

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

**TEXAS HEALTH AND
ENVIRONMENT ALLIANCE, INC.,**

Plaintiff,

v.

**UNITED STATES
ARMY CORPS OF ENGINEERS,**

Defendant.

Civil Case No. _____

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

Plaintiff Texas Health and Environment Alliance, Inc. (“THEA”), by and through its undersigned attorneys, alleges as follows:

I. INTRODUCTION

1. This is a civil suit brought against Defendant United States Army Corps of Engineers (“USACE”) under the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (“APA”); the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370(a) (“NEPA”); the implementing regulations for NEPA, 40 C.F.R. §§ 1500-1508 (“NEPA Regulations”); regulations issued by the USACE to implement NEPA and the NEPA Regulations, 33 C.F.R. pt. 230 (“USACE NEPA Regulations”); and the United States Army Corps of Engineers’ permitting regulations, 33 C.F.R. pts. 320, 322, and 325 (“USACE Permitting Regulations”), in which THEA seeks declaratory and injunctive relief, and other relief the Court deems proper, to remedy USACE’s violations of federal law related to its issuance of “Letter of Permission for Department of the Army Permit Application

No. SWG-2015-0855”¹ to Holtmar Land, LLC (hereinafter “Letter of Permission”). *See* Letter of Permission and Memorandum of Record, attached as Exhibit A.

2. A letter of permission is a permit granted through an abbreviated permitting process, which omits a formal environmental assessment and public notice and comment period. Under the USACE Permitting Regulations, a letter of permission may only be granted where (1) “the proposed work would be minor,” (2) “would not have significant individual or cumulative impacts on environmental values, and” (3) “should encounter no appreciable opposition.” 33 C.F.R. § 325.2(e)(1)(i). Here, despite significant proposed work, the potential for significant environmental impacts, and appreciable opposition to the proposed project, USACE improperly granted the Letter of Permission using the abbreviated process.

3. Holtmar Land, LLC submitted a permit application to USACE seeking approval to construct and operate a barge facility in the San Jacinto River (“Project”). The Project would involve dredging of 15,000 cubic yards of sediment material from 2.5 acres of the San Jacinto River (“River”) sediments, removal of rip-rap and debris, and the installation of moorings and 576-foot-long bulkhead, as well as discharging the fill material in an area upland disposal site (“Upland Disposal Site”), located on 5 acres of a 40-acre tract, near Devers, in Liberty County, Texas. *See* Interagency Coordination Notice (“ICN”) for Letter of Permission (Aug. 29, 2023), at 2, attached as Exhibit B. The Project site is located along the San Jacinto River at 17525, 17601, 17603, 17605, and 17607 River Road in Channelview, Harris County, Texas, within the San Jacinto River Waste Pit Superfund Site Area of Concern and a FEMA Floodway Zone (“Project Site”).

4. The San Jacinto River is a valuable water resource in the State of Texas and the United States for recreation, fishing, wildlife habitat, and commercial navigation.

¹ *See generally* U.S. Army Corps of Engineers, Galveston District, Letter of Permission and Memorandum of Record for Permit SWG-2015-0855 (Apr. 11, 2024) (hereinafter “Letter of Permission”).

5. In the middle of the River rests mounds of toxic waste known as the San Jacinto River Waste Pit Superfund Site (“SJRW Site”). The SJRW Site is located in Harris County in the San Jacinto River near Interstate 10, and consists of two sets or impoundments, or pits, that were used in the 1960s for disposal of solid and liquid pulp and paper mill wastes contaminated with hazardous substances such as dioxins and furans, as well as the surrounding areas containing contaminants that have migrated from the impoundments.

6. Together, the United States Environmental Protection Agency (“EPA”), the Texas Commission on Environmental Quality, (“TCEQ”), and the USACE designated an “Area of Concern” around the Superfund Site, which includes the area in which Holtmar Land intends to construct its barge facility.

7. The waste pits are currently covered by a temporary cap that has been damaged by various hurricanes, barge strikes, and other disturbances since its construction causing exposure to the underlying waste material. EPA is still working with the responsible parties to develop a final remediation plan for the Site.

8. The San Jacinto River and surrounding habitats, as well as those who live and recreate on the River, remain at risk of exposure to hazardous substances from the Site, especially when contaminated sediment within Area of Concern is disturbed.

9. Holtmar Land’s Project Site was the subject of alleged unauthorized activity in 2015, before Holtmar Land submitted a permit application, which USACE later investigated. Months later, Holtmar Land then began the permit application process.

10. The Project went through numerous iterations over the years, with Holtmar Land ultimately submitting five different permit applications to USACE seeking approval of the proposed work. Throughout the entirety of the permit application process, including in connection

with the fifth and final application, there was appreciable public opposition expressed by those concerned with the potential impacts of the Project.

11. Plaintiff THEA and its supporters expressed significant opposition to the USACE about this Project and objected to its approval. *See* discussion *infra* Section V.B.iv. THEA and its supporters have repeatedly expressed concerns to USACE about the potential impacts of Holtmar Land's Project.

12. Potential individual and cumulative impacts of the Project include but are not limited to: the environmental impacts of the dredging and construction process, including the potential for resuspension of and exposure to hazardous substances previously eroded from the SJRWP Site and persisting in the Area of Concern, the risks posed by flooding hazards at the proposed Project Site, and impacts from the increased barge traffic in this portion of the River resulting from the operation of Holtmar Land's barge fleeting facility.

13. Despite the potential environmental impacts of the Project and the significant amount of public opposition expressed to the agency, the USACE continued to drive Holtmar Land's permit applications through the "fast-track" letter of permission process, rather than comply to the USACE's own permitting procedure requirements, as well as with NEPA and the NEPA regulations.

14. As stated above, USACE is authorized to use the letter of permission alternative procedures only where (1) "the proposed work would be minor," (2) "would not have significant individual or cumulative impacts on environmental values, and" (3) "should encounter no appreciable opposition." 33 C.F.R. § 325.2(e)(1)(i). These requirements are clearly not satisfied here.

15. USACE knew of the potential environmental impacts of the Project yet deviated from appropriate permitting procedures and instead elected to follow the letter of permission alternative procedure to approve Holtmar Land's Project anyway. In doing so, the agency thereby failed to conduct an environmental assessment or an environmental impact statement, as required by the USACE Permitting Regulations, as well as NEPA and the NEPA Regulations.

16. USACE was and is aware of the widespread and overwhelming public opposition to the Project. The agency nonetheless erroneously chose to instead implement the letter of permission alternative procedure to approve Holtmar Land's Project. In granting the Letter of Permission, the USACE failed to provide proper public notice and an opportunity to comment, as required by the USACE Permitting Regulations, as well as NEPA and the NEPA Regulations.

17. In granting the Letter of Permission, USACE also failed to conduct a public interest review, including a consideration of conservation, general environmental concerns, wetlands, fish and wildlife values, flood hazards, navigation, recreation, water quality, safety, the needs and welfare of the people, and more. 33 C.F.R. § 320.4(a).

18. In granting the Letter of Permission, USACE also neglected to fulfill additional requirements it is subject to when granting permits for work within the SJRWP Site Area of Concern. For example, the USACE did not properly follow the Permit Evaluation Requirement Process in collaboration with the TCEQ to ensure sampling was conducted and verified at Holtmar Land's Project Site. *See infra* ¶ 136.

19. In granting the Letter of Permission, rather than following the USACE Permitting Regulations, NEPA, NEPA Regulations, USACE Permitting Regulations, and the USACE Permit Evaluation Requirement Process, USACE improperly used the letter of permission procedures and skipped over material steps intended to ensure that federal agencies ground decisions in sound

science that are protective and human health and the environment and recognizes that the public may have important ideas and information that can assist federal agency decisions to reduce potential harms and enhance ecological, social, and economic well-being.

20. USACE's decision to issue the Letter of Permission to Holtmar Land was arbitrary, capricious, and otherwise not in accordance with law. The USACE's issuance of the Letter of Permission without conducting an environmental assessment, without providing proper public notice, and without conducting a public interest review was arbitrary, capricious, and otherwise not in accordance with law.

21. Accordingly, THEA requests that the Letter of Permission be revoked. Further, THEA requests that any future permit applications related to the Holtmar Land Project be required to follow the USACE Permitting Regulations, NEPA, NEPA Regulations, the 2009 Permit Evaluation Requirement Process, and other applicable permitting requirements and procedures.

II. JURISDICTION AND VENUE

22. This Court has subject matter jurisdiction over the parties and this action pursuant to 28 U.S.C. § 1331 (federal question), § 2201 (declaratory relief), § 2202 (injunctive relief), § 1346(a)(2) (civil action against the United States), and 5 U.S.C. §§ 701-705 (APA), because this case arises under the laws of the United States and involves the United States as a defendant.

23. Venue of this action is proper in this Court under 28 U.S.C.A. § 1391(e) and 5 U.S.C. § 703, because a substantial part of the events or omissions giving rise to the claims occurred, and the property that is the subject of the action, is situated in this District and Division.

III. PARTIES

24. Plaintiff THEA is a nonprofit organization dedicated to protecting public health and the environment by engaging, educating, and empowering impacted communities to advocate

effectively for the cleanup of historical contamination. It is organized and exists under the laws of the State of Texas, with its principal office in Houston, Texas. THEA has built a coalition of many residents and local community members. THEA and its supporters played a major role in the submittal of more than 58,000 comments to the EPA as part of its procedures for determining the Record of Decision (“ROD”) for the SJRWP Site. THEA’s supporters attend regular meetings; participate in advocacy and educational campaigns, including letter writing and phone banking; serve on the board of directors; and gather public health data through surveys; and publish informational resources related to the health impacts of pollution and toxic contamination from the SJRWP Site, all of which is critical to supporting THEA’s mission and the interests of its supporters.

25. THEA and its supporters have long worked, neighborhood-by-neighborhood, to clean up toxic chemicals in Houston and Harris County, with a focus on Superfund sites in the area. THEA’s work is particularly focused on the San Jacinto River Waste Pits Superfund Site. THEA and its supporters have worked to educate communities in the area about the SJRWP Site and its potential impacts, advocate for removal of toxic substances from the Site, and organize supporters and community members to advocate for further action to protect public health and the environment.

26. THEA supporters live near, recreate on, and regularly visit the area and waters near Holtmar Land’s Project site, including, but not limited to, the San Jacinto River. THEA and its supporters use and rely on the River for educational, recreational, aesthetic, and other pursuits. THEA and its supporters frequently travel to and will continue to travel to the River and have derived and will continue to derive substantial benefit and enjoyment from the River and its environs.

27. THEA and its supporters are injured by USACE's violations of NEPA and the APA. Specifically, THEA supporters have been severely affected by the USACE's approval of the barge fleeting facility to be constructed in the SJRWP Site Area of Concern, in and adjacent to the areas where THEA supporters live and recreate.

28. THEA and its supporters are harmed and threatened by USACE's approval of the Letter of Permission allowing construction and operation of Holtmar Land's Project, which was issued without completing an environmental assessment or a public interest review, and without providing for proper public notice and comment.

29. Irreparable harm would result of USACE were to allow construction and operation of the Project to take place.

30. THEA and its supporters are concerned about and have an interest in eliminating the risk from the discharge and/or release of pollutants from the SJRWP Site into the San Jacinto River, as well as into nearby communities and neighborhoods.

31. THEA and its supporters are concerned about and have an interest in dredging activities within the San Jacinto River, and specifically within the SJRWP Site Area of Concern. The SJRWP Site was uncontrolled in the river for decades and it is unknown where exactly hazardous substances from the Site was deposited as the northern pit was freely in contact with the River for many years. Dredging activities, including the activities allowed pursuant to the Letter of Permission, threatens to uncover, move, resuspend into the water column and otherwise disturb hazardous substances from within the SJRWP Area of Concern, thus increasing the risk of exposure to these hazardous substances to the environment and to the public, including THEA and its supporters.

32. THEA and its supporters are also concerned about barge activity in the San Jacinto River. In addition to risks to air and water quality,² increased barge traffic presents risks to the SJRWP Site, Interstate-10, homes in Channelview's River Bottom and the riverfront homes in Highlands. Barge collisions are especially dangerous near the Project site given the facility's proximity to the SJRWP Site. A barge collision at or near the Superfund site could result in catastrophic releases of unremediated contaminants into the water column. This concern was realized in Tropical Storm Imelda when nine (9) barges broke loose on the river, north of the Interstate, and a loaded vessel struck and beached on the SJRWP Site, causing damage to the cap intended to protect the public and the environment from exposure to hazardous substances within the SJRWP Site. Another collision would have disastrous consequences to water quality, marine and riverine fishes and mammals, and human health. Holtmar Land's barge fleeting facility will invite more barges to this sensitive region of the San Jacinto River and the SJRWP Superfund site.

33. Barge activity is also known to cause impacts to air quality in the Houston Ship Channel.

34. THEA has invested substantial time and organizational resources into environmental and public health advocacy, educating the public, and compiling information about the risks associated with Holtmar Land's Project, including to the environmental, recreational, and aesthetic interest that THEA and its supporters have in the San Jacinto River and surrounding areas. The organization's advocacy related to the River and the SJRWP Site takes the form of mobilizing local communities, gathering public health data through surveys, and publishing informational resources related to the health impacts of pollution, toxic contamination, and climate change. More

² EASTERN RESEARCH GROUP, INC., *Barge Emission Estimates: Final Report* (Aug. 31, 2010), https://wayback.archive-it.org/414/20210527185456/https://www.tceq.texas.gov/assets/public/implementation/air/am/contracts/reports/ei/5820783985FY1002-20100831-ergi-barge_emission_estimates.pdf.

specifically, THEA has significant concerns about the environmental and public health impacts of the Project, which would mobilize contaminated sediment into the water column, threaten wildlife habitats, increase the risk of exposure to hazardous waste, increase barge traffic, and cause additional noise and aesthetic disturbances. The efficacy and impact of THEA's work has been frustrated by the USACE's failure to comply with the APA, NEPA, NEPA Regulations, and USACE Permitting Regulations.

35. THEA and its supporters' injuries are fairly traceable to the USACE's failure to: fully assess the environmental impacts of the Project, ensure the sediment at the Project Site is properly and timely tested for contaminants, consider and select a project alternative with less harmful effects; provide proper public notice and comment, including the consideration of the same in making its decision; and conduct a public interest review prior to making the decision to issue the Letter of Permission. These injuries are actual, direct, concrete, and irreparable, as money damages cannot adequately remedy these injuries once they occur. THEA's injury would be rectified by an order from this Court granting the declaratory and injunctive relief requested herein.

36. Defendant USACE is an agency of the United States of America, which has been delegated responsibility by the Department of the Army, for, among other things, construction, management and operation of various rivers, lakes and other water resources of the United States of America, and the issuance, modification and revocation of permits relative to various activities taken or proposed to be taken on waters of the United States and its tributaries. The USACE is an agency within the United States Department of the Army, which, in turn, is an agency with the United States Department of Defense, all of which are agencies of the United States of America. As a federal agency, the USACE must comply with federal laws including NEPA and the APA. The Letter of Permission for the dredging and construction of the barge fleeting facility in the San

Jacinto River was approved by the USACE's Galveston District, which is located at 2000 Fort Point Road, Galveston, Texas.

IV. STATUTORY AND REGULATORY BACKGROUND

A. Administrative Procedure Act

37. Under the APA, a Court must “hold unlawful and set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” U.S.C. § 706(2)(A).

38. The APA authorizes any person who has been adversely affected by an agency action to seek judicial review of the action. 5 U.S.C. § 702. The APA provides a cause of action to challenge agency actions “made reviewable by statute,” or final actions “for which there is no other adequate remedy in a court.” *Id.* § 704.

B. Rivers and Harbors Act

39. Under Section 10 of the Rivers and Harbors Act (“RHA”), 33 U.S.C. § 403, a permit issued by the USACE is required for work or structures affecting navigable waters of the United States.

40. Under USACE regulations, specifically 33 C.F.R. § 320.2(b) and § 322, “[t]he construction of any structure in or over any navigable water of the United States, the excavating from or depositing of material in such waters, or the accomplishment of any other work affecting the course, location, condition, or capacity of such waters is unlawful unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army.”

C. USACE Permitting Procedures

41. The procedures for processing Department of Army permits are contained in 33 C.F.R. pt. 325 and appendices thereto. Special procedures and additional information are contained

in 33 C.F.R. pts. 320 through 327 and part 330. The applicable procedural requirements for the permit at issue in this case are described below.

i. Standard Permitting Procedures

42. Under the standard permitting procedures, “[w]hen an application for a permit is received the district engineer shall immediately assign it a number for identification, acknowledge receipt thereof, and advise the applicant of the number assigned to it.” Then, the district engineer “shall review the application for completeness, and if the application is incomplete, request from the applicant within 15 days of receipt of the application any additional information necessary for further processing.” 33 C.F.R. § 325.2(a)(1).

43. Once the application is deemed complete, the district engineer shall “issue a public notice as described in 33 C.F.R. § 325.3, unless specifically exempted by other provisions of this regulation.” 33 C.F.R. § 325.2(a)(2).

44. The public notice will be issued within 15 days of receipt of all information required to be submitted by the applicant in accordance with 33 C.F.R. § 325.1(d). 33 C.F.R. § 325.2(d)(1).

45. “The comment period on the public notice should be for a reasonable period of time within which the interested parties may express their views concerning the permit.” 33 C.F.R. § 325.2(d)(2).

46. “The 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).

47. The notice must include “sufficient information to give a clear understanding of the nature and magnitude of the activity to generate meaningful comment.” 33 C.F.R. § 325.3(a) (listing specific items that should be included in the public notice).

48. “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 appropriate Indian Tribes or tribal representatives, to concerned Federal agencies, to local, regional and national shipping and other concerned business and conservation organizations, to appropriate River Basin Commissions, to appropriate state and areawide clearing houses as prescribed by OMB Circular A-95, 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, to the U.S. Senators and Representatives for the area where the work is to be performed, the field representative of the Secretary of the Interior, the Regional Director of the Fish and Wildlife Service, the Regional Director of the National Park Service, the Regional Administrator of the Environmental Protection Agency (EPA), the Regional Director of the National Marine Fisheries Service of the National Oceanic and Atmospheric Administration (NOAA), the head of the state agency responsible for fish and wildlife resources, the State Historic Preservation Officer, and the District Commander, U.S. Coast Guard.” 33 C.F.R. § 325.3(d).

49. “The district engineer will consider all comments received in response to the public notice in his subsequent actions on the permit application. Receipt of the comments will be acknowledged, if appropriate, and they will be made a part of the administrative record of the application.” 33 C.F.R. § 325.2(a)(3).

50. “The district engineer may also offer Corps regulatory staff to be present at meetings between applicants and objectors, where appropriate, to provide information on the process, to mediate differences, or to gather information to aid in the decision process.” 33 C.F.R. § 325.2(a)(3).

51. “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.” 33 C.F.R. § 325.2(a)(4).

52. “The district engineer will follow Appendix B of 33 CFR part 230 for environmental procedures and documentation required by the National Environmental Policy Act of 1969.” 33 C.F.R. § 325.2(a)(4).

53. Only where a permit application satisfies the requirements of a letter of permission under 33 C.F.R. § 325.2(e)(1) and 33 C.F.R. § 325.5(b)(2) will it be excluded from NEPA documentation requirements. 33 C.F.R. Part 325, App. B (6)(a).

54. “The district engineer will also evaluate the application to determine the need for a public hearing pursuant to 33 C.F.R. Part 327.” 33 C.F.R. § 325.2(a)(5).

55. “A public hearing will be held in connection with the consideration of a DA permit application or a Federal project whenever a public hearing is needed for making a decision on such permit application or Federal project.” 33 C.F.R. § 327.4(a).

56. “In case of doubt, a public hearing shall be held.” 33 C.F.R. § 327.4(c).

57. Pursuant to the USACE Permitting Regulations, 33 C.F.R. § 320.4(a)(1), “[t]he decision whether to issue a permit will be based on an evaluation of the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest.”

58. “Evaluation of the probable impact which the proposed activity may have on the public interest requires a careful weighing of all those factors which become relevant in each particular case.” *Id.* “The benefits which reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments.” *Id.* “The decision whether to authorize a proposal, and if so, the conditions under which it will be allowed to occur, are therefore

determined by the outcome of this general balancing process. That decision should reflect the national concern for both protection and utilization of important resources.” *Id.*

59. “All factors which may be relevant to the proposal must be considered including the cumulative impacts thereof: among those are conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership and, in general, the needs and welfare of the people.” *Id.*

60. The following criteria will be considered in the evaluation of every application: (i) the relative extent of the public and private need for the proposed structure or work; (ii) where there are unresolved conflicts as to resource use, the practicability of using reasonable alternative locations and methods to accomplish the objective of the proposed structure or work; and (iii) the extent and permanence of the beneficial and/or detrimental effects which the proposed structure or work is likely to have on the public and private uses to which the area is suited. 33 C.F.R. § 320.4(a)(2).

61. “After all above actions have been completed, the district engineer will determine in accordance with the record and applicable regulations whether or not the permit should be issued.” 33 C.F.R. § 325.2(a)(6).

62. The district engineer “shall prepare a statement of findings (SOF), or, where an EIS has been prepared, a ROD, on all permit decisions. The SOF or ROD shall include the district engineer's views on the probable effect of the proposed work on the public interest. 33 C.F.R. § 325.2(a)(6).

ii. Letter of Permission

63. A letter of permission is an alternative permitting procedure available to division and district engineers under limited circumstances. Specifically, “[l]etters of permission are a type of permit issued through an abbreviated processing procedure which includes coordination with Federal and state fish and wildlife agencies, as required by the Fish and Wildlife Coordination Act, and a public interest evaluation, but without the publishing of an individual public notice.” 33 C.F.R. § 325.2(e)(1).

64. Letters of permission may only be used “[i]n those cases subject to Section 10 of the Rivers and Harbors Act of 1899 where, in the opinion of the district engineer, the proposed work would be minor, would not have significant individual or cumulative impacts on environmental values, and should encounter no appreciable opposition.” 33 C.F.R. § 325.2(e)(1)(i); *see also* 33 C.F.R. § 325.5(b)(2).

iii. Permit Evaluation Requirement Process for USACE Permitting Actions within the SJRWP Site Area of Concern

65. USACE has recognized the sensitive nature of the SJRWP Site Area of Concern and has established special permitting requirements for applicants seeking permits to conduct dredging activities within the Area of Concern.

66. On October 21, 2009, the USACE issued notice of a Permit Evaluation Requirement Process, effective November 1, 2009, for all proposed and existing permits issued under Section 404 of the CWA and Section 10 of the RHA, stating that “[d]ue to the Site being partially located in the San Jacinto River, area permitting activities . . . may impact the Site.” Accordingly, USACE, together with EPA and TCEQ, developed a process under which “all permit applicants and existing permittees within the area of concern must collect certain sampling events to ensure that any activities conducted, especially activities involving dredging or disposal of

dredged materials, do not impact Site investigation and cleanup.”³ See Permit Evaluation Requirement Process, attached as Exhibit C.

67. The Permit Evaluation Requirement Process requires that, prior to USACE issuing a permit for activity within the SJRWP Site Area of Concern, TCEQ verify the fulfillment of certain pre-condition processes, including (1) required sampling procedures, (2) required State of Texas lab certification, (3) required sample number and distribution, and (4) required sample analysis.⁴ See Permit Evaluation Requirement Process, attached as Exhibit C.

68. Depending upon the results of the sampling analyses, TCEQ shall certify to USACE certain conditions to be integrated into the permit set forth in the Permit Evaluation Requirement Process. See Permit Evaluation Requirement Process, Section II.A.5, attached as Exhibit C.

69. “After the TCEQ's evaluation of Section II.A. is submitted to the USACE Galveston District, the USACE will review the information and will add special conditions to Department of the Army permits when such conditions are necessary to satisfy legal requirements under the Clean Water Act and Rivers and Harbors Act of 1899 to otherwise satisfy the public interest requirement. The USACE will only be responsible for enforcing those conditions that are specifically tied to Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899.”⁵ See Permit Evaluation Requirement Process, attached as Exhibit C.

70. In addition, a permit for activity within the Area of Concern shall contain the following language: “By accepting this permit, the permittee agrees to accept potential liability for both response costs and natural resource damages, to the same extent as would be inherent under

³ U.S. ENVIRONMENTAL PROTECTION AGENCY, REGION 6, U.S. ARMY CORPS OF ENGINEERS, GALVESTON DISTRICT, & TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, *Public Announcement: Permit Evaluation Requirement Process* (Oct. 21, 2009) (hereinafter “Permit Evaluation Requirement Process”).

⁴ *Id.* at Section II.A.

⁵ *Id.* at Section II.B.I.

the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) as amended (42 U.S.C. 9601 et. seq.). Further, the permittee agrees that this permit does not exclude the permittee from liability under the CERCLA, nor does the permit waive any liability for response costs, damages, and any other costs that may be assessed under the CERCLA.”⁶ See Permit Evaluation Requirement Process, attached as Exhibit C.

D. NEPA and NEPA Regulations

71. Pursuant to the USACE Permitting Regulations, “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.” 33 C.F.R. § 325.2(a)(4). The preparation of an environmental assessment or an environmental impact statement is governed by NEPA and its regulations.

72. NEPA is our “basic national charter for the protection of the environment.” 40 C.F.R. § 1500.1. It was enacted “to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of [humans],” 42 U.S.C. § 4321; to ensure that the federal government uses all practicable means to “assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings[;]” and to “attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences.” 42 U.S.C. § 4331(b).

73. According to the White House Council on Environmental Quality (“CEQ”), the federal agency responsible for implementing NEPA:

NEPA was a statute ahead of its time, and it remains relevant and vital today. It codifies the common-sense and fundamental idea of “look before you leap” to guide agency decision making, particularly in complex and consequential areas, because conducting sound environmental analysis before actions are taken reduces

⁶ *Id.* at Section II.B.

conflict and waste in the long run by avoiding unnecessary harms and uninformed decisions. It establishes a framework for agencies to ground decisions in sound science and recognizes that the public may have important ideas and information on how Federal actions can occur in a manner that reduces potential harms and enhances ecological, social, and economic well-being.

87 Fed. Reg. 23,453 (April 20, 2022).

74. To achieve those goals and policies, NEPA requires federal agencies to determine whether a proposed major federal action is likely to have significant environmental effects.

75. To determine whether an action is likely to have a significant impact on the environment and thus whether an EIS is required, agencies must take a hard look at the context of the project's potential impacts by analyzing 1) "the potentially affected environment" and 2) the "degree of the effects of the action." 40 C.F.R. § 1501.3(b). When analyzing the degree of the effects of the action, the agency should consider: 1) short and long-term effects; 2) beneficial and adverse effects; 3) effects on public health and safety; and 4) effects that would violate Federal, State, Tribal, or local law protecting the environment. *Id.* § 1501.3(b)(2).

76. If the environmental effects of a proposed federal action are likely not significant or the environmental impact is unknown, agencies must prepare an environmental assessment ("EA"). 40 C.F.R. § 1501.3(a)(2). An EA shall briefly discuss the (i) "[p]urpose and need for the proposed agency action; (ii) [a]lternatives as required by § 102(2)(H) of NEPA; and (iii) environmental effects of the proposed action and alternatives." 40 C.F.R. § 1501.5(c)(2)(i)-(iii); *see also* 33 C.F.R. § 230.10.

77. If the EA demonstrates that the action is not likely to significantly affect the environment, then the agency must prepare a finding of no significant impact ("FONSI"). 40 C.F.R. §§ 1501.6(a), 1501.5(c); *see also* 33 C.F.R. § 230.11. An agency may only issue a FONSI for actions with absolutely no significant effects. *See* 40 C.F.R. § 1508.13. If an action *may* have

a significant effect on the environment, or if there are substantial questions as to whether it may, an EIS must be prepared. 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1502.3.

78. If the agency determines that the federal action will likely significantly affect the human environment, it must prepare an environmental impact statement (“EIS”). 42 U.S.C. § 4332(2)(C); 40 C.F.R. §§ 1501.5(c), 1501.3(a)(3).

79. An agency must accurately and transparently analyze the environmental impact of its entire “action.” 42 U.S.C. § 4332; 40 C.F.R. § 1501.3(b). This analysis must be based on accurate, high-quality information. 40 C.F.R. § 1502.23 (agencies must “ensure the professional integrity, including scientific integrity, of the discussions and analyses in environmental documents”).

80. The environmental review must discuss a proposed action's direct, indirect, and cumulative effects. 40 C.F.R. §§ 1502.16, 1508.9(b). It must include a reasonable range of alternatives, 42 U.S.C. § 4332(2)(C)(iii), (E); 40 C.F.R. § 1508.9(b), and provide “a clear basis for choice among options by the decisionmaker and the public.” 40 C.F.R. § 1502.14.

81. Public participation is an important part of the NEPA process. Pursuant to the regulations, the agency must “make diligent efforts to involve the public in preparing and implementing their NEPA procedures” by (i) providing public notice, (ii) holding public hearings, particularly if there is “substantial environmental controversy concerning the proposed action,” (iii) soliciting appropriate information from the public, and (iv) explaining where members of the public can obtain more information on the proposed action. 40 C.F.R. § 1506.6.

V. FACTUAL BACKGROUND

A. The San Jacinto River and the San Jacinto River Waste Pits Superfund Site

82. The San Jacinto River flows through eastern Harris County, Texas into the Houston Ship Channel where it then runs into Galveston Bay. In Harris County alone, the San Jacinto River watershed covers about 487 square miles.⁷ The San Jacinto River is a valuable water resource in the State of Texas and the United States for recreation, fishing, wildlife habitat, and commercial navigation.

83. The San Jacinto River is considered a “navigable water” within the meaning of the Clean Water Act, 33 U.S.C. §1344, and a “navigable water of the United States” within the meaning of §§ 10 and 13 of the Rivers and Harbors Act of 1899, 33 U.S.C. §§ 403, 407.

84. The SJRWP Site is located in Harris County on the San Jacinto River near Interstate 10 (“I-10”), east of Houston.

85. The SJRWP Site consists of two sets or impoundments, or pits, that were built in the 1960s for disposal of hazardous waste, including solid and liquid pulp and paper mill wastes contaminated with dioxins and furans, as well as the surrounding areas containing sediments and soil impacted by waste materials disposed of in the impoundments.⁸ See EPA Record of Decision: SJRWP at 14, attached as Exhibit D.

86. The northern impoundments are 14 acres in size and are partially submerged in the San Jacinto River and abut its western bank.⁹ The southern impoundment is about 20 acres in size and is located on a peninsula south of I-10.

⁷ HARRIS COUNTY FLOOD CONTROL DISTRICT, *San Jacinto River*, <https://www.hcfed.org/Activity/Projects/San-Jacinto-River> (last visited Nov. 20, 2024).

⁸ U.S. EPA, RECORD OF DECISION: SAN JACINTO RIVER WASTE PITS, 5 (Oct. 2017), <https://semspub.epa.gov/work/06/100003945.pdf> [hereinafter ROD].

⁹ U.S. EPA, *San Jacinto River Waste Pits Superfund Site*, <https://www.epa.gov/tx/sjrwp> (last visited Nov. 20, 2024).

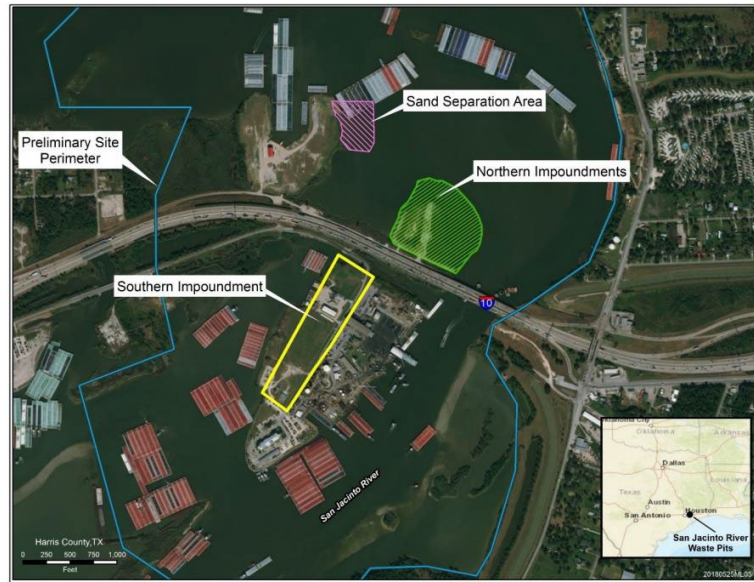


Figure 1 - Aerial map depicting the SJRWP Site. The site perimeter is outlined in blue, the northern impoundments in green, and the southern impoundments in yellow.¹⁰

87. Physical changes at the site in the 1970s and 1980s resulted in partial submergence of the northern impoundments and exposure of the contents of the northern impoundments to surface waters.

88. The primary contaminants of concern include dioxins and furans, and polychlorinated biphenyls (“PCBs”).¹¹ See EPA Record of Decision: SJRWP at 14, attached as Exhibit D. According to an EPA Memorandum, dioxin concentrations as high as 41,300 parts per trillion have been found in soil and sediment samples collected from the northern impoundments and from river sediments near the Site.¹² Sediments contaminated with high levels of dioxins have been found in the San Jacinto River both upstream and downstream from the impoundments due to tidal influences.¹³ See EPA Record of Decision: SJRWP at 34, attached as Exhibit D.

¹⁰ *Id.*

¹¹ ROD, *supra* note 8, at 5.

¹² U.S. EPA, MEMORANDUM REQUEST FOR A TIME CRITICAL REMOVAL ACTION AT THE SAN JACINTO RIVER WASTE PITS SITE, HARRIS COUNTY, TEXAS, 3 (Apr. 2, 2010), <https://semspub.epa.gov/work/06/610993.pdf>.

¹³ *Id.* at 3.

89. Human exposure to dioxins and PCBs have been associated with a range of toxic effects, including immunotoxicity, developmental and neurodevelopmental effects, and hormone changes that can cause a variety of health symptoms.¹⁴ Developmental effects are the most sensitive health outcome, making children, particularly breast-fed infants, the population most at risk.¹⁵

90. Dioxins and PCBs are also bioaccumulative and biomagnified compounds, meaning that the toxins build up in an organism's tissue over time and increase concentration along higher levels of the food chain.

91. Sediment, fish, and crab samples collected near the Site in August 1993 and May 1994 indicated elevated dioxin and furan levels. Between 2002 and 2004, the TCEQ conducted a study of total maximum daily loads ("TMDLs") for dioxins and furans in the Houston Ship Channel. Sediment, fish, and crab samples collected in the summer of 2002, fall 2002, spring 2003, and spring 2004 indicated the continued presence of elevated dioxin and furan contamination in the San Jacinto River surrounding the Site. Results indicated that the human health-based standard was exceeded by 97 percent of fish samples and 95 percent of crab samples.¹⁶ See EPA Record of Decision: SJRWP at 17, attached as Exhibit D.

92. Since 1990, the Texas Department of State Health Services has issued fish advisories for the Houston Ship Channel, including the San Jacinto River below the Lake Houston dam, recommending that persons do not consume any blue crabs or any species of fish from the area. The contaminants of most concern in the local seafood are PCBs and dioxins. The primary

¹⁴ WORLD HEALTH ORGANIZATION, *Exposure to Dioxins and Dioxin-Like Substances: A Major Public Health Concern*, 1 (2010), <https://iris.who.int/bitstream/handle/10665/329485/WHO-CED-PHE-EPE-19.4.4-eng.pdf?sequence=1>.

¹⁵ *Id.*

¹⁶ ROD, *supra* note 8, at 8.

source of the contamination was unknown until the rediscovery in 2005 of the historic disposal site now known as the SJRWP Site.

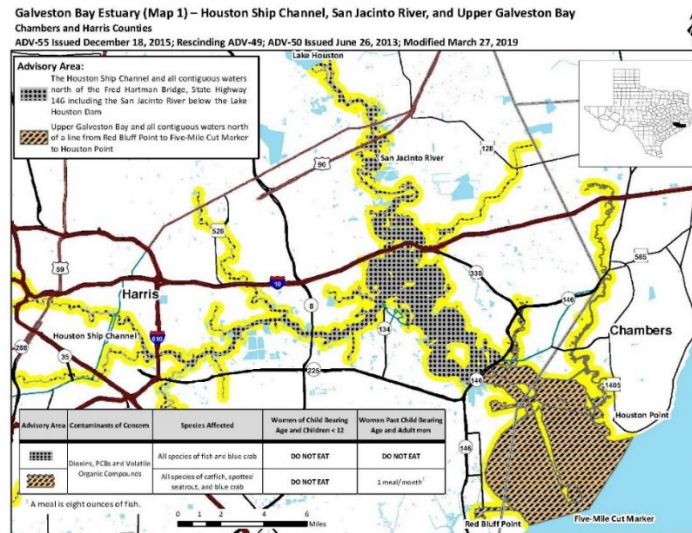


Figure 2 - Map of the Houston Ship Channel and Upper Galveston Bay that are impacted by contaminants of concern, including dioxins, PCBs, and volatile organic compounds.¹⁷

93. Between 2005 and 2006, TCEQ conducted a preliminary assessment and screening site inspection at the SJRWP Site. This assessment identified the surface water pathway as the primary pathway of concern. Through the collection and assessment of sediment samples, the surface impoundments were identified as the source of hazardous substances at the site.

94. Based on the findings in the preliminary assessment, the Site was proposed for listing on the National Priorities List on September 19, 2007, and was placed on the list effective April 18, 2008.

¹⁷ THEA, *Can I Eat What I Catch?*, [https://www.txhea.org/blog/can-i-eat-what-i-catch#:~:text=For%20more%20than%2030%20years,Houston%20Dam\)%2C%20and%20all%20connected](https://www.txhea.org/blog/can-i-eat-what-i-catch#:~:text=For%20more%20than%2030%20years,Houston%20Dam)%2C%20and%20all%20connected) (last visited Nov. 5, 2024); see also TEXAS DEPT. OF STATE HEALTH SERVICES, *Fish Consumption Advisories in Harris County*, (Jan. 2014), <https://semsub.epa.gov/work/06/9563731.pdf>.

95. The Area of Concern for the SJRWP Site includes the area south of longitude -95.063977 and latitude 29.833028 and north of longitude -95.086488 and latitude 29.761463 as depicted by the red line in the map below:



Figure 3 - Area of Concern: San Jacinto Waste Pits, Harris County, TX.

See Permit Evaluation Requirement Process at 3, attached as Exhibit C.

96. A release of the hazardous substances from the northern impoundments was identified through site assessment activities conducted by EPA and TCEQ in 2006. Site assessment activities included surface water and sediment sampling for the presence of dioxins and furans. Further, during a site visit by EPA conducted on March 1, 2010, releases of hazardous substances were observed entering the San Jacinto River from the northern impoundments.

97. A “Time Critical Removal Action” (“TCRA”) to temporarily address the hazardous substances associated with the northern impoundments was completed in July 2011. The TCRA included the installation of geotextile and geomembrane underlayments in certain areas and a temporary armored cap. The purpose of the temporary cap was to prevent hazardous substances from washing into the river during the site characterization and remedy selection process and to

prevent the recreational use of the northern impoundments that had been occurring. This cap experienced repeated damage and repairs since its construction.

98. Since its completion, documented events have shown that the cap has suffered repeated damages and deficiencies from floods that were less than a 100-year flood event, even though the northern impoundment was designed for a 110-year flood. Repairs to the cap have been performed in July 2012, January 2013, January 2014, December 2015, February 2016, March 2016, and June 2016 since its completion in July 2011.

99. In October 2017, EPA issued a ROD, which presented the selected remedy for the SJRWP Site. The remedy selected in the ROD is intended to address “unacceptable human health risks associated with consumption of fish and direct contact with waste material from the Site. It also addresses Site-related ecological risks to bottom-dwelling organisms from exposure to sediment and waste material.”¹⁸

100. “The overall strategy for addressing contamination at the Site includes excavation and off-site disposal of source materials and contaminated soils from impoundments in and adjacent to the San Jacinto River.”¹⁹ “Institutional Controls will be used to prevent disturbance of certain areas (e.g., dredging and anchoring in the Sand Separation Area, and construction, and excavation in the Southern Impoundment). Monitored natural recovery will be used for sediment in the nearby sand separation area to ensure remedy protectiveness in the aquatic environment.”²⁰

101. As of the date of this filing, remediation of the SJRWP Site is not complete and highly toxic, carcinogenic hazardous substances remain within the San Jacinto River and continue to threaten the marine and riverine environment and wildlife, as well as human health.

¹⁸ ROD, *supra* note 8, at 1.

¹⁹ *Id.*

²⁰ *Id.* at 1-2.

102. “The area [of the SJRWP Site] receives an average of 54-inches of rain annually.”²¹ The Site is affected by tides, winds, waves, and currents resulting from extreme weather conditions such as strong storm winds, flooding, tornadoes, and hurricanes, which may cause a potential release or migration of materials contaminated with dioxins, furans, PBS or other toxins.²²

103. For example, the EPA issued a news release in September 2017 reporting that the agency’s post-Hurricane Harvey inspections found damage to a protective cap at the SJRWP Site that caused exposure of underlying waste material.²³ The EPA’s sediment sampling at fourteen areas showed the dioxin level was at 70,000 ng/kg; for reference, EPA’s recommended clean up level for the site is 30 ng/kg.²⁴

B. Holtmar Land’s Barge Facility Project

104. Since 2015, Holtmar Land has sought to construct and operate a barge facility in the San Jacinto River. Such a project requires a permit pursuant to Section 10 of the RHA. *See* ICN for Letter of Permission at 1, attached as Exhibit B.

105. In November 2015, prior to any permit applications being filed, dredging was observed at the Project Site along the San Jacinto River, northwest of the SJRWP Site. USACE recorded this dredging activity as “potentially unauthorized.” It was after this report that the Project Site was assigned its current reference number (SWG-2015-00855), which has been used for subsequent permit applications.

²¹ *Id.* at 5.

²² *See Id.* at 5.

²³ U.S. EPA, *News Releases from EPA Region 06: EPA Statement – San Jacinto River Waste Pits Superfund Site Data*, (Sept. 28, 2017), <https://www.epa.gov/archive/epa/newsreleases/epa-statement-san-jacinto-river-waste-pits-superfund-site-data.html>.

²⁴ *Id.*

106. Over the course of eight years, Holtmar Land submitted five separate permit applications for this Project, the fifth application being the operable application for purposes of the Letter of Permission.

107. According to USACE, the prior applications “were withdrawn due to lack of applicant providing sufficient information.”²⁵ See Letter of Permission and Memorandum of Record at 19, attached as Exhibit A.

108. Each application of Holtmar Land’s five permit applications has received appreciable public opposition, including the fifth and operable permit application.

109. Despite the potential environmental impacts of the Project and despite significant public opposition to the Project, USACE improperly continued forward with the letter of permission process, failing to abide by the requirements in its own regulations to conduct a NEPA environmental review, provide proper public notice and comment, and conduct a public interest review. Issuing the Letter of Permission was contrary to the USACE’s own regulations that permit the use of the letter of permission process only if the project “should encounter no appreciable opposition.” 33 C.F.R. § 325.2(e)(1)(i).

i. Permit Application History

110. Holmar Land’s first permit application, submitted to USACE on May 3, 2016, proposed to mechanically dredge approximately 50,000 cubic yards of material from a 4.32-acre area at the Project Site. The dredged material was proposed to be placed in uplands on the Project Site.

111. In conjunction with that 2016 application, Holtmar Land conducted sediment testing pursuant to the Public Announcement for the San Jacinto River Waste Pits Superfund Site,

²⁵ Letter of Permission, *supra* note 1, at 19.

dated October 21, 2009. The samples were analyzed for polychlorinated dibenzodioxins and polychlorinated dibenzofurans. The sampling report submitted to TCEQ on August 23, 2016, indicated that one sample exceeded the TCEQ conditions determination of 33 parts per trillion (“ppt”) by 13 ppt, reaching a concentration of 46.2 ppt.

112. Based on these findings, the TCEQ concluded that the dredged material had to be placed in “an upland confined placement area or a hazardous waste landfill.” With these instructions, the USACE, after Interagency Coordination and consultation with professional engineers, found that “the on-site dredged material placement area was determined not to be physically capable of adequately containing the volume of material proposed to be dredged.” The USACE stated that “[t]he design of the upland placement area was not capable of containing the material in a manner that the dredged material would remain physically separated from all waters of the United States.”²⁶

113. This first application for the Holtmar Land Project was withdrawn on December 4, 2017.

114. Holtmar Land filed a second permit application on August 17, 2018. Holtmar Land’s second application proposing a smaller-scale project—dredge approximately 31,000 cubic yards (837,000 cubic feet) of material from a 3.58-acre area of the San Jacinto River—and an alternate site for dumping of the dredged material. The dredged material was proposed to be placed in a scow barge, transported and off loaded into dump trucks for final disposition on a 3.0-acre upland tract, on Parcel Number 16217, on McCullum Park Drive, Beach City, in Chambers County, Texas, approximately 15.28 miles east of the Project site.

²⁶ U.S. ARMY CORPS OF ENGINEERS, GALVESTON DISTRICT, INTERAGENCY COORDINATION NOTICE FOR LETTER OF PERMISSION FOR PERMIT SWG-2015-0855, 3 (Aug. 29, 2023).

115. On December 21, 2018, after USACE issued an Interagency Coordination Notice, and after the agency received several comments regarding the proposed Project, “[the second] application was withdrawn to become a Standard Permit.” See ICN for Letter of Permission at 3, attached as Exhibit B. Despite this determination in the agency’s record to use standard permitting procedures at this point of the application history, Holtmar Land’s application never became a “Standard Permit.” Instead, USACE continued to push Holtmar Land’s subsequent applications through the letter of permission process, despite the significant public opposition that prohibited pursuance of a letter of permission in this situation.

116. Holtmar Land submitted its third permit application for the Project on December 24, 2018. The third application mirrored the second application as it sought to dredge the same amount of material from the same acreage of the San Jacinto River. The proposed upland disposal site also remained the same as the prior application.

117. On January 14, 2019, the USACE issued a notice regarding the third application. The USACE received many public comments in response to this notice, questioning, among other things, the ability of the proposed placement area to keep the dredge material physically contained and separate from any waters of the United States.

118. The third application was withdrawn on February 4, 2019, at the request of the applicant.

119. Holtmar Land submitted its fourth permit application for the Project on January 12, 2021. The fourth application proposed to mechanically dredge approximately 15,000 cubic yards (405,000 cubic feet) of material from a 2.50-acre area of the San Jacinto River, a smaller area than the previous proposal. The disposal location for the dredged material was revised, now proposing placement in an area upland disposal site (“Upland Disposal Site”), a 5.0-acre upland tract lined

with a geosynthetic clay liner at a site approximately 35 miles northeast of the Project Site 3.7 miles north of the City of Devers, in Liberty County, Texas. See ICN for Letter of Permission at 2, attached as Exhibit B.

120. Holtmar Land did not submit additional sediment sampling with its fourth permit application (or the fifth). In his March 3, 2022, email, Brian Bader wrote that it was the USACE's "preference [] that the sediment sampling occur within a year or two prior to filing the permit application."²⁷ Mr. Bader acknowledged that the submitted sediment sampling for the fourth permit application, submitted in January 2021, was performed in 2016.²⁸

121. The fourth application was withdrawn on September 14, 2022.

122. The USACE received a significant number of letters and correspondence from the public and local government opposing Holtmar Land's proposed Project and the USACE's use of the letter of permission procedures in lieu of the standard permitting procedures required by the USACE Permitting Regulations.

123. From the years 2019 to 2022, the timeframe in which the third and fourth applications were under review, USACE received at least 353 letters and correspondence from the public objecting to Holtmar Land's Project and expressing concerns about the impact it would have on the environment. The authors of these objections include not only THEA and THEA supporters, but other community members and entities, including the City of Devers, the Commissioner's Court of Liberty County, and other members of the public.

124. In 2019, THEA supporters and community members submitted 372 letters strongly opposing the Project.

²⁷ *Id.*

²⁸ *Id.*

125. In 2021, THEA supporters and community members submitted 63 letters strongly opposing Holtmar Land's proposed Project.

126. In June of 2022, THEA submitted 100 letters from supporters and local community members opposing Holtmar Land's proposed project and asking that the request for a letter of permission be denied.

127. Many of these letters, particularly those from THEA and its supporters, raised localized concerns about environmental and health impacts of the project and the impacts related to the nearby SJRWP Site.

128. The history of opposition to the various iterations of Holtmar Land's Project is well documented in the public domain.²⁹

ii. Holtmar Land's Fifth and Operative Permit Application

129. Holtmar Land submitted its fifth and operative permit application for the Project on May 17, 2023.

130. USACE knew or should have known that the proposed Project, as described in Holtmar Land's fifth application, would receive appreciable opposition given in part the opposition

²⁹ BLUEBONNET NEWS, *Liberty County officials opposing potential toxic waste dump in Devers, urging residents to get involved* (Mar. 16, 2021), <https://bluebonnetnews.com/2021/03/16/liberty-county-officials-opposing-potential-toxic-waste-dump-in-devers-urging-residents-to-get-involved/>; Emily Foxhall, *Plans to dump possibly toxic sludge reviewed in Beach City*, LONGVIEW NEWS JOURNAL (Feb. 15, 2019), https://www.news-journal.com/plans-to-dump-possibly-toxic-sludge-reviewed-in-beach-city/article_720bd83e-316d-11e9-bd03-7fb80f3f5825.html; Devers Mayor Steve Horelica, *For information on proposed dump sites near the city of Devers*, 6 KFDM (Mar. 17, 2021, 09:39 PM), <https://kfdm.com/news/local/for-information-on-proposed-dump-sites-near-the-city-of-devers>; Carolyn Stone, *Another attempt to install barge moorings in the SJ River*, NORTH CHANNEL STAR (Sep. 14, 2023), https://www.northchannelstar.com/2023/09/another-attempt-to-install-barge-moorings-in-the-sj-river/#google_vignette; NORTH CHANNEL STAR, *San Jacinto River Waste Pits: Superfund News* (Dec. 2018), <https://www.northchannelstar.com/wp-content/uploads/2019/01/SUPERFUND-NEWS-DEC-2018.pdf>; BLUEBONNET NEWS, *Liberty County commissioners sign resolution to oppose dump site proposed for Devers* (Mar. 21, 2021), <https://bluebonnetnews.com/2021/03/21/liberty-county-commissioners-sign-resolution-to-oppose-dump-site-proposed-for-devers/>; Carolyn Stone, *Another attempt to install barge moorings in SJ River*, STAR COURIER (Sept. 14, 2023), <https://www.starcouriernews.com/wp-content/uploads/2023/09/SC-2023-09-14.pdf>.

previously expressed over the course of Holtmar Land's prior permit applications submitted between 2016 and 2022. Indeed, as described below, Holtmar Land's fifth permit application for the Project did receive appreciable opposition.

131. USACE knew or should have known that the proposed Project, as described in Holtmar Land's fifth application, could have significant individual or cumulative impacts on environmental values given in part its location within the SJRWP Site Area of Concern.

132. Despite the well-known opposition to the Project and the potential impacts to environmental values, USACE improperly used the letter of permission procedure, rather than its standard permitting procedures, in granting the Letter of Permission in response to Holtmar Land's fifth permit application, contrary to the requirements of 33 C.F.R. § 325.2(e)(1).

a. Holtmar Land's fifth application and supporting materials did not include an environmental assessment or an environmental impact statement, a public interest review, or other environmental evaluation requirements.

133. Holtmar Land's fifth application and supporting materials did not include an environmental assessment or an environmental impact statement as required by 33 C.F.R. § 325.2(a)(4).

134. USACE made no determination of whether the proposed action was likely to have a significant impact on the environment, or whether an EIS was required. See 40 C.F.R. § 1501.3(b).

135. USACE did not discuss the proposed Project's direct, indirect, or cumulative effects. See 40 C.F.R. §§ 1502.16, 1508.9(b).

136. USACE did not discuss a reasonable range of alternatives to the proposed Projects, 42 U.S.C. § 4332(2)(C)(iii), (E); 40 C.F.R. § 1508.9(b), nor did it provide a "clear basis for choice among options." 40 C.F.R. § 1502.14.

137. USACE did not provide an evaluation of the probable impacts, including cumulative impacts, of Holtmar Land's Project and its intended use on the public interest. 33 C.F.R. § 320.4(a)(1).

138. USACE did not prepare a statement of findings, or, where an EIS has been prepared, a ROD, on its decision to grant Holtmar Land's permit application. USACE's decision did not include the district engineer's views on the probable effect of the proposed work on the public interest. 33 C.F.R. § 325.2(a)(6).

139. The fifth application did not include a verification from TCEQ regarding the fifth application's compliance with the 2009 Permit Evaluation Requirement Process. Nor did the application provide any additional sediment sampling, instead relying on the sampling conducted in 2016, nearly seven years prior. This is contrary to USACE's stated preference that sampling be conducted within two years of the application, and the stated policy of not considering materials submitted with prior applications in its present determinations, as well as the requirements of the Permit Evaluation Requirement Process.

b. USACE did not provide proper public notice and comment for Holtmar Land's fifth permit application.

140. USACE did not provide proper public notice and comment for Holtmar Land's fifth permit application, contrary to 33 C.F.R. § 325.2(a)(2) and 33 C.F.R. § 325.3.

141. USACE did not issue a public notice within 15 days of receipt of all information required to be submitted by the applicant in accordance with 33 C.F.R. § 325.1(d). *See* 33 C.F.R. § 325.2(d)(1).

142. USACE did not provide public notice containing "sufficient information to give a clear understanding of the nature and magnitude of the activity to generate meaningful comment." *See* 33 C.F.R. § 325.3(a).

143. On August 29, 2023, the USACE issued a “Interagency Coordination Notice for Letter of Permission” for Holtmar Land’s fifth Permit Application. The substantive text, method of distribution, and recipients of the ICN cannot be construed as satisfying public notice requirements of USACE regulations at 33 C.F.R. § 325.3.

144. The ICN does not satisfy regulatory notice requirements for many reasons, including in that it does not provide or include the following: (a) “The comment period based on § 325(d)(2);” § 325.3(a)(14); or (b) “A statement that any person may request, in writing, within the comment period specified in the notice, that a public hearing be held to consider the application.” 33 C.F.R. § 325.3(a)(15).

145. Additionally, the agency’s method of distributing the ICN does not satisfy USACE regulatory requirements because the agency did not send notice to adjoining property owners, concerned businesses and conservation organizations, or local news media, as provided in § 325.3(d)(1). Moreover, available evidence illustrates that the USACE did not maintain or include in the record “[a] copy of the public notice with the list of the addresses to whom the notice was sent,” for the ICN, as required by the regulations at § 325.3(d)(3). Finally, the agency did not and has not “update[d] public notice mailing lists at least once every two years,” for either the ICN or any other notices concerning this Project. 33 C.F.R. § 325.3(d)(4).

146. The fifth application documents did not include the referenced attachment of adjacent property owners, but rather, relied upon the adjacent property owners list from the previous application.³⁰ See Tasha Metz: Memorandum for File, attached as Exhibit E.

³⁰ Tasha Metz, MEMORANDUM FOR FILE: ASSIGNMENT FOR APPLICATION EVALUATION ASSISTANCE; AND ADMINISTRATIVE RECORD FOR PERMIT APPLICATION NUMBER: SWG-2015-0855 (Feb. 2, 2024).

147. At least one THEA supporter who continued to live at the same property near the Project Site received notice letters from the USACE for the earliest attempts to permit the project, but did not receive notice of the fifth application.

148. Although the ICN does not qualify as public notice under 33 C.F.R. § 325.3, THEA supporters and other members of the public nonetheless took it upon themselves to request public hearings and submit comments on the Permit Application in response to the ICN.

149. For the most recent fifth Project Application, USACE received at least 135 letters objecting to this Project.

150. THEA supporters alone authored 85 of those letters. Other entities that submitted comments objecting to the Project and/or requesting that the USACE deny Holtmar Land's application include the Harris County Attorney, the County of Liberty, the City of Devers, as well as dozens of other members of the public.

151. On September 12, 2023, THEA submitted a letter to Brian Bader opposing the Project and explaining that the issuance of a Letter of Permission was not an appropriate action because the proposed Project work would not be minor, the Project would have significant individual and cumulative impacts on environmental values, and because the agency had received opposition from a considerable number of people.

152. THEA also submitted a letter to Col. Rhett A. Blackmon of the USACE on December 6, 2023, explaining that a letter of permission was not the appropriate procedure by which to review the applications by Holtmar Land.

153. In these letters, THEA also requested a meeting with USACE to discuss its concerns with the Project, but USACE never agreed to a meeting.

154. Of the comments USACE received, over 55% of the authors requested a public hearing. USACE never agreed to hold a public hearing.

155. USACE did not acknowledge receipt of any public comments, including those from THEA, or demonstrated that it had considered any public comments in its subsequent actions on the permit application. 33 C.F.R. § 325.2(a)(3).

156. Further, despite many requests for a public hearing and the instruction in 33 C.F.R. § 327.4(c) that “[i]n case of doubt, a public hearing shall be held, USACE did not hold a public hearing in connection with Holtmar Land’s fifth permit application.

157. Throughout the lifetime of this Project and its numerous applications, THEA mobilized its supporters and other community members to submit letters to USACE imploring the agency to deny Holtmar Land’s Project.

158. The above numbers demonstrate that public opposition to Holtmar Land’s Project is far greater than simply appreciable; the public opposition here is staggering.

C. USACE Improperly Issued a Letter of Permission Approving Holtmar Land’s Project

159. Despite the potential environmental impacts and the staggering public opposition to the Project, the USACE improperly issued the Letter of Permission procedure in lieu of the standard permitting procedures, omitting material steps critical to protecting public health and the environment.

160. On April 11, 2024, the USACE issued the Letter of Permission for Department of the Army Permit Application No. SWG-2015-00855 under the regulatory authority of Section 10 of the RHA. The Letter of Permission provides the following description of the permitted activity:

The applicant proposes to mechanically remove approximately 475 cubic yards of riprap and debris and mechanically dredge approximately 15,000 cubic yards of

material from a 2.5-acre area of the San Jacinto River to a maximum depth of -12.5 feet below Mean High Water (MHVW). The project also involves the installation of three 36-inch steel monopile moorings within the San Jacinto River and 576.75 linear feet of bulkhead to stabilize the shoreline in two separate areas. The bulkhead is to be placed in uplands at or above the high tide line, and no discharge of fill material will be placed below the high tide line in association with the bulkhead. All dredged material will be deposited and retained in an area that has no waters of the United States (US) and complies with the Texas Commission on Environmental Quality (TCEQ) requirements of an upland confined disposal area. An area located approximately 35 miles northeast of the project site, and approximately 3.7 miles north of Devers in Liberty County, Texas was selected for dredge material disposal. The discharge of dredged or fill material into waters of the US is not authorized.³¹

See Letter of Permission and Memorandum of Record at 18, attached as Exhibit A.

161. The Letter of Permission provides that the “applicant has stated that they have avoided and minimized the environmental impacts by avoiding the discharge of fill material into waters of the US and/or special aquatic sites, including wetlands.”³²

162. Per a statement provided by USACE in an email, only those documents associated with this application are considered in determining whether to grant a letter of permission. *See* Email from USACE: Withdrawn Actions, attached as Exhibit F.

163. The record does not include an environmental assessment, an environmental impact statement, verification from TCEQ regarding the fifth application’s compliance with the Permit Evaluation Requirement Process, or a public interest determination. Nor does the record show that USACE provided for proper public notice and comment.

³¹ Letter of Permission, *supra* note 1, at 18.

³² *Id.*

164. The Letter of Permission was signed by Kristi N. McMillion, Chief, Evaluation Branch, USACE, Galveston District, on April 11, 2023. The USACE's issuance of the Letter of Permission was a final agency action reviewable pursuant to the APA.

VI. CLAIMS FOR RELIEF

COUNT I

The USACE Issued a Letter of Permission to Holtmar Land in Violation of the USACE Permitting Regulations and the APA

165. Plaintiff incorporates herein by reference the foregoing paragraphs into Count I of this Complaint as if fully set out herein.

166. The USACE Permitting Regulations provide that letters of permission may be used as an alternative permitting procedure only if, in the opinion of the district engineer, the proposed work (i) would be minor, (ii) would not have significant individual or cumulative impacts on environmental values, and (iii) should encounter no appreciable opposition. 33 C.F.R. § 325.2(e)(1)(i).

167. The USACE's own criteria for the use of a Letter of Permission was not met in this case because:

- i. Construction of the proposed barge terminal facility could not reasonably be considered a "minor" project. The Project involves the removal of 475 cubic yards of riprap and debris and dredging of 15,000 cubic yards of material from 2.5 acres of the San Jacinto River that is potentially or could potentially become contaminated with dioxins, furans, PCBs and other toxins from the Superfund Site that is less than one mile away. The sediment from the proposed Project site has not been tested for contamination since 2016. Contaminant data from eight years ago is outdated and therefore cannot reasonably be relied upon. The Project also involves the permanent installation of 36-inch steel monopile moorings and a

bulkhead over 576 feet long. The removal of riprap and debris, dredging of thousands of yards of sediment, and installation of moorings and a bulkhead cannot be construed as constituting a “minor” project.

- ii. Construction at the Project site could not reasonably be determined to have an insignificant impact on environmental values. The dredging and construction activities will, at a minimum, (i) increase turbidity of the water in the San Jacinto River, (ii) disturb sediment on the riverbed allowing for material potentially contaminated with dioxins, furans, and PCBs, and other toxins to be released back into the water column, (iii) discharge wastewater, trash, and other debris in the water from vessels involved with construction of the Project, (iv) adversely impact the marine and riverine habitats of the San Jacinto River, (v) present a hazard to navigation along the San Jacinto River, (vi) increase barge traffic, (vii) increase the likelihood of a vessel collision with the impoundments of the SJRWP, particularly the northern pit, and (viii) adversely impact air quality from the release of hazardous gases by the barges and equipment used to dredge and construct the facility, as well as from the barges that will be stored at the terminal once construction is completed.
- iii. The USACE received hundreds of letters and correspondence opposing this Project from local governments, a city attorney, nonprofit organizations, members of the public, as well as THEA, THEA supporters, and THEA community members. For the fifth and most recent application, USACE received 135 letters of opposition, of which THEA organized the submission of 85 of those letters from its supporters and community members. Over half of the total number of letters received during

the fifth application review period also requested a public hearing. Despite the numerous requests, the agency did not hold a public hearing. The public opposition to this Project is significant and the USACE is aware that the public, THEA, its supporters and its community members, share concerns about the potential impact this Project will have on the environment and public health.

168. Based on the criteria for following the letter of permission permitting procedure contained in USACE's own regulations, a Letter of Permission was not appropriate or suitable for this proposed Project.

169. The action of the USACE in issuing Letter of Permission for Department of the Army Permit Application No. SWG-2015-00855 dated April 11, 2024, was not reasonable and was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law, and should be set aside. Plaintiff is entitled to bring causes of action under NEPA, applicable regulations and the APA, 5 U.S.C.A. §§ 702 and 706.

170. There is no other remedy in a court with respect to the USACE's issuance of the Letter of Permission.

171. Plaintiff asks this Court to hold and declare unlawful and set aside the action of the USACE issuing the Letter of Permission for Department of the Army Permit Application No. SWG-2015-00855.

COUNT II

The USACE's Authorization of Holtmar Land's Project without First Completing an Environmental Assessment or Environmental Impact Statement Violated NEPA, the NEPA Regulations, USACE Permitting Regulations, and the APA

172. Plaintiff incorporates herein by reference the foregoing paragraphs into Count II of this Complaint as if fully set out herein.

173. The USACE regulations implementing NEPA govern the agency's review and issuance of permits. USACE regulations require that "[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." 33 C.F.R. § 325.2(a)(4).

174. The work proposed in Holtmar Land's fifth project application did not qualify for a Letter of Permission and does not properly or legally fall within a categorical exclusion.

175. There was no environmental assessment or environmental impact statement prepared by the USACE on the application for the Project.

176. The action of the USACE in issuing the Letter of Permission authorizing dredging and construction of the barge terminal facility in the San Jacinto River Area of Concern without completing an environmental assessment and/or environmental impact statement was unreasonable, and was also arbitrary, capricious, an abuse of discretion under the APA and not in accordance with the law. Failure by the USACE to complete the NEPA environmental review process was unlawful and unreasonable.

COUNT III

The USACE's Authorization of Holtmar Land's Project without Providing Public Notice Violated NEPA, NEPA Regulations, USACE Permitting Regulations, and the APA

177. Plaintiffs incorporates herein by reference the foregoing paragraphs into Count III as if fully set out herein.

178. The USACE Permitting Regulations oblige the agency to notify adjoining property owners as part of its public notice requirements for permit applications. 33 C.F.R. § 325.3(d)(1).

179. The agency's own administrative record for the fifth application did not include a list of adjacent property owners, and only "reused" the adjacent property owner list on file from Holtmar Land's fourth permit application.

180. The administrative record is unclear as to how the USACE “reused” the list of adjacent property owners from 2022. The agency could have, for example, (a) relied upon the outdated information from 2022 to provide public notice only to those adjacent property owners already included on that list, or (b) declared or otherwise determined that the agency was already in compliance with its public notice requirements because it had previously contacted adjacent property owners during its review of the fourth application.

181. Given the above-described reasoning from the USACE staff and the related outstanding questions, it can therefore be reasonably concluded that the USACE (1) failed to create a list of adjacent property owners upon receipt of the fifth application and (2) failed to contact adjacent property owners at any time during the agency’s review of the fifth application.

182. The resulting consequences flowing from the agency’s failure to provide public notice are as follows: (a) the agency did not solicit comments and information from adjacent property owners about Holtmar Land’s Project, and (b) without these comments and information, the agency was unable to appropriately “evaluate the probable impact [of Holtmar Land’s Project] on the public interest” as is “necessary” pursuant to 33 C.F.R. § 325.3(a). The USACE failed to provide public notice to adjacent property owners, which is critical to the mandatory procedure for the USACE in evaluating permit applications under NEPA, the NEPA implement regulations, and the USACE’s own regulations.

183. The action of the USACE in issuing the Letter of Permission authorizing dredging and construction of the barge terminal facility in the San Jacinto River Area of Concern without providing adjacent property owners with public notice and opportunity to comment and be heard, and without considering all comments received in its subsequent actions in the permit application was unreasonable, and was also arbitrary, capricious, an abuse of discretion under the APA and not in

accordance with the law. Failure by the USACE to provide public notice and an opportunity for public comment was unlawful and unreasonable.

184. Plaintiff asks this Court to hold and declare unlawful the USACE's reliance on the 2022 list of adjacent property owners to satisfy its requirement to provide public notice for Department of the Army Permit Application No. SWG-2015-00855.

COUNT IV

The USACE's Authorization of Holtmar Land's Project without Conducting a Public Interest Review Violated USACE Permitting Regulations, and the APA

185. Plaintiffs incorporates herein by reference the foregoing paragraphs into Count IV as if fully set out herein.

186. The USACE Permitting Regulations oblige the agency to conduct a public interest review that consists of "an evaluation of the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest," 33 C.F.R. § 320.4(a), and as further described above.

187. The agency's own administrative record for the fifth application did not include an evaluation of the impacts of the Project to the public interest.

188. The action of the USACE in issuing the Letter of Permission authorizing dredging and construction of the barge terminal facility in the San Jacinto River Area of Concern without conducting a public interest review was unreasonable, and was also arbitrary, capricious, an abuse of discretion under the APA and not in accordance with the law. Failure by the USACE to conduct a public interest review was unlawful and unreasonable.

189. Plaintiff asks this Court to hold and declare unlawful the Letter of Permission that was granted without proper evaluation of the Project's impacts on the public interest.

COUNT V

The USACE's Authorization of Holtmar Land's Project without Conducting Sufficient Sediment Sampling Violated the USACE Permit Evaluation Requirement Process, and the APA

190. Plaintiff incorporates herein by reference the foregoing paragraphs into Count V as if fully set out herein.

191. USACE's 2009 Permit Evaluation Requirement Process is binding on the USACE. The 2009 Permit Evaluation Requirement Process requires that when USACE is considering a permit application for activity within the SJRWP Site Area of Concern, additional requirements must be satisfied. As one of those requirements, TCEQ must verify the fulfillment of certain pre-condition processes, including (1) required sampling procedures, (2) required State of Texas lab certification, (3) required sample number and distribution, and (4) required sample analysis.

192. In issuing the Letter of Permission, USACE did not obtain proper TCEQ verification of required sampling procedures. Instead, USACE relied upon TCEQ's verification of 2016 sampling results. No additional sampling was conducted or verified related to the fifth permit application, which was ultimately approved in the form of the Letter of Permission.

193. Failing to obtain verification from TCEQ of all pre-condition processes set forth in the USACE's Permit Evaluation Requirement Process was a violation of USACE's own permitting requirements, and was unreasonable, and was also arbitrary, capricious, an abuse of discretion under the APA and not in accordance with the law.

VII. PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully prays this Court to:

a. Declare the issuance of "Letter of Permission for Department of the Army Permit Application No. SWG-2015-0855" dated April 11, 2024, to Holtmar Land, LLC contrary to law;

b. Declare that the “Letter of Permission for Department of the Army Permit Application No. SWG-2015-0855” dated April 11, 2024, issued to Holtmar Land, LLC is null and void and is to have no effect;

c. Enter an order requiring USACE to revoke the “Letter of Permission for Department of the Army Permit Application No. SWG-2015-0855” dated April 11, 2024, issued to Holtmar Land, LLC, and declare it null and void;

d. Issue an order of permanent injunction enjoining the USACE from allowing Holtmar Land, LLC or any other of its affiliates, agents, employees, and persons or any other individual or entity in active concert or participation with Defendant, from directly or indirectly:

- i. Engaging in any preparatory activities, such as clearing or modifying the condition of the land, wetlands, the riverbank, or the San Jacinto River at the Project Site;
- ii. Dredging or removing sediment from wetlands, the riverbank, or the San Jacinto River;
- iii. Constructing structures, installing moorings or pylons, or in any way modifying the land, wetlands, the riverbank, or San Jacinto River at the Project site;
- iv. Using any of the potential unpermitted and unauthorized barge storage facilities or other structures in the Project area for any reason whatsoever unless and until the USACE has issued a permit required by Section 10 of the Rivers and Harbors Act in compliance with NEPA and other federal laws;

e. Declare the 2009 Permit Evaluation Requirement Process binding on the USACE;

f. Declare that the USACE must comply with the requirements of NEPA, the NEPA Regulations, the USACE NEPA Regulations, the USACE Permitting Regulations, and the Permit Evaluation Requirement Process as a condition for the review and processing of any new permit for the construction or operation of barge storage and service facility within the SJRWP Site Area of Concern;

g. Declare that the USACE may not consider any investment made in construction of the unpermitted and unauthorized structure associated with the Project in the SJRWP Site Area of Concern in any subsequent analysis of reasonable alternatives under NEPA;

h. To the extent that Holtmar Land, LLC may have initiated any work at the Project Site, issue an order requiring USACE to instruct Holtmar Land, LLC to restore and remediate the land, wetlands, riverbanks, and San Jacinto River at the Project Site to their original, unmodified conditions as it was before Holtmar Land allegedly engaged in any activity at the Project Site;

i. Award reasonable costs and attorneys' fees pursuant to applicable statute or authority; and

j. Grant any other relief as the Court deems just, equitable, and proper.

Dated: November 21, 2024.

Respectfully submitted,

EARTHJUSTICE

By: /s/ Allison Brouk

Allison Brouk*

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**Pro Hac Vice Application*

Forthcoming

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