steps to dredge the materials – all without determining the nature and extent of the contamination, or developing plans for safe dredging and disposal --the risk of harm is clearly "present tense." This Court can assert jurisdiction. There is no requirement that the Plaintiffs delay filing until circumstances amount to an emergency. EPA, Guidance on the Use of Section 7003 of RCRA 10 (1997) ("An endangerment is 'imminent' if the present conditions indicate that there may be a future risk to health or the environment even though the harm may not be realized for years. It is not necessary for the endangerment to be immediate or tantamount to an emergency.") (footnotes omitted).

Taking the facts that the Plaintiffs allege as true for purposes of the Rule 12 motion, the Army is a "past or present owner or operator of a treatment, storage, or disposal facility" and has contributed and is contributing "to the past or present handling, storage, treatment, transportation, or disposal of ... solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(B).

B. <u>The Army Misinterprets the Word "Handling."</u>

The Army argues without support that it will not be "handling" the contaminated

sediments until it is physically dredging them. But as the Justice Department has elsewhere acknowledged, "handling" is a catch-all term that Congress used to "include virtually anyone dealing with hazardous waste." DOJ, Hazardous Waste Memorandum 79 (Jan. 31, 1979) (Ex. B). EPA has adopted the dictionary definition of the term: "'to deal with or have responsibility' for something." EPA, Guidance on the Use of Section 7003 of RCRA 13 (1997) (Ex. A); *see also* Webster's Third New International Dictionary 1027 (1993) (definitions include "to conduct oneself in relation to" and "to deal with: act upon: dispose of: perform some function with regard to ..."). This is also the definition that the Eastern District of California adopted in Lincoln Properties v. Higgins, 23 Envtl. L. Rep. (Envtl. L. Inst.) 20,665, (E.D..Cal. 1993). The Lincoln Properties court held:

> "Handling" [as used in § 6972(a)(1)] is not defined in RCRA. However, in ordinary usage, ***to "handle" something is "to deal with or have responsibility" for it***. American Heritage Dictionary 592 (2d College ed. 1985). The dry cleaners were responsible for and dealt with PCE.

Id. at 20,672 (emphasis added).

By owning, operating, and maintaining the Canal, making decisions as to the disposition of contaminated sediments in the Canal, and taking steps to dredge those sediments, the Army is "handling" as well as storing and disposing of those sediments.

C. The Army Misinterprets the Word "Contribute."

EPA and the courts have rejected the Army's restrictive interpretation of § 6972(a)(1)(B). "RCRA is a remedial statute, which should be liberally construed." United States v. Aceto Agric. Chems. Corp., 872 F.2d 1373, 1383 (8th Cir. 1989) (citing United States v. Price, 688 F.2d 204, 211, 213–14 (3d Cir. 1982)). The Fifth Circuit Court of Appeals has explained that "contribute" means to "have a part or share in producing an effect." Cox v. City of Dallas, 256

F.3d 281, 295 (5th Cir. 2001) (citing Aceto, 872 F.2d at 1383). Using this definition, the court in Cox determined that a city's "'lax oversight' of its contractors and their disposal of City waste [was] evidence of the City's 'contributing to' liability.'" 256 F.3d at 297. See also Briggs & Stratton Corp. v. Concrete Sales & Servs., 20 F. Supp. 2d 1356, 1372–73 (N.D. Ga. 1998) (holding that the defendant's liability was not relieved by his lack of direct responsibility for the conditions because "defendants have been held liable as . . . owners under RCRA based on their *failure to investigate or to abate the conditions on their property* even though they were not directly responsible for the conditions."). (Emphasis added).

Here, the Army has contributed to and is contributing to the handling and storage of hazardous waste through its ownership and operation of the canal and its "lax oversight" of the environmental impact statement process. Furthermore, the Army has taken steps to begin the dredging, including publishing a severely lacking EIS and Record of Decision and beginning physical work at the canal. These steps are evidence of the Army's "part or share in producing an effect," in this case the release of hazardous wastes into the canal. *Id.* at 295.

EPA "agrees ... that the plain meaning of 'contributing to' is 'to have a share in any act or effect.'" EPA, Guidance on the Use of Section 7003 of RCRA 17 (1997). As an example of a "contributor," the EPA cites an owner who fails to abate an existing hazardous condition of which he or she is aware. *Id.* at 18 (citing United States v. Price, 523 F. Supp. 1055, 1073–74 (D.N.J. 1981)). The hazardous wastes at issue in this case are already present in the sediments at the bottom of the canal. As the present owner and operator of the canal, the Army is a contributor to the handling of hazardous wastes, regardless of its dredging plans.

Finally, the Army's argument is also inconsistent with the Justice Department's longstanding interpretation of the same language in a parallel provision of the same statute.

Referring to terms in the EPA enforcement provision, § 6973, the DOJ defines "contributing to" as having a "very broad reach" that applies "not only to those who participate in the operation of hazardous waste activities, but also to those having an ownership interest." DOJ, Hazardous Waste Memorandum 79 (Jan. 31, 1979) (Ex. B).

D. The Army Misinterprets the Phrase "Imminent and Substantial Endangerment."

The Army claims that, because it has not yet begun to dredge, it is not yet "contributing to the past or present" handling, storage, treatment, transportation, or disposal of hazardous or solid waste. However, the Plaintiffs' allegations establish that the harm will occur *contemporaneously* with the act of dredging: the second amended complaint alleges that dredging "will kill benthic organisms ... ," will cause "sediments [to be] mobilized ... and moved by currents into less polluted areas ... ," and "stir up ... toxic sediments from the Canal, causing them to enter the water and the food chain." All of these consequences flow directly from the act of dredging. (Second Am. Compl. ¶¶ 38–43.) As soon as dredging commences, contamination also commences. Therefore, if the Army's statutory interpretation were correct, the Plaintiffs would be required to wait until contamination had already occurred before bringing suit.

The Supreme Court, federal Courts of Appeals, and EPA have all concluded that Congress intended the "imminent hazard" provisions to prevent contamination before it occurs. In Meghrig v. KFC, Inc., 516 U.S. 479, 485 (1996), the Supreme Court held: "§ 6972(a) was designed to provide a remedy that ameliorates present or obviates the risk of future 'imminent' harms ...." The Court cited with approval Price v. United States Navy, in which the Ninth Circuit Court of Appeals concluded that RCRA is "intended to confer upon the courts the authority to grant affirmative equitable relief to the extent necessary to eliminate any risk posed by toxic

wastes." 39 F.3d 1011, 1019 (9th Cir. 1994) (emphasis added). Similarly, in United States v. Waste Indus., Inc., the Fourth Circuit Court of Appeals determined that "[t]he EPA need not prove that an emergency exists to prevail under section 7003, only that the circumstances *may* present an imminent and substantial endangerment." 734 F.2d 159, 168 (4th Cir. 1984) (emphasis added). "A finding of 'imminency' does not require a showing that actual harm will occur immediately so long as the risk of threatened harm is present ...." Dague v. City of Burlington, 935 F.2d 1343, 1356 (2d Cir. 1991), rev'd in part on other grounds, 505 U.S. 557 (1992); Ethyl Corp. v. EPA, 541 F.2d 1, 13 (D.C. Cir. 1976), cert denied, 426 U.S. 941 (1976) ("case law and dictionary definition agree that endanger means something less than actual harm"). "An endangerment need not be an immediate one in order for it to be 'imminent.'" Me. People's Alliance v. Holtrachem Mfg. Co., L.L.C., 211 F. Supp. 2d 237, 247 (D. Me. 2002). RCRA plaintiffs do not need to quantify the risk of harm to maintain a citizen's suit. *Id.* "In terms of substantiality, [p]laintiffs need not quantify the risk of harm in order to establish an endangerment .... An endangerment is 'substantial,' therefore, 'if there is some reasonable cause for concern that someone or something may be exposed to risk or harm ... if remedial action is not taken.'" *Id.* (citations omitted). The RCRA's citizen suit provision was clearly intended to have prospective effect. *See* Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 59 (1987) (In environmental citizen suits, "the interest of the citizen-plaintiff is primarily forward-looking.")

EPA has adopted its own assessment of conditions that would present an imminent and substantial endangerment to health or the environment based on the interpretation federal courts give to § 6972(a)(1)(B). The EPA concludes:

As underscored by the words 'may present' in the endangerment standard of

> Section 7003, neither certainty nor proof of actual harm is required, only a risk of harm .... An endangerment is 'imminent' if the present conditions indicate *there may be a future risk to health or the environment even though the risk may not be realized for years. It is not necessary for the endangerment to be immediate or tantamount to an emergency.*
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> EPA, Guidance on the Use of Section 7003 of RCRA 10 (1997) (emphasis added).

"[T]he EPA's interpretations of its regulations are entitled to substantial deference and are given 'controlling weight' unless 'plainly erroneous or inconsistent with the regulation.'" Public Citizen, Inc. v. EPA, No. 02-60069, 2003 U.S. App. LEXIS 16735, at *10 (5th Cir. Aug. 15, 2003) (quoting Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512, 129 (1994)).

The Army owns, operates, and maintains a canal contaminated with solid and hazardous wastes, and has decided to dredge that canal without determining the nature of extent of contamination or assessing the resulting risks to public health and the environment. In the "present tense," the Army has contributed and is contributing "to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(B).

II. THE ARMY MUST COMPLY WITH BOTH THE CLEAN WATER ACT AND RCRA.

Making a fact-based argument – albeit without proving any facts – the Army argues that 42 U.S.C. § 6905 precludes an injunction against ill-planned dredging. By its plain language, however, RCRA must be applied "to the extent that such application (or regulation) is not inconsistent with the requirements of" the Clean Water Act ("CWA"). 42 U.S.C. § 6905(a). The Army has proven no facts to suggest that it would be "inconsistent" with CWA requirements for the Army to conduct adequate sampling and planning before dredging the canal. Nor has the

Army demonstrated that an injunction requiring it to determine the nature and extent of the contamination in canal sediments would violate the CWA.

When "two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." Morton v. Mancari, 417 U.S. 535, 551 (1974). Even when statutes conflict to some degree, they are not necessarily inconsistent unless that conflict damages "their sense and purpose." OXY USA, Inc. v. Babbitt, 122 F.3d 251, 258 (5th Cir. 1997) (quoting United States v. Cavada, 821 F.2d 1046, 1048 (5th Cir. 1987)). Safely managing and disposing of solid or hazardous waste would not damage the CWA's purpose. Further, the Army has made no factual showing to establish that the CWA mandates its plans to deepen the canal (as opposed to its plans to widen the lock).

On its face, RCRA's policy against creating imminent hazards is fully consistent with the CWA. Congress designed RCRA to "end the environmental and public health risks associated with the mismanagement of hazardous waste." United States v. Kentucky, 252 F.3d 816, 822 (6th Cir. 2001). Similarly, Congress intended the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251. The application of both statutes is not "an either or" proposition, as long as "each reaches some distinctive cases." J.E.M. AG Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc. 534 U.S. 124, 144 (2001). Both the CWA and RCRA have unique purposes, regulatory structures, and enforcement mechanisms. These statues are complementary, not conflicting. This Court, therefore, should give effect to both.

As one court noted when finding "no inherent inconsistency" between a plaintiff's claims under the Safe Drinking Water Act and RCRA: "[S]ection 1006 of RCRA [does] not preclude the simultaneous consideration of both [laws]." Vernon Village, Inc. v. Gottier, 755 F. Supp. 1142, 1154 (D. Conn. 1990). The court in Vernon Village noted that, "[w]hile the SDWA

applies to the safety of drinking water, RCRA is concerned with the safe treatment and disposal of hazardous substances–hazardous substances that could be contained in the drinking water." *Id.* (emphasis added). The same reasoning applies to this case. While the CWA is concerned with the biological integrity of the Nation's waters, RCRA is concerned with the disposal of solid or hazardous wastes in those same waters. Similarly, when harmonizing RCRA and the Atomic Energy Act, one court concluded that "Congress must have intended that the RCRA be at least partially applicable to facilities operated pursuant to the AEA. Otherwise 42 U.S.C. [§6905(a)] would have simply excluded application of the RCRA to AEA federal facilities." Legal Envtl. Assistance Found. v. Hodel, 586 F. Supp 1163, 1167 (E.D. Tenn. 1984). By the same token, if Congress had intended RCRA to have no application to projects authorized under the CWA, RCRA's provision for application that is "not inconsistent with" the CWA would be "mere surplusage." *But see* Potter v. United States, 155 U.S. 438, 446 (1894) (the word "willful" in a statute "cannot be regarded as mere surplusage; it means something").

III. THIS LAWSUIT IS NOT A "COLLATERAL ATTACK."

The Army argues that this suit is a "collateral attack" on a permit without specifying what permit it is talking about or what the lawsuit is "collateral" to. The basic principle behind the "collateral attack" cases is that a plaintiff cannot decline to participate in an administrative permitting process and then challenge the permit terms as an "imminent hazard." 42 U.S.C. § 6972(b)(2)(D) (RCRA imminent hazard suits cannot challenge the siting of a "hazardous waste treatment, storage, or a disposal facility" or seek "to restrain or enjoin the issuance of a permit for such facility."); Palumbo v. Waste Tech. Indus., 989 F.2d 156, 160-62 (4th Cir. 1993) ("[T]echnical violations in the EPA permitting process" which "should have been raised on direct appeal or with the relevant regulatory bodies" are not appropriate for imminent hazard

lawsuits). This does not mean that permits "shield" their holders from liability if they create endangerments; only that § 6972(a)(1)(B) does not provide an end run around administrative law procedures to challenge RCRA permits. *See* EPA, Guidance on the Use of Section 7003 of RCRA 3 (1997) ("[A] permit holder may not assert a 'permit as shield' defense under Section 7003 to RCRA."). In this case, the Plaintiffs are not challenging – whether collaterally or otherwise – any permit whatsoever.

The Army has not cited any law that would support an extension of the "collateral attack" exception to projects that have not been issued RCRA permits through an administrative process that includes a right to appeal. In Chemical Weapons Working Group, the Tenth Circuit Court of Appeals barred the "[p]laintiffs' imminent hazard claim [because it] essentially attack[ed] Utah's ***decision to issue the Army a [RCRA] permit***." 111 F.3d at 1492 (emphasis added). Likewise, the Sixth Circuit found that "[a] hazardous waste operator's compliance with the terms of its RCRA permit precludes district court jurisdiction under § 6972(a)(1)(B) to challenge ***properly permitted activity***." Greenpeace, Inc. v. Waste Tech. Indus., 9 F.3d 1174, 1181 (6th Cir. 1994) (emphasis added). In both of those cases, the courts were dealing with previously issued RCRA permits that had been subject to administrative processes that included a right to appeal. In this case, there was no permitting process for this lawsuit to be collateral to. This is the only opportunity the Plaintiffs have to challenge the Army's decision to dredge contaminated sediments without adequate sampling or planning.

Furthermore, even if the Army had a RCRA permit for its activity under the Project, "an imminent hazard citizen suit may be brought for permitted activity so long as it is based on information not already considered in the permit process." Chem. Weapons Working Group v. U.S. Dep't of the Army, 111 F.3d at 1492. Additionally, the Court of Appeals for the Sixth

Circuit determined that the collateral attack doctrine only bars imminent and substantial endangerment claims against permitted operations that otherwise meet all federal and state criteria for safe operation of the facility. Coalition for Health Concern v. LWD, Inc., 60 F.3d 1188, 1192 (6th Cir. 1995) ("Plaintiffs [allege] that even if LWD met all the federal and state criteria for the safe operation of the facility and were ... issued a permit, the facility would continue to pose 'substantial endangerment' to the public and the environment. As such this claim is barred by [§ 6972(b)(2)(D)]."). The Army's canal project never went through a permitting process nor has it shown that it meets all state and federal criteria for safe operation.

The plain language of 42 U.S.C. § 6972(b)(2)(D) does not bar the Plaintiffs' imminent and substantial endangerment claim, which is not a collateral attack of anything.

III. THERE IS NO "DREDGING EXCEPTION" TO THE STATUTORY DEFINITION OF HAZARDOUS WASTE.

The Army purports to rely on a regulatory exemption to the Subtitle C definition of hazardous waste. But EPA has long recognized that "the broad statutory definitions, not the regulatory definitions govern in [§ 6973] actions." EPA, Guidance on the Use of Section 7003 of RCRA 14 (1997); *see also id.* at 3 ("Section 7003 can ... be used to address potential endangerments that may be presented by solid or hazardous waste even if the person or activities causing the potential endangerment are not subject to any other provision of RCRA or other environmental law."). In Sierra Club v. U.S. Dept. of Energy, 734 F. Supp. 946, 948 (D. Colo. 1990), the court noted:

> RCRA has statutory ***and*** regulatory definitions of "hazardous waste." ***The broad statutory definition, 42 U.S.C. § 6903(5), primarily governs actions to abate imminent and substantial risks to the public and environment.*** *See e.g.*, 42 U.S.C. § 6973.") (emphasis added).

RCRA defines "hazardous waste" at 42 U.S.C. § 6903(5) to include all "solid waste" that "because of its quantity, concentration, or physical, chemical, or infection characteristics may ... pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of or otherwise managed." Thus, "hazardous waste" is, in essence, "solid waste" that might harm the public or the environment. In turn, "solid waste" is any "discarded material, including solid, liquid, semisolid or contained gaseous material. ..." 42 U.S.C. § 6903(27). There are ***only*** four exceptions: "[1] solid or dissolved material in domestic sewage, [2] solid or dissolved material in irrigation return flows [3] or industrial discharges which are point sources subject to permits [under the Clean Water Act], or [4] source, special nuclear, or byproduct material as defined by the Atomic Energy Act ..." Id. There is ***no*** dredged-material exception in the statute. Congress also instructed EPA to select "particular hazardous wastes" and characteristics from the broad statutory definition "which shall be subject to the provisions of this subchapter" [i.e., Subtitle C or subchapter III, which governs the RCRA regulatory program]. 42 U.S.C. § 6921(b). Thereafter, when Congress intended to refer to the narrow Subtitle C definition, RCRA references "hazardous waste identified or listed under this subchapter" or uses similar language. *See, e.g.*, 42 U.S.C. §§6925(a), 6930(a). In § 6972(a)(1)(B), however – which is part of Subtitle "G" (or subchapter VII), not Subtitle C (or subchapter III) – Congress referred simply to "hazardous" or "solid waste," referencing the broad statutory definitions. *See* 45 Fed. Reg. 33084, 33090 (May 19, 1980) ("Unlike Sections 3002 though 3004 and Section 3010, Congress did not confine the operations of sections 3007 and 7003 to 'hazardous wastes identified or listed under this subtitle' ... To avoid future confusion on this point, EPA has stated it explicitly in §261.1(b)").[1]

[1] *See generally*, Adam Babich, *RCRA Imminent Hazard Authority: A Powerful Tool for*

The D.C. Circuit has explained that "EPA has narrowed the definition of solid waste for ***purposes of Subtitle C***" in regulations such as 40 C.F.R. § 261.4(g). Military Toxics Project v. EPA, 146 F.3d 948, 951 (D.C. Cir. 1998). But "the statute itself still provides the relevant definition for purposes of Subtitle G, which authorizes the Administrator (§ 7003)– or, indeed, 'any person' (§ 7002(a)(1)(B))– to bring suit in order to force such action as may be necessary to abate 'an imminent and substantial endangerment to health or the environment' caused by solid waste." *Id.* (emphasis added).[1] The Military Toxics Project court relied in part on 40 C.F.R. § 261.1(b)(2), which provides that "material not defined as solid waste for purposes of Subtitle C 'is still a solid waste' if '[i]n the case of section 7003, the statutory elements are established.'" *Id.*

The Army has not cited ***any*** contrary authority. Indeed, the Army's assertion that 40 C.F.R. § 261.4(g) has any bearing on this case lacks any support in the law.

V. THE ARMY MISCONSTRUES THE NOTICE PLEADING STANDARD.

The Army misreads Plaintiffs' Amended Complaint by reciting only certain portions and ignoring others, and then alleging it fails to comply with Federal Rule of Civil Procedure 8(a). Rule 8(a), however, requires a "short and plain statement of the claim showing the pleader is entitled to relief" that gives the defendant fair notice of what the plaintiff's claim is, and the grounds upon which it rests. Fed. R. Civ. P. 8(a)(2); Conley v. Gibson, 355 U.S. 41, 45–46 (1957). The Amended Complaint properly provides the Army with notice that the RCRA claim

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Businesses, Governments, and Citizen Enforcers, 24 Envtl. L. Rep. (Envtl. L. Inst.) 10122 at nn.37-40 (March 1994)

[1] In Conn. Coastal Fishermen v. Remington Arms, 989 F.2d 1305, 1308, 1315 (2d Cir. 1993), the court held: "[A] careful perusal of RCRA and its regulations reveals that 'solid waste' plainly means one thing in one part of RCRA and something entirely different in another part of the

rests on the management and dredging of hazardous waste-laden sediments, containing contamination above residential and industrial screening levels, in a public waterway adjacent to a New Orleans neighborhood and in the Lake Pontchartrain ecosystem. If, however, this Court were to determine that more allegations are necessary, the Plaintiffs would respectfully request an opportunity to amend their complaint.

CONCLUSION

The Plaintiffs have alleged that the Army's decision to dredge the canal, and steps it has taken to dredge the canal without appropriate studies and planning, constitute handling, storage, and disposal of waste that "may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(B). The Army's assertion that the lawsuit is premature is belied by the fact that the Army has already completed the NEPA process and made a decision and is taking steps to implement that decision. In other words, the response to the Plaintiffs' RCRA allegations cannot be "we'll cross that bridge when we come to it" because NEPA required the Army to perform its analyses before making the decision to go forward. The Army's argument that the Plaintiffs must wait to sue until the harm is actually occurring finds no support in the law.

For all the foregoing reasons, this Court should DENY the Army's Motion to Dismiss the Plaintiffs' RCRA Claims.

Respectfully submitted on October 7, 2003.

M. Nicole Adame

M. Nicole Adame, Law Student

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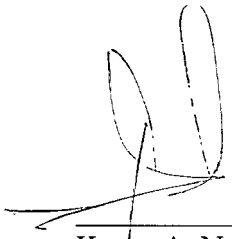
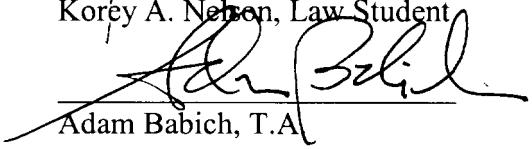
same statute . . . the broader statutory definition of solid waste applies to citizen suits brought to abate imminent hazard to health or the environment."



Korey A. Nelson, Law Student



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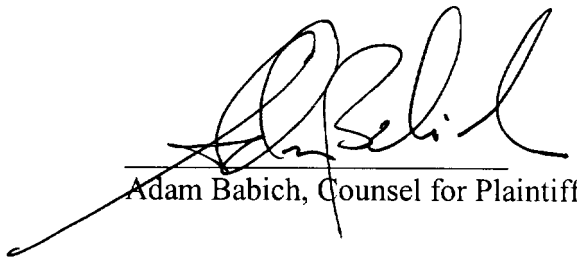
(504) 862-8721
Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this the 7th day of October, 2003, a copy of this pleading and all attachments has been served on Defendant by U.S. mail, postage prepaid, and properly addressed to:

Natalia T. Sorgente
U.S. Department of Justice
Environmental & Natural Resources Division
Environmental Defense Section
P.O. Box 23986
Washington, DC 20026-3986



Adam Babich, Counsel for Plaintiffs

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Holy Cross Neighborhood Association,	*	
Gulf Restoration Network, and	*	Case No.: 03-0370
Louisiana Environmental Action Network,	*	Section: L
Plaintiffs,	*	Judge: Fallon
	*	Magistrate: 4
v.	*	
	*	
United States Army Corps of Engineers,	*	
Defendant.	*	

EXHIBITS TO PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS RCRA CAUSE OF ACTION

Plaintiffs Holy Cross Neighborhood Association, Gulf Restoration Network, and Louisiana Environmental Action Network respectfully submit their Exhibits to their opposition to Defendant U.S. Army Corps of Engineers' ("the Army's") Motion to Dismiss RCRA Cause of Action (dated July 31, 2003).

Respectfully submitted on October 7, 2003.

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Counsel for Plaintiffs

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P.O. Box 23986
Washington, DC 20026-3986

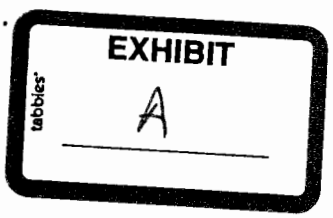
Adam Babich, Counsel for Plaintiffs

GUIDANCE ON THE USE OF SECTION 7003 OF RCRA

October 1997

Office of Enforcement and Compliance Assurance
U.S. Environmental Protection Agency

NOTICE: This document is intended solely as guidance for employees of the U.S. Environmental Protection Agency. It is not a rule and does not create any legal obligations. Whether and how EPA applies this guidance in any given case will depend on the facts of the case.



UNITED STATES GOVERNMENT

memorandum

DATE: January 31, 1979

REPLY TO ATTN OF: Durwood Zaelke
Attorney, Special Projects

SUBJECT: Hazardous Wastes Memorandum.

TO: Mr. James W. Moorman
Assistant Attorney General
Land and Natural Resources Division
Mr. Sanford Sagalkin
Deputy Assistant Attorney General
Mr. Vance Hughes
Legislative Assistant
Mr. Angus C. MacBeth
Chief, Pollution Control Section
Ms. Lois J. Schiffer
Chief, General Litigation Section
Mr. Kenneth Berlin
Attorney, Special Projects
Ms. Khristine Hall
Attorney, Special Projects

Attached is the "Hazardous Waste Memo," conceived in October, researched in November, written in December, and, finally, produced in January.

Please note that the analysis in the section on §7003 of RCRA and the related "imminent hazard" provisions, and the section on Finding a Deep Pocket is now somewhat dated. Additional work on these sections is underway. Also note that political analysis has been omitted.

Attachment

cc: Barry Trilling
Mike Carlton