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U.S. DISTRICT COURT  
EASTERN DISTRICT OF LA

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA

HOLY CROSS, ET AL.

\* CIVIL ACTION

VERSUS

\* NO. 03-370

UNITED STATES ARMY CORPS OF ENGINEERS

\* SECTION "L" (4)

ORDER AND REASONS

Plaintiffs brought suit seeking a declaratory judgment and injunctive relief to enjoin Defendant United States Army Corps of Engineers (the "Corps") from dredging, stirring up, releasing, and disposing allegedly hazardous waste-contaminated sediments of the Inner Harbor Navigational Canal as part of the Inner Harbor Navigational Canal Lock Replacement Project (the "Project"). In their complaint, plaintiffs allege that the Corps has failed to conduct adequate analyses and planning for the Project to proceed safely and in accordance with the law. As such, plaintiffs seek not the cancellation of the Project, but the halting of it until further testing and planning is conducted.

Before the Court are the plaintiffs' motion for summary judgment on the issue of standing, (Rec. Doc. No. 7), and the defendants' motion to dismiss the plaintiffs' cause of action under the Resource Conservation and Recovery Act ("RCRA") 42 U.S.C. §§ 6901-6992(k) for failure to state a claim and for lack of subject matter jurisdiction. (Rec. Doc. No. 16).

I. Factual and Procedural Background

The Inner Harbor Navigational Canal, known locally as the Industrial Canal, is a link in a

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navigation system that connects the Mississippi River, the Gulf Intracoastal Waterway, Lake Pontchartrain, and the Mississippi River-Gulf Outlet. The Industrial Canal makes use of a lock which was constructed in the 1920s and has been in use for some 80 years. In 1956, Congress, concluding that the lock might need to be replaced at some time in the future, provided for and approved its replacement or addition of another lock at a time when the Corps would determine that the existing lock had become obsolete or incapable of handling increased marine traffic. River and Harbor Act of 1956 (PL 84-455).

The Corps has been contemplating updating the existing lock since at least the 1960s. *Holy Cross Neighborhood Ass'n v. Julich*, 106 F. Supp. 2d 876, 877 (E.D. La. 2000).<sup>1</sup> The current lock is 75 feet wide by 640 feet long and 31.5 feet deep. In 1998, the Corps announced plans to construct a new lock that will measure 110 feet wide by 1200 feet long and 36 feet deep. As part of the new construction plan, the Corps will need to dredge the canal. This large construction project is a joint effort by the Corps and the Port of New Orleans. It is estimated to cost more than \$600 million and take over 10 years to complete. In conjunction with the project, the Corps prepared an Environmental Impact Statement ("EIS") as required by the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370(f), ("NEPA").

The Holy Cross Neighborhood Association was the original plaintiff in this action. The Gulf Restoration Network and the Louisiana Environmental Action Network were added as plaintiffs in the First Amended and Superceding Complaint [Record Doc. No. 10]. Plaintiff Holy Cross is a non-profit corporation composed of residents of the Holy Cross neighborhood that

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<sup>1</sup>This prior suit challenged the Corp's compliance with the Federal Advisory Committee Act in connection with the Project.

borders the Industrial Canal. Plaintiff Gulf Restoration Network is a non-profit corporation made up of a regional coalition of environmental and social justice groups that address the protection of the resources of the Gulf of Mexico region. Plaintiff the Louisiana Environmental Action Network is a non-profit organization that serves as an umbrella organization for environmental and citizen groups across the state of Louisiana.

Plaintiffs contend that the Project endangers Lake Pontchartrain and the surrounding ecosystem because dredging the Canal will release hazardous waste-contaminated sediment into the ecosystem and will require storage and maintenance of the hazardous material which will create other problems. Plaintiffs argue that the EIS prepared by the Corps is insufficient because it fails to account for significant adverse affects the Project will have on the environment, the economy, and the safety and welfare of the communities surrounding the Industrial Canal and also fails to consider or recommend alternative methods for dealing with the hazards.

In their complaint, plaintiffs assert three causes of action. First, under RCRA, plaintiffs allege that the Corps has contributed or is contributing to the past or present handling, storing, treatment, transportation, or disposal of solid and hazardous waste which may present an imminent and substantial endangerment to health or the environment. Second, under NEPA, plaintiffs claim that the EIS provided by the Corps is inadequate and that the Court has the authority the compel the Corps to comply with the requirements of NEPA pursuant to the Administrative Procedure Act, 5 U.S.C. § 702 & 28 U.S.C. § 2201, ("APA"). Third, plaintiffs claim that the Corps failed to file a Supplemental EIS when potential adverse impacts were brought to its attention.

Plaintiffs assert that they have standing to bring these claims and ask the Court to so find

in its motion for summary judgment on the issue. Defendant moves the Court to dismiss the plaintiffs RCRA cause of action for failure to state a claim and for lack of subject matter jurisdiction. The Court considers each argument in turn.

## II. Plaintiffs' Motion for Summary Judgment on the Issue of Standing

### A. Legal Standards

In determining whether a party is entitled to summary judgment, the court views the evidence in the light most favorable to the non-moving party. *Littlefield v. Forney Indep. School Dist.*, 268 F.3d 275, 282 (5<sup>th</sup> Cir. 2001) (citing *Smith v. Brenoetsy*, 158 F.3d 908, 911 (5<sup>th</sup> Cir. 2001)). Summary judgment will be granted only if the pleadings, depositions, answers to interrogatories, and admissions, together with affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56. If the moving party fails to meet its initial burden of demonstrating the absence of a genuine issue of material fact, the motion for summary judgment must be denied, regardless of the nonmovant's response. *Little v. Liquid Air Corp.* 37 F.3d 1069, 1075 (5<sup>th</sup> Cir. 1994) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)). However, if the party moving for summary judgment demonstrates the absence of a genuine issue of material fact "the nonmovant must go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial." *Willis v. Roche Biomedical Laboratories, Inc.*, 61 F.3d 313, 315 (5<sup>th</sup> Cir. 1995). "[A] dispute about a material fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* If the evidence leads to only one reasonable conclusion, summary judgment is proper. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

## B. Standing

The plaintiffs have moved for summary judgment on the issue of standing. They assert that they meet the requirements of Constitutional, associational, and prudential standing. The government does not oppose the motion at this time based on the information now in its possession.

The requirement of standing to sue emanates from the "Case" or "Controversy" limitation contained in Article III of the Constitution. U.S. Const. art. III § 2, cl. 1. The doctrine of standing assures that courts issue rulings in the context of concrete disputes in which plaintiffs have an actual stake in the outcome of the lawsuit. *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972). A RCRA citizen suit claim may be brought by "any person" who has Constitutional standing. 42 U.S.C. § 6972(a)(1)(B). The "constitutional minimum of standing" requires three elements: (1) "injury in fact— a harm suffered by the plaintiff that is concrete and actual or imminent, not conjectural or hypothetical"; (2) "causation— a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant"; and (3) "redressability— a likelihood that the requested relief will redress the alleged injury." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). Any party may raise standing at any time. *U.S. v. Hays*, 515 U.S. 737, 742-43 (1995). As standing is not subject to waiver and is a jurisdictional issue, courts may raise it *sua sponte*. *Ford v. Nylcare Health Plans of the Gulf Coast, Inc.*, 301 F.3d 329, 331-32 (5<sup>th</sup> Cir. 2002).

In this case, the plaintiffs have established the existence of Constitutional standing at this

stage in the proceedings.<sup>2</sup> First, plaintiffs satisfy the requirement of injury in fact. The Supreme Court has held that environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons for whom the values of the area will be lessened by the challenged activity. *Friends of the Earth v. Laidlaw Env'tl. Services*, 528 U.S. 167, 183 (2000). In this case, plaintiffs allege that they are community members who live adjacent to the Industrial Canal and who use the area that will allegedly be affected. (Second Am. Compl. ¶¶ 7-11). Such an allegation is sufficient at this stage in the suit to establish injury in fact for standing purposes.

Second, plaintiffs allege a causal connection between the imminent injuries and the challenged action of the defendants. To meet the causation requirement of standing, the plaintiffs bear a modest burden at the pleading stage of the litigation. *Bennett v. Spear*, 520 U.S. 154, 171, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997). The essence of plaintiffs' complaint is that the Corps' plan to dredge the Industrial Canal will cause injury to the surrounding environment. (Second Am. Compl. ¶ 1). As such, plaintiffs sufficiently establish the requisite connection between defendant's conduct and the alleged threatened injury.

Third, plaintiffs aver that the relief sought will redress the alleged injury. Plaintiffs ask the Court to enjoin the Project until such time as the Corps conducts further analyses of the adverse impacts the Project may have and considers less environmentally injurious alternatives to the current Project. (Second A. Compl. XII). Thus, the harm plaintiffs allege will occur can be redressed by Order of this Court.

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<sup>2</sup>As the plaintiffs have satisfied the requirements for Constitutional standing, the Court need not address the existence of prudential or associational standing.

As plaintiffs meet the elements of constitutional standing, their motion for summary judgment on the issue of standing is hereby GRANTED. This holding does not prejudice the rights of the parties or the Court to revisit the issue of standing at a later time if it becomes relevant.

### III. Defendant's Motion to Dismiss Plaintiffs' RCRA Cause of Action for Lack of Subject Matter Jurisdiction and Failure to State a Claim

#### A. Legal Standards

Federal courts are courts of limited jurisdiction and may exercise only that power conferred by Article III of the Constitution or by Congress. *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986). Plaintiffs bear the burden of proving the existence of subject matter jurisdiction, and its absence requires dismissal. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). The United States, along with its agencies and instrumentalities, enjoys immunity from being sued unless Congress has explicitly waived immunity and consented to suit. *United States v. Dalm*, 494 U.S. 596, 608 (1990). Therefore, as in the instant case, to establish jurisdiction over a claim against the United States, plaintiffs must identify a Congressional waiver of immunity that is unequivocally expressed. *United States v. Mitchell*, 445 U.S. 535, 538 (1980).

A motion to dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) should be granted only if it appears beyond doubt that the plaintiffs can prove no facts that would entitle them to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Taylor v. Books A Million, Inc.*, 296 F.3d 376, 378 (5<sup>th</sup> Cir. 2002). In making its determination, the court construes the complaint in favor of the plaintiffs, and all well pled facts are taken as true. *S. Christian*

*Leadership Conf. v. Supreme Court of Louisiana*, 252 F.3d 781, 786 (5<sup>th</sup> Cir. 2001). Thus, movants bear a heavy burden when seeking to dismiss under Rule 12(b)(6) and are rarely successful in meeting that burden. *Id.* However, "conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss. *Taylor*, 296 at 378 (quoting *S. Christian Leadership Conf.*, 252 F.3d at 786). Thus, a complaint will be dismissed if it does not "contain a short and plain statement of the claim, [but] only legal conclusions of such generality as to fail to give fair notice." *Vulcan Materials Co. v. Tehuacana*, 238 F.3d 382, 387 (5<sup>th</sup> Cir. 2001).

## B. Analysis

Defendant's move to dismiss the plaintiffs' RCRA claim for lack of subject matter jurisdiction and for failure to state a claim. RCRA is a comprehensive environmental statute that governs the treatment, storage, and disposal of solid and hazardous waste from "the cradle to the grave." *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 483 (1996). According to the Court in *Meghrig*, the primary purpose of RCRA is to "reduce the generation of hazardous waste and to ensure the proper treatment, storage, and disposal of that waste which is nonetheless generated, 'so as to minimize the present and future threat to human health and the environment'" (*citing* 42 U.S.C. § 6902(b)). To achieve this broad purpose, RCRA was designed with three general goals: (1) "to provide technical and financial assistance for the development of management plans and facilities for the recovery of energy and other resources from discarded materials," (2) "to provide for the safe disposal of discarded materials," and (3) "to regulate the management of hazardous waste." William B. Johnson, *Right to Maintain Citizen Suit Under § 7002 of Resource Conservation and Recovery Act (42 U.S.C. § 6972)*, 91 A.L.R. Fed. 436, 445 (1989).



As with other federal environmental regulations, such as the Clean Air Act, Congress included a citizen suit provision in RCRA which empowers a citizen to bring suit for certain limited injunctive and declaratory relief against persons, including the United States, who violate the substantive provisions of RCRA.<sup>3</sup> 42 U.S.C. § 6972; *see* Randall James Butterfield, *Recovering Environmental Cleanup Costs Under the Resource Conservation and Recovery Act: A Potential Solution to a Persistent Problem*, 49 *Vanderbilt L. Rev.* 689, 702 (April, 1996).

Plaintiffs bring their RCRA cause of action pursuant to the citizen suit provision and allege that the Corps "is contributing to the past or present handling, storage, treatment, transportation, and disposal of solid and hazardous waste" for two reasons: 1) by taking steps to dredge hazardous waste-contaminated sediments from the Industrial Canal and store and dispose of them in an uncapped confined disposal facility on the South Bank of the MRGO/Intracoastal Waterway; 2) by maintaining and having custody over the Industrial Canal.

Defendants claim that the plaintiffs' motion concerning the dredging should be dismissed because it is based on future events. According to defendants, Congress waived immunity for claims involving the "past or present" conduct regarding hazardous waste, not future acts. Because the dredging has not yet commenced, defendants claim that an attack under the citizen

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<sup>3</sup>The Citizen suits provision of RCRA is codified at 42 U.S.C. § 6972. The relevant provision in this case provides the following:

[A]ny person may commence a civil action on his own behalf . . .

(B) against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, 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 . . . .

suit provision of RCRA is premature and improper and that the United States is immune to any such challenge. Furthermore, defendants claim that the citizen suit provision expressly prohibits an action regarding the siting of a hazardous waste storage and disposal facility. 42 U.S.C. § 6972(b)(2)(D).<sup>4</sup>

Furthermore, defendants claim that the plaintiffs' motion concerning the maintenance of the Canal should be dismissed for failure to state a claim because the plaintiffs do not satisfy the pleading requirements Rule 8 of the Federal Rules of Civil Procedure. Specifically, defendants claim that plaintiffs fail to allege detailed facts indicating that the maintenance of the Canal amounts to "handling, storage, treatment, transportation, or disposal" of solid or hazardous waste as required under the RCRA.

The Court will consider each issue in turn.

#### 1. Dredging

Defendant's claim that the plaintiffs may not properly bring suit under the citizen suit provision because the dredging has not yet commenced and future actions are not covered by RCRA. The government makes two points in relation to this argument. First, the government contends that Congress couched the citizen suit provision in the past and present tense by using

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<sup>4</sup>This Section of the RCRA is codified at 42 U.S.C. § 6972(b)(2)(D) and provides the following:

No action may be commenced under subsection (a)(1)(B) of this section by any person (other than a State or local government) with respect to the siting of a hazardous waste treatment, storage, or a disposal facility, nor to restrain or enjoin the issuance of a permit for such facility.

the terms "has contributed or . . . is contributing to the past or present . . . ." <sup>5</sup> 42 U.S.C. § 6972. This choice of tense is significant, according to the government, because it indicates that Congress only intended to waive sovereign immunity in suits arising from past or present, not future, actions. Thus, the government contends that this Court lacks subject matter jurisdiction to hear the suit. Second, as the dredging has not yet commenced, the government contends that the dredging has not contributed nor is presently contributing to past or present handling, etc. of solid or hazardous waste. Therefore, the government argues that the plaintiffs' suit should be dismissed pursuant to Rule 12(b)(6) for failure to state a claim. As these two arguments are interrelated, the Court shall consider them together.

Plaintiffs contend that the Corps' decision and plan to dredge contaminated waste satisfies the requirements of RCRA because the statute was designed to provide a remedy that "ameliorates present or obviates the risk of future 'imminent harms . . . ." *Meghrig*, 516 U.S. at 486. Further, plaintiffs contend that they may bring suit under RCRA before dredging commences because the alleged harm will occur contemporaneously with the dredging.

The Court agrees with plaintiffs that the purpose of RCRA would hardly be satisfied if

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<sup>5</sup>The Citizen suits provision of RCRA is codified at 42 U.S.C. § 6972. The relevant provision in this case provides the following:

[A]ny person may commence a civil action on his own behalf . . .

(B) against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, 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 . . . .

parties could not bring suit until damage had occurred or offensive conduct had commenced. "RCRA is a remedial statute, which should be liberally construed." *United States v. Price*, 688 F.2d 204, 211, 213-14 (3d Cir. 1982). Courts, including the Fifth Circuit, interpret the citizen suit provision analogously with a similar provision in RCRA which details the requirements that must be met in order for the Environmental Protection Agency to bring a RCRA suit, 42 U.S.C. § 6973. *Cox v. City of Dallas*, 256 F.3d 281, 294 n.22 (5<sup>th</sup> Cir. 2001). Noting the Congressional history, the *Cox* court stated that "private parties may sue under the citizen suit provision . . . 'pursuant to the standards of liability established under [§ 6973]." *Id.* (citing H.R.Rep. No. 98-198, Part I, at 53 (1983), *reprinted in* 1984 U.S.C.C.A.N. 5576, 5612). Further, the *Cox* court explained, § 6973 contains identical language to the citizen suit provision. *Id.* Following the normal rules of statutory construction, "identical words used in different parts of the same act are intended to have the same meaning." *Id.* (citing *Commissioner v. Lundy*, 516 U.S. 235, 250 116 S.Ct. 647, 133 L.Ed.2d 611 (1996)). Thus, it is helpful to consider the meaning courts have given the term "contribute" in § 6973 claims.

Drawing on a body of case law interpreting § 6973, the Fifth Circuit defined "contribute" to mean "to have a part or share in producing an effect." *Cox v. City of Dallas*, 256 F.3d 281, 295 (5<sup>th</sup> Cir. 2001). Indeed, the EPA states that the phrase "has contributed to or is contributing to" should be broadly construed. EPA, *Guidance on the Use of Section 7003 of RCRA 17* (1997). Thus, though the statute refers to past or present acts, it is not primarily aimed at providing a mechanism for cleaning up or ameliorating existing waste. *Meghrig*, 516 U.S. at 483. Rather, RCRA's primary purpose is to "reduce the generation of hazardous waste and to ensure the proper treatment, storage, and disposal of that waste which is nonetheless generated, 'so as to minimize

the present and future threat to human health and the environment'." *Id.* (citing 42 U.S.C. § 6902(b)). The government's argument, then, that Congress only intended to waive immunity for suits brought against the United States for past or present actions of the Corps rings hollow. Such reasoning would render the statute meaningless.<sup>6</sup> Accordingly, the Court finds that the Corps is not immune from the instant suit.

Further, plaintiffs need not wait until dredging commences to bring suit. It is not necessary to "prove that an emergency exists to prevail under [RCRA], only that circumstances may present an imminent and substantial endangerment." *United States v. Waste Industries, Inc.*, 734 F.2d 159, 168 (4<sup>th</sup> Cir. 1984). On the face of their complaint, plaintiffs allege that the Corps owns and operates a canal containing sediments with contamination that exceed standards for non-industrial as well as industrial sites. (Second Am. Compl. ¶ 38). Plaintiffs further argue that dredging will release these contaminants into Lake Pontchartrain and the surrounding communities. (Second Am. Comp. ¶ 38). Accepting these allegations as true, as must be done under a 12(b)(6) analysis, the Court concludes that plaintiffs have sufficiently stated a cause of

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<sup>6</sup>Further, this Court finds that Congress expressly waived immunity from suits such as the instant one:

Each department, agency, and instrumentality of the executive . . . branch[] of the Federal Government (1) having jurisdiction over any solid waste management facility or disposal site, or (2) engaged in any activity resulting, or which may result, in the disposal or management of solid waste or hazardous waste shall be subject to, and comply with, all Federal, State, Interstate, and local requirements, both substantive and procedural . . . respecting control and abatement of solid waste or hazardous waste disposal and management in the same manner, and to the same extent, as any person is subject to such requirements. . . . The United States hereby 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).

action under RCRA.

## 2. Siting of Hazardous Waste Treatment, Storage, or Disposal Facility

As further regards the proposed dredging, the government contends that the suit should be dismissed because the citizen suit provision explicitly prohibits an action regarding the siting or permitting of a hazardous waste treatment, storage, or disposal facility.<sup>7</sup>

In their complaint, plaintiffs allege that:

Defendant is contributing to the past or present handling, storage, treatment, transportation, and disposal of solid and hazardous waste by taking steps to dredge hazardous waste-contaminated sediments from the Canal and store and dispose of them in an uncapped confined disposal facility on the South Bank of the MRGO/Intracoastal Waterway near the intersection of the MRGO/Intracoastal Waterway with the Canal.

(Second Am. Cmplt. ¶ 67). The government asks this Court to view plaintiffs' allegation as a prohibited collateral attack on the siting of a hazardous waste treatment, storage, or disposal facility without providing support for or an explanation of why the Court should so view the allegation. A collateral attack is an attack on a judgment or administrative decision entered in a different proceeding. Black's Law Dictionary 255 (7<sup>th</sup> ed. 1999). In the environmental arena, a

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<sup>7</sup>RCRA provides in part:

No action may be commenced under subsection (a)(1)(B) of this section by any person (other than a State or local government) with respect to the siting of a hazardous waste treatment, storage or a disposal facility, nor to restrain or enjoin the issuance of a permit for such facility.

42 U.S.C. § 6972(b)(2)(D).

plaintiff may not decline or fail to participate in an administrative permitting process and then later collaterally challenge the permit terms. *Palumbo v. Waste Tech. Indus.*, 989 F.2d 156, 160-62 (4<sup>th</sup> Cir. 1993). In the instant case, there was no permitting or other administrative process to which this lawsuit would be collateral. Thus, plaintiffs had no other opportunity to challenge the Project. Thus, this Court finds that plaintiffs' lawsuit does not constitute a collateral attack and is not prohibited by the exclusion contained in the RCRA.

### 3. Maintenance of the Industrial Canal

The government also contends that the plaintiffs' allegations relating to the Corps' present conduct concerning maintenance of the Canal should be dismissed because the plaintiffs do not allege facts, only legal conclusions. The government states that the plaintiffs fail to meet the notice pleading requirement of Rule 8(a) of the Federal Rules of Civil Procedure because they do not "set forth sufficient information to outline the elements of [their] claim or to permit inferences to be drawn that these elements exist." *Walker v. South Central Bell Telephone Co.*, 904 F.2d 275, 277 (5<sup>th</sup> Cir. 1990). The plaintiffs respond that their Second Amended Complaint satisfies the requirement of notice pleading by putting the Corps on fair notice that it is responsible for maintaining a public waterway that contains contaminated sediments.

Rule 8(a) 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 Fifth Circuit has articulated the elements of a claim under RCRA as follows: (1)

that the defendant is a person<sup>8</sup>; (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. *Cox*, 256 F.3d at 292. The government claims that the plaintiffs have failed to allege facts that show how the Corps has contributed to the handling, storage, treatment, transportation, or disposal of solid or hazardous waste or that the solid or hazardous waste allegedly present in the Canal may present an imminent and substantial endangerment to health or the environment.

Plaintiffs Second Amended Complaint does not allege that the project must be cancelled or that the dredging could not occur safely. Rather, the plaintiffs contend that the Corps has not conducted adequate analyses and planning for a safe project. The plaintiffs allege numerous facts in their Second Amended Complaint to support their contention that the Corps currently owns, operates, controls, and maintains a site already contaminated with toxins and metals. For example, throughout their complaint, plaintiffs contend that the Corps is directing and organizing the Project. (Second Am. Compl. ¶¶ 16-17, 36-57). Further, plaintiffs aver that the Industrial Canal currently contains toxins, such as Polycyclic Aromatic Hydrocarbons, at levels that exceed standards for non-industrial and industrial sites. (Second Am. Compl. ¶ 38). Plaintiffs further allege that the toxic contaminants are located in the lower levels of the Industrial Canal bottom and that these contaminants will be released into the environment when the upper levels are dredged away. (Second Am. Compl. ¶ 39-41). Plaintiffs satisfy the requirements of notice

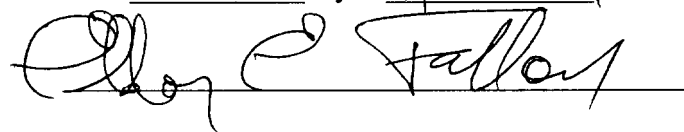
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<sup>8</sup>The United States is explicitly included in the definition of "person" under this section of the statute. 42 U.S.C. § 6972(a)(1)(B).



pleading by putting the Corps on notice that the RCRA claim rests on the management of and plan to dredge the Industrial Canal. Thus, the Court finds that the plaintiffs satisfy the requirements of Rule 8 by resting their RCRA claim on sufficient factual allegations.

Accordingly and for reasons explained more fully above, the defendants motion to dismiss for lack of subject matter jurisdiction and failure to state a claim should be and is hereby DENIED.

This 3d day of November, 2003  


United States District Court Judge