



Tulane Environmental Law Clinic

May 21, 2015

By U.S. Post

Lieutenant General Thomas P. Bostick
United States Army Corps of Engineers
441 G Street NW
Washington, DC 20314-1000

RE: Petition regarding regional General Permit NOD-13 MVN-2007-01994-WNN (“NOD-13” or the “General Permit”).

Introduction

Pursuant to the Administrative Procedure Act, 5 U.S.C. § 555(e), the Atchafalaya Basinkeeper¹ and the Louisiana Crawfish Producers Association-West² (“Petitioners”) respectfully petition the U.S. Army Corps of Engineers (“Corps”) to *1*) issue public notice for General Permit NOD-13 MVN-2007-01994-WNN (“NOD-13”), *2*) perform a complete environmental review under the provisions of the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4332, *et seq.*, for NOD-13, and *3*) reconsider and reverse its own decision to re-issue NOD-13 so as to avoid its implementation without proper notice or environmental review. Petitioners request a written response to this Petition. Petitioners also request that the Corps send their counsel (at the address below) a copy of any and all public notices and NEPA reviews regarding NOD-13.

Factual Background

On or about November 24, 2014, the Corps produced a document titled “Special Public Notice [for] Time Extension and Modification of the General Permit for Board Roads and Ring Levees (NOD-13)” (the “Notice”). NOD-13 is a regional general permit that had expired on December 31, 2012.

¹ Atchafalaya Basinkeeper is a non-profit organization that seeks to further the public interest by reviewing the Corps’ permitting of projects that may impact the wetlands and natural environment of Louisiana.

² The Louisiana Crawfish Producers Association-West is a non-profit corporation organized under the laws of Louisiana. LCPA’s purpose is to protect water quality in the Atchafalaya Basin in order to promote a healthy, thriving habitat for the crawfish, fish, and other wildlife that the Basin supports. The organization is also concerned with protecting and insuring public access to the waters of the United States located in the Basin.

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On January 6, 2015, the Atchafalaya Basinkeeper submitted a Freedom of Information Act (“FOIA”) to the Corps requesting production of, among other things, “proof of publication for any and all public notices published/issued by the Army Corps establishing a public comment period for the ‘Time Extension and Modification of the General Permit for Board Roads and Ring Levees (‘NOD-13’).’”

On March 26, 2015, Atchafalaya Basinkeeper submitted a second FOIA request to the Corps requesting production of “Any and all document(s) related to the environmental review requirements of [NEPA], including, but not limited to, any “environmental assessment,” “environmental impact statement,” or “finding of no significant impact.”

On April 13, 2015, the Corps’ response to the March 26, 2015 FOIA request included several documents, but no environmental assessment or other review that satisfied the requirements of NEPA for reissuance of NOD-13.

On May 1, 2015, the Corps’ response to the January 6, 2015 FOIA request indicated that the Corps’ dissemination of the Notice was limited to placing it on a Corps website and sending it to federal and state agencies. The Corps did not publish the Notice in any newspaper or at the post office and did not send it to interested parties.

Law and Analysis

1. The Corps’ Notice on General Permit NOD-13 Failed to Satisfy Public Notice Requirements.

Petitioners request that the Corps issue a public notice on the reissuance of NOD-13 because its November 14, 2014 Notice failed to meet publication requirements. Public notice is the “primary method of advising all interested parties of the proposed activity for which a permit is sought and of soliciting comments and information necessary to evaluate the probable impact on the public interest.” 33 C.F.R. § 325.3(a). It is required for “proposed regional general permits and for significant modifications to, or *reissuance of*, existing regional permits....” *Id.* § 325.3(b) (emphasis added). The Corps’ regulations dictate, in detail, how public notices must be distributed:

Public notices will be distributed for posting in post offices or other appropriate public places in the vicinity of the site of the proposed work and will be sent to the applicant, to appropriate city and county officials, to adjoining property owners, to appropriate state agencies, ... to concerned Federal agencies, to local, regional and national shipping and **other concerned business and conservation organizations**, to appropriate River Basin Commissions, ... to local news media and to **any other interested party**. Copies of public notices will be sent to all parties who have specifically requested copies of public notices....

33 C.F.R. § 325.3(d)(1) (emphases added); *see also Surf & Env't Conservation Coalition v. Dep't of the Army United States*, 322 F. Supp. 2d 126, 131 (D.P.R. 2004) (“Aside from the requirement of sending copies of public notices to concerned federal, local and regional agencies and conservation organizations, the local news media, property owners adjacent to the disposal area, and to any interested party, these regulations also require their posting in post offices or other appropriate public places in the vicinity of the site of the proposed work.”).

Here, because NOD-13 had expired on December 31, 2012, the Corps' November 24, 2014 Notice was, in fact, a notice for reissuance of NOD-13 rather than a “time extension” or “modification,” as titled.³ As a reissuance, 33 C.F.R. § 325.3(b) required the Corps to distribute public notice pursuant to 33 C.F.R. § 325.3(d)(1).

The Corps failed to meet section § 325.3(d)(1)'s requirements because it failed to distribute the Notice to any post office or other appropriate public place. The Corps also failed to send the Notice to either Petitioner, who are organizations that qualify as “concerned business and conservation organizations.” Each Petitioner is also an “interested party” because each is a Plaintiff in *Atchafalaya Basinkeeper, et al v. Bostick, et al.*, No. 2:14-cv-649 (E.D. La.), litigation challenging the Corps' authorization of a project to construct a permanent limestone access road with a drill pad and ring levee under NOD-13. Because the Corps did not distribute the Notice in accordance with § 325.3, it failed to give the public notice required for the reissuance of a General Permit NOD-13. Accordingly, Petitioners request the Corps issue public notice for General Permit NOD-13, including sending a copy to each Petitioner and their counsel.

2. *The Corps Must Perform the NEPA Environmental Review before Reissuing General Permit NOD-13.*

Petitioners request the Corps to conduct an appropriate NEPA environmental review regarding the effects of NOD-13, as the Corps is obliged to follow the provisions of NEPA before approving Clean Water Act (“CWA”) permits. When dealing with CWA permits, it is well-settled that “the Corps must comply not only with the requirements of the Clean Water Act, but also with NEPA's procedural requirements.” *O'Reilly v. U.S. Army Corps of Eng'rs*, 477 F.3d 225, 229 n.1 (5th Cir. 2007); *see* 33 C.F.R. § 325.2(a)(4) (“The district engineer will follow ... environmental procedures and documentation required by the National Environmental Policy Act of 1969. A decision on a permit application will require either an environmental assessment or an environmental impact statement unless it is included within a categorical exclusion.”) Compliance with NEPA is necessary for regional general permits. 33 C.F.R. § 325.2(e)(2) (“Regional permits ... may be issued by a division or district engineer after compliance with the other procedures of this regulation.”).

Thus, for regional General Permit NOD-13, the Corps should have performed a NEPA review considering the environmental direct, indirect, and cumulative impacts of reissuing the

³ A time extension or modification is also inapplicable to extend a still-effective general permit past five years. *See* CWA § 404(e)(2), 33 U.S.C. 1344(e)(2) (“No general permit issued under this subsection shall be for a period of more than five years after the date of issuance.”)

regional permit. *See* 42 U.S.C. § 4332; 40 C.F.R. § 1508.8; *id.* § 1508.9; *id.* § 1508.11. These impacts include “ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social” effects. 40 C.F.R. § 1508.8. As the Fifth Circuit explained, at a minimum, the Corps should have taken a “hard look” at the project so as to “realistically assess[] its individual and cumulative environmental effects....” *O’Reilly*, 477 F.3d at 235. For general permits, this review requires consideration of, among other things, all cumulative impacts from past incarnations of the permit. *See Kentucky Riverkeeper, Inc. v. Rowlette*, 714 F.3d 402, 411 (6th Cir. 2013) (Corps reauthorization of nationwide general permit arbitrary and capricious where NEPA review “omitted the present effects of past actions from its cumulative-impact analysis); *see also Wyoming Outdoor Council v. U.S. Army Corps of Eng’rs*, 351 F. Supp.2d 1232, 1243 (D. Wyo. 2005) (“The Corps’ failure to assess ... the cumulative impacts of [a regional general permit] on environmental resources other than wetlands is arbitrary and capricious.”).

In the case of NOD-13’s reissuance, cumulative impacts are particularly in need of review. For example, since at least 2000, the Corps has applied NOD-13 to authorize numerous wetlands destruction projects near Interstate-10 on the east side of the Atchafalaya Basin, impacting the natural hydrology of the area. Moreover, many of the projects authorized under NOD-13 have not been removed or restored as the provisions of NOD-13 requires – increasing actual impacts to levels beyond those considered for any earlier issuance of NOD-13. Moreover, the Corps has failed to perform even an Environmental Assessment under NEPA since, at least, its original issuance in 1981. Therefore, Petitioners request the Corps reverse its decision and perform a NEPA analysis before reissuing General Permit NOD-13.

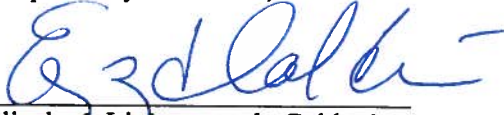
Conclusion

For the reasons stated above, Petitioners, the Atchafalaya Basinkeeper and the Louisiana Crawfish Producers Association-West, respectfully requests the Corps *1)* issue public notice for General Permit NOD-13 MVN-2007-01994-WNN (“NOD-13”), *2)* perform a complete environmental review under the provisions of the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4332, *et seq.*, for NOD-13, and *3)* reconsider and reverse its own decision to re-issue NOD-13 so as to avoid its implementation without proper notice or environmental review. Petitioners thank the Corps for its attention to this request.

Prepared in substantial part by,

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