

**UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA**

No. _____

FRIENDS OF BACK BAY,
308 Swordfish La.
Virginia Beach, VA 23456,

and BACK BAY RESTORATION FOUNDATION,
3022 New Bridge Road
Virginia Beach, Virginia 23456

Plaintiffs

v.

UNITED STATES ARMY CORPS OF ENGINEERS,
Headquarters, 441 G Street, NW
Washington, D.C. 20314

JOHN McHUGH, in his official capacity as Secretary
of The Army, 101 Army Pentagon,
Washington, D.C. 20310

LIEUTENANT GENERAL ROBERT L. VAN
ANTWERP, in his official capacity as Chief of
Engineers and Commanding General of the U.S. Army
Corps of Engineers, Headquarters, 441 G Street,
NW, Washington, D.C. 20314

and COLONEL ANDREW W. BACKUS, in his
official capacity as District Engineer the of U.S. Army
Corps of Engineers, Norfolk District, 803 Front Street,
Norfolk, VA 23510

Defendants.

COMPLAINT

NATURE OF ACTION

1. This action challenges the issuance of the Department of the Army Permit No. 04-V2213 (the “permit”) under Section 404 of the Clean Water Act (“CWA”), 33 U.S.C. § 1344,

by the United States Army Corps of Engineers (the “Corps”) to Kenneth Douglas Wilkins (“Wilkins”) to construct and use a 76-slip mooring and launching facility (the “Wilkins Facility” or the “project”) in North and Shipps Bays, tributaries to Back Bay, in the Sandbridge Beach section of Virginia Beach, Virginia. The Wilkins Facility will introduce a significant quantity of recreational motorboat traffic to the shallow, sensitive, and globally rare aquatic ecosystem of Back Bay and be located less than 3,000 feet from the Back Bay National Wildlife Refuge (“Back Bay NWR”), a sanctuary, wintering, and breeding ground for a rich variety of wildlife, and an important stopover for migratory birds traveling the Atlantic Flyway. The Corps issued the permit to Wilkins on 11 October 2008, over the objections of the federal and state resource agencies, and the vast majority of local residents, who opposed the project because of the significant adverse environmental impacts that would result. The U.S. Fish and Wildlife Service (“FWS”) and the U.S. Environmental Protection Agency (“EPA”) recommended that the Corps deny the Section 404 permit because of the potential for significant adverse impacts on the sensitive Back Bay ecosystem and the interference with the management goals of the Back Bay NWR.

2. Back Bay is one of the most diverse and extensive ecosystems in southeastern Virginia. It is located immediately west of the barrier islands of southeastern Virginia and constitutes the northern-most end of the Albemarle-Pamlico Estuarine Sound System, which the EPA has designated an “estuary of national significance.” See Final Environmental Assessment and Finding of No Significant Impact, Application No. 04-V2213, at 2 (10 Oct. 2008) (hereinafter “EA”).

3. Characterized by emergent wetlands, scattered beds of submerged aquatic vegetation (“SAV”), and large expanses of open water, Back Bay provides valuable habitat for a

variety of aquatic life, including largemouth bass, white perch, channel catfish, flounder, and other freshwater and brackish species. *Id.* at 3, 10. It also provides important habitat areas for migratory waterfowl, wading birds, marsh birds, shorebirds, and other birds, including bald eagles and ospreys; small mammals; and a number of state-listed rare plant and animal species. *Id.* at 3.

4. The water in Back Bay averages just four feet deep and is, thus, extremely vulnerable to disturbance and resulting turbidity. Additionally, Back Bay's water depths fluctuate based on wind direction rather than lunar tides, making it an aquatic system that is "considered globally rare" but also uniquely vulnerable. Because Back Bay does not ebb and flow regularly with the lunar tides, it has limited opportunity to "flush" itself of nutrients, sediment, or other pollutants discharged to its waters. SAV, which absorbs nutrients, stabilizes bottom sediments, removes suspended sediments from the water column, and reduces shoreline erosion, thus, plays a critical role in maintaining good water quality in Back Bay.

5. The health and density of SAV are also vital to the overall productivity of Back Bay. SAV serves as a major food source for wildlife and as habitat and nursery areas for many species of fish and invertebrates. Though SAV density began to decline in Back Bay in the mid-1980's, a host of local, state, and federal restoration programs have been underway, and a significant amount of public and private funds have been invested since that time to study and address the problem. See EA at 3-4. These efforts are beginning to show progress. Recent surveys indicate that SAV is returning to Back Bay along with increasing numbers of wintering waterfowl. See EA at 8.

6. The Wilkins Facility will result in a significant increase in the amount and frequency of recreational motorboat activity in Back Bay. It would be the only commercial

mooring facility in Back Bay and the only public boat launch for motorboat access to Back Bay, with the exception of two boat launches operated by the Virginia Department of Game and Inland Fisheries (“VDGIF”) in a less fragile area much further south and on the opposite shore of the Bay. The increase in motorboat activity from the Wilkins Facility, particularly during the peak of the summer boating season, will cause damage to SAV, disturb feeding, nesting, and breeding activities of marsh birds and other wildlife, and cause turbidity, shoreline erosion and other water quality problems. Because of the configuration of the adjacent islands and shoreline, the Wilkins Facility will concentrate motorboat traffic in and around the Back Bay NWR and its islands, amplifying the negative impacts on these most sensitive areas. See Proposed Project Site, (“Exhibit 1”). These negative impacts to the aquatic system and overall health of the Back Bay environment will seriously compromise the ongoing local, state, and federal efforts to preserve, protect, and restore Back Bay, and the progress they have made to date.

7. Although the Corps acknowledged that the increase in motorboat activity in Back Bay could result in significant adverse environmental impacts on this sensitive environment, it concluded that the impacts would be sufficiently mitigated by a newly established **Restricted Area regulation (“no-wake zone”) in waters adjacent to the Back Bay NWR that the Corps admitted is not being enforced**, and by other unenforceable conditions intended to augment that regulation. As a result, the Corps issued the EA and Finding of No Significant Impact (“FONSI”), and Section 404 permit. The Corps offered no evidence that the no-wake zone and permit conditions would, in fact, mitigate the impacts below the level of significance.

8. The Corps’ action in issuing the permit violates the CWA, 33 U.S.C. §§ 1251 et seq., the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321 et seq., and their implementing regulations, and is arbitrary and capricious, an abuse of discretion, and otherwise

not in accordance with the law in violation of the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701-706.

9. Plaintiffs ask the Court to: (1) declare that the Corps issued the permit in violation of its statutory and regulatory duties under the CWA, NEPA, and the APA; (2) issue a permanent injunction requiring the Corps to revoke the Section 404 permit for the Wilkins Facility or, in the alternative, issue an injunction requiring the Corps to prepare an Environmental Impact Statement (“EIS”) and remand the matter to the Corps; and (3) award plaintiffs all costs and expenses of this action, including reasonable attorneys’ fees.

JURISDICTION AND VENUE

10. This action arises under the CWA, 33 U.S.C. §§ 1251 et seq., NEPA, 42 U.S.C. §§ 4321 et seq., and the APA, 5 U.S.C. §§ 701-706. This Court has jurisdiction of this action pursuant to 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1361 (mandamus), and 28 U.S.C. §§ 2201 and 2002 (declaratory and further relief).

11. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e) and 5 U.S.C. § 703, because defendant the Corps resides at 441 G Street, N.W., Washington, D.C., 20314, where its headquarters are located.

PARTIES AND STANDING

12. Plaintiffs are the Friends of Back Bay (“FBB”) and the Back Bay Restoration Foundation (“BBRF”).

13. Plaintiff FBB is a not-for-profit corporation founded in 1983 to “promote conservation and preservation of the land, water, and life indigenous to the geographic area known as Back Bay; to encourage reasonable uses of Back Bay compatible with the goals of conservation and preservation; to assure that future generations enjoy the full benefit and value

of the unique and special natural flora, fauna and terrain of Back Bay.” Articles of Incorporation, art. 3(a).

14. FBB currently has over 50 members, most of whom live in or own property in the Sandbridge Beach section of Virginia Beach, Virginia. Members of FBB regularly use and enjoy the natural resources of Back Bay for fishing, hunting, wildlife viewing, scenic photography, scientific research, kayaking, canoeing, aesthetic, spiritual, and other purposes. Members use Back Bay for these purposes most frequently during late spring and early fall, overlapping the same 10-week period during the summer that is the peak season for recreational motorboating.

15. Members of FBB participated in the public proceedings relating to the Section 404 permit process for the Wilkins Facility by submitting written comments and by meeting with Colonel Yvonne Prettyman-Beck in 2005 and with Colonel Dionysios Anninos in 2007, who were the Commanders of the Norfolk District of the Corps (“Norfolk District”) at those times, to further present their concerns regarding the environmental impacts of the proposed Wilkins Facility.

16. FBB uses Back Bay for environmental education programs, which involve classroom instruction as well as canoe and kayak fieldtrips on the water. These educational programs teach students about the natural resources in Back Bay, including how to conduct water quality testing and identify different types of SAV grasses, birds, and other wildlife. The Wilkins Facility will cause injury to these educational programs by compromising Back Bay water quality, destroying SAV and wildlife habitat, and otherwise impairing the aesthetic and scientific value of the natural resources that FBB seeks to educate children about.

17. One of the primary efforts of FBB is to protect Back Bay through land conservation. For over 20 years, FBB has been involved in an ongoing expansion project that allows Back Bay NWR to acquire land from willing sellers within an expanded project boundary surrounding Back Bay. The goal of this project is to restore and preserve a buffer of land around Back Bay to protect against encroaching development and pollution runoff from upland development. As a result of FBB's lobbying efforts, Congress has appropriated over 24 million dollars towards the expansion project, allowing Back Bay NWR to purchase approximately 5,000 acres since the project began. The additional acreage has helped protect the water quality in Back Bay. The additional acreage has also helped conserve and enhance wildlife habitat, and in 1994, the improved habitat on one tract attracted the first pair of bald eagles to nest in Back Bay in over thirty years. Continued involvement in the expansion project remains one of FBB's top priorities. Construction of the Wilkins Facility and the resulting increase in recreational motorboat traffic and adverse impacts on water quality and wildlife habitat will harm FBB's efforts to preserve and conserve Back Bay and its natural resources. The impacts will undermine the success FBB has achieved so far and greatly hamper its continued efforts to restore and protect the health of Back Bay and to assure that future generations may enjoy its full benefit and value.

18. The Wilkins Facility construction, the resulting increase in recreational motorboat traffic in Back Bay, and its negative impact on water quality, SAV, and wildlife will cause injury to members of FBB by preventing them from using and enjoying Back Bay as they now do for fishing, hunting, wildlife viewing, scenic photography, scientific research, kayaking, canoeing, aesthetic, spiritual, and other purposes. The negative impacts on water quality, wildlife habitat, and overall ecological health will reduce Back Bay's value as a place to fish, hunt, and view

wildlife. These impacts will also impair the scenic, scientific, and aesthetic qualities of Back Bay that make it valuable for photography, research, and spiritual uses. The additional recreational motorboat traffic will also harm members who canoe and kayak on Back Bay by disturbing the peace and quiet of the water and by creating safety concerns.

19. As set forth above, FBB and its members have particularized interests that are adversely affected and irreparably harmed by the Corps' decision to issue the Section 404 permit necessary for the construction of the Wilkins Facility. These injuries have been and continue to be caused by the illegal decision of the Corps to issue the Section 404 permit for the Wilkins Facility. The relief requested of this Court would redress these injuries because construction of the Wilkins Facility cannot go forward without the Section 404 permit or a proper environmental impact analysis for the action, as required by NEPA.

20. Plaintiff BBRF is a not-for-profit organization founded in 1984 to address the deterioration of water quality of Back Bay, caused by SAV loss, erosion, and increased nutrient loading. BBRF sought to reverse this trend by focusing its efforts on improving water quality, environmental education, and restoration efforts. BBRF has now expanded its focus to include preservation, enhancement and improvement of the water quality and wetlands located in the Back Bay and North Landing River watersheds.

21. BBRF has approximately 750 members, most of whom live in Virginia Beach and surrounding localities, and a number of whom reside in or own property adjacent to Back Bay or its tributaries. BBRF's members include sportsmen as well as conservationists who use Back Bay for fishing, hunting, wildlife viewing, scientific research, and for educational, aesthetic, and other purposes.

22. BBRF's members participated in the public proceedings relating to the Section 404 permit process for the Wilkins Facility by submitting written comments and by meeting with the former commanders of the Norfolk District in 2005 and 2007 to further present their concerns regarding the environmental impacts of the proposed Wilkins Facility.

23. As part of its mission to restore Back Bay, BBRF engages in various educational outreach activities. BBRF's environmental education efforts include providing the public with news and information through its website and bi-monthly newsletter about Back Bay and ways to help protect water quality in the watershed. BBRF also hosts an annual Back Bay Forum that invites speakers from across the nation to present scientific research and other information relevant to the Back Bay watershed. Additionally, for more than twelve years, BBRF has been conducting a water quality monitoring program in Back Bay. Every month, BBRF members collect water samples at seven sites along the western and northern boundaries of Back Bay and conduct field tests for a number of water quality parameters, including temperature, salinity, pH, conductivity, and dissolved oxygen. BBRF also sends samples to the Virginia Department of Environmental Quality ("DEQ") laboratory in Richmond for further analysis of the fecal coliforms, nutrients, and suspended solids contained in the water. BBRF also offers educational programs for school children at its Environmental Education Center in Virginia Beach and holds presentations in schools to teach children about watersheds, wetlands, Back Bay, and the wildlife that resides and migrates through the NWR. BBRF's educational programs include canoe clean-ups that allow children to learn about Back Bay and the wildlife resources while also helping to clean up the Back Bay watershed. The Wilkins Facility will cause injury to these educational programs by compromising Back Bay water quality, destroying SAV and wildlife habitat, and

otherwise impairing the aesthetic and scientific value of the natural resources that BBRF seeks to educate the public about.

24. BBRF's efforts to restore Back Bay also include SAV restoration. BBRF has organized and participated in several SAV planting projects, including a planting project in close proximity to the proposed Wilkins Facility site, to help restore SAV throughout Back Bay. The construction of the Wilkins Facility and resulting motorboat traffic will cause injury to BBRF's SAV restoration efforts by increasing turbidity and sediment loading in the water column, which will impede SAV growth and survival. Additionally, the motorboat traffic from the Wilkins Facility will cause injury to BBRF's SAV restoration efforts by increasing the number of incidents of boat propellers coming in contact with and directly destroying existing SAV beds.

25. The Wilkins Facility will cause injury to BBRF's members who use Back Bay for fishing, hunting, wildlife viewing, and scientific research, and for educational and aesthetic purposes. The additional motorboat traffic will directly disturb and frighten wildlife, causing injury to members who use Back Bay for wildlife viewing, hunting, and fishing. It will also degrade water quality and wildlife habitat and, in turn, the educational, scientific, and aesthetic values of Back Bay, preventing members from using and enjoying Back Bay for these purposes as they do now. The Wilkins Facility will also harm the interests of BBRF's members in preserving, enhancing, and improving the water quality of Back Bay. The restoration efforts they have participated in since the mid-1980's would be greatly hampered by the increased motorboat traffic from the proposed Wilkins Facility, which will compromise water quality, existing SAV beds, and the overall health of Back Bay.

26. As set forth above, BBRF and its members have particularized interests that are adversely affected and irreparably harmed by the Corps' decision to issue the Section 404 permit

necessary for the construction of the Wilkins Facility. These injuries have been and continue to be caused by the illegal decision of the Corps to issue the Section 404 permit for the Wilkins Facility. The relief requested of this Court would redress these injuries because construction of the Wilkins Facility cannot go forward without the Section 404 permit or a proper environmental impact analysis for the action, as required by NEPA.

27. Defendant the Corps is the federal agency charged with considering applications for permits to discharge dredged or fill material into waters of the United States under Section 404 of the CWA. In evaluating such permit applications, the Corps must ensure that the requirements of Section 404 and the Section 404(b)(1) Guidelines and the requirements of NEPA are fulfilled. The Corps is headquartered in Washington, D.C., and it has a District Office in Norfolk, Virginia. The Norfolk District issued the Section 404 permit for the Wilkins Facility.

28. Defendant John McHugh is the Secretary of the Army and is sued in his official capacity. Secretary McHugh succeeded Pete Geren, who was the Secretary of the Army when the Corps issued the EA, FONSI, and Section 404 permit. The Secretary of the Army, acting through the Corps, has ultimate responsibility for the issuance of Section 404 permits by the Corps. 33 U.S.C. § 1344(a),(d). The Department of the Army's headquarters is located in Washington, D.C.

29. Defendant Lieutenant General Robert L. Van Antwerp is the Chief of Engineers and Commanding General of the Corps. The Office of the Chief of Engineers is located in the Corps headquarters in Washington, D.C. Defendant Van Antwerp is charged with the supervision and management of all Corps decisions and actions, and is sued in his official capacity.

30. Defendant Colonel Andrew W. Backus is the Commander of the Norfolk District, headquartered in Norfolk, Virginia, and is sued in his official capacity. Colonel Backus succeeded Dionysios Anninos as Norfolk District Commander on 12 June 2009. Colonel Anninos was the Commander of the District at the time that the Corps issued the EA, FONSI, and Section 404 permit.

STATUTORY BACKGROUND

Clean Water Act

31. In 1972, Congress passed the CWA, 33 U.S.C. §§ 1251 et seq. “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” CWA § 101(a), 33 U.S.C. § 1251(a). To achieve this objective, Section 301 of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of any “pollutant” into “waters of the United States” except in accordance with promulgated water quality standards and permits issued pursuant to relevant sections of the CWA.

32. “Pollutants” include dredged spoil, rock, and sand, among other materials. CWA § 502(6), 33 U.S.C. § 1362(6). The term “waters of the United States” includes wetlands. 40 C.F.R. § 232.2.

33. Section 404 of the CWA, 33 U.S.C. § 1344, authorizes the Secretary of the Army to issue permits for the discharge of dredged or fill material into waters of the United States when certain conditions are met. The Section 404 permitting program is administered by the Corps. Unless exempted by section 404(f)(1), all discharges of dredged or fill material into waters of the United States, including wetlands, must be authorized by the Corps through the issuance of a Section 404 permit.

34. The EPA has final supervisory authority over the Corps' administration of, and compliance with, Section 404 of the CWA for the issuance of permits for the discharge of dredged or fill material. Pursuant to Section 404(c) of the CWA, 33 U.S.C. § 1344(c), EPA has authority to prohibit the specification of a disposal site where discharges "will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas."

35. In reviewing an application for a Section 404 permit, the Corps must follow the binding guidelines adopted by EPA and developed by the EPA Administrator in conjunction with the Secretary of the Army acting through the Chief of Engineers of the Corps. 33 U.S.C. § 1344(b)(1). These guidelines are known as the "404(b)(1) Guidelines" and are codified in the Code of Federal Regulations at 40 C.F.R. Part 230. The purpose of the 404(b)(1) Guidelines is to "restore and maintain the chemical, physical, and biological integrity of the waters of the United States through the control of discharges of dredged or fill material." 40 C.F.R. §230.1(a); see also 33 U.S.C. §1251(a). The Corps is prohibited from issuing a Section 404 permit unless there is "sufficient information to make a reasonable judgment as to whether the proposed discharge will comply with [the] Guidelines." 40 C.F.R. § 230.12(a)(3)(iv). "[A]ll requirements in § 230.10 must be met" before a permit may issue. 40 C.F.R. §230.10.

36. The 404(b)(1) Guidelines prohibit the issuance of a Section 404 permit under certain conditions relevant to this lawsuit: First, no permit shall issue if there is a practicable alternative that would have less adverse impact on the aquatic ecosystem. 40 C.F.R. § 230.10(a). An alternative is "practicable" if "it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes." 40 C.F.R. § 230.10(a)(2).

37. Second, the 404(b)(1) Guidelines prohibit the issuance of a Section 404 permit if the discharge will “cause or contribute to significant degradation of the waters of the United States.” 40 C.F.R. § 230.10(c). “Significant degradation” includes, but is not limited to, “significantly adverse effects” on: (1) “fish, shellfish, wildlife, and special aquatic sites;” (2) “life stages of aquatic life and other wildlife dependent on aquatic ecosystems;” (3) “aquatic ecosystem diversity, productivity, and stability. Such effects may include, but are not limited to, loss of fish and wildlife habitat or loss of the capacity of a wetland to assimilate nutrients, purify water, or reduce wave energy;” and (4) “recreational [and] aesthetic” values.” 40 C.F.R. §320.10(c).

38. Factors the Corps must consider when determining whether a project may result in “significant degradation” of waters of the United States include, but are not limited to: (1) impacts on biological characteristics of the aquatic ecosystem, including whether the discharge will result in the “loss or change of breeding and nesting areas . . . and preferred food sources for resident and transient wildlife species associated with the aquatic ecosystem,” Subpart D, 40 C.F.R. §230.32; (2) impacts on special aquatic sites, including wetlands, wildlife refuges, and mud flats, Subpart E, 40 C.F.R. §§ 230.40-230.42; and (3) impacts on human use characteristics, including recreational and commercial fisheries; water-related recreation; aesthetic impacts; and effects on national seashores, wilderness areas, research sites, and similar preserves, Subpart F, 40 C.F.R. §§ 230.51- 230.54. The Corps must base its “significant degradation” determination on the potential short-term or long-term effects, including cumulative and secondary effects, of the proposed discharge on the physical, chemical, and biological components of the aquatic environment. 40 C.F.R. §§ 230.10(c); 230.11 (g), (h). “Secondary effects are effects on an

aquatic ecosystem that are associated with a discharge of dredged or fill materials, but do not result from the actual placement of the dredged or fill material.” 40 C.F.R. § 230.11(h).

39. Third, the 404(b)(1) Guidelines prohibit the issuance of a Section 404 permit if “appropriate and practicable steps” remain available to “minimize potential adverse impacts of the discharge on the aquatic ecosystem.” 40 C.F.R. § 230.10(d). The 1990 Memorandum of Agreement (“MOA”) between the Corps and the EPA articulates the mitigation policy and procedures the Corps must follow to comply with 40 C.F.R. § 230.10(d), and to implement the objectives of the CWA and the 404(b)(1) Guidelines to restore and maintain existing aquatic resources. MOA at I-II.B, 55 Fed. Reg. 9210 (12 March 1990).

40. Mitigation has three components: avoidance, minimization, and compensatory mitigation. MOA at II; see also 33 C.F.R. § 320.4(r) (setting forth general statement of the Corps’ mitigation policy, which applies to all Department of Army permits); 73 Fed. Reg. 19594 (10 April 2008) (compensatory mitigation is considered only “after all appropriate and practicable steps have been taken to first avoid and then minimize adverse impacts to the aquatic ecosystem pursuant to . . . the CWA Section 404(b)(1) Guidelines”). In evaluating Section 404 permit applications, the Corps must first determine that the potential impacts have been avoided to the maximum extent practicable. MOA at II.C. Avoidance is defined as the selection of the least environmentally damaging practical alternative. *Id.* at II.C.1. Remaining unavoidable impacts must then be mitigated to the extent practicable by requiring steps to minimize impacts, and, finally, compensate for aquatic resource values lost. *Id.* Minimization is achieved through project modifications and permit conditions. *Id.* at II.C.2.

41. Monitoring is an important aspect of mitigation and “should be directed toward determining whether permit conditions are complied with and whether the purpose intended to be served by the condition is actually achieved.” MOA at III.D.

42. All mitigation measures must be conditions of the Section 404 permit. *Id.* at III.E; 33 C.F.R. § 325.4(a). This requirement ensures legal enforceability of the mitigation measures and enhances the level of compliance. MOA at III.E. Further, “[i]f the mitigation plan necessary to ensure compliance with the Guidelines is not reasonably implementable or enforceable, the permit shall be denied.” *Id.*

43. Additionally, the Corps’ review of CWA Section 404 permit applications is governed by the Corps’ general policies for evaluating permit applications, codified at 33 C.F.R. §320.4, including the “public interest review” regulation, 33 C.F.R. § 320.4(a). The public interest review regulation requires the Corps to weigh the benefits of the project against its reasonably foreseeable detriments, considering all factors relevant to the project as well as the cumulative impacts, and prohibits the district engineer from issuing the permit if he “determines that it would be contrary to the public interest.” *Id.* § 320.4(a). Relevant factors the Corps must consider when making the public interest determination include: conservation, aesthetics, general environmental concerns, wetlands, fish and wildlife values, navigation, shore erosion and accretion, recreation, water quality, safety, and the general needs and welfare of the people. *Id.*

44. The “public interest review” regulation also establishes general criteria that the Corps must consider in the evaluation of every application for a permit, including: (1) the “relative extent of the public and private need” for the project; (2) the “practicability of using reasonable alternative locations and methods to accomplish the objective” of the project; and (3) 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.” Id. § 320.4(a)(2)(i)-(iii).

45. In evaluating all permits, the district engineer must consult with the FWS and the state fish and wildlife agencies, “with a view to the conservation of wildlife resources by prevention of their direct and indirect loss and damage due to the activity proposed in a permit application.” Id. § 320.4(c); see also id. § 320.4(e). The Corps must “give full consideration to the views of those agencies on fish and wildlife matters in deciding on the issuance, denial, or conditioning” of the permit. Id. § 320.4(c).

46. Full evaluation of the public interest requires that the Corps give “due consideration” to the effects the proposed activity may have on values such as those associated with areas established under federal or state law for historic, cultural, scenic, or recreational values. Id. § 320.4(e).

47. When conditions are necessary to satisfy the public interest requirement, the Corps must add those conditions as special conditions to the permit, and the conditions must be reasonably enforceable. Id. § 325.4(a). The Corps may take into account the existence of controls imposed under other federal, state, or local programs in “determining whether a proposal complies with the 404(b)(1) guidelines, . . . other applicable statutes, and is not contrary to the public interest.” Id. § 325.4(a)(2). In such cases, the Corps permit must “be conditioned to state that material changes in, or a failure to implement and enforce such program . . . will be grounds for modifying, suspending, or revoking the permit.” Id.

48. If special conditions are necessary to satisfy the public interest requirement but those conditions are not reasonably implementable or enforceable, the Corps must deny the permit. Id. § 325.4(c).

National Environmental Policy Act

49. NEPA requires that federal agencies prepare a detailed EIS of every proposal for a major federal action that may “significantly affect the quality of the human environment.” 42 U.S.C. § 4332(2)(C). NEPA is implemented pursuant to regulations promulgated by the Council on Environmental Quality (“CEQ”), codified at 40 C.F.R. §§ 1500-1508 (“CEQ NEPA regulations”). The Corps has promulgated its own regulations and adopted procedures for complying with NEPA in processing Section 404 permits. These regulations supplement the CEQ NEPA regulations and are codified at 33 C.F.R. § 325, Appendix B.

50. For purposes of NEPA, “federal actions” include federal agency approval of specific projects, including those approved by federal permit. 40 C.F.R. § 1508.18(b)(4).

51. At a minimum, NEPA requires the agency to prepare an EA, the purpose of which is to determine whether the proposed action may significantly affect the environment, in which case the agency must prepare an EIS. If not, the agency prepares a FONSI. *Id.* § 1501.4(c), (e).

52. Whether the impacts of an action may be “significant” within the meaning of NEPA depends on both context and intensity. *Id.* § 1508.27. “Context” “means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality.” *Id.* § 1508.27(a). “Both short- and long-term effects are relevant.” *Id.*

53. “Intensity” refers to the severity of impact and requires the agency to evaluate a number of factors, including, but not limited to: the unique characteristics of the geographic area, including proximity to park lands, wetlands, or ecologically critical areas; the degree to which the proposed action affects public health or safety; the degree to which the possible effects on the environment are highly uncertain; the degree to which the effects on the environment are

controversial; the degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration; and whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Id. § 1508.27(b). “Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment.” Id.

54. For purposes of NEPA, “effects” include the direct and indirect environmental impacts of the proposed action. Id. § 1508.8. “Direct effects” are “caused by the action and occur at the same time and place.” Id. § 1508.8(a). “Indirect effects” are effects “caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.” Id. § 1508.8(b). Indirect effects include “growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.” Id. The NEPA regulations define “cumulative impact” as the “impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (federal or non-federal) or person undertakes such other actions.” Id. § 1508.7. “Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.” Id.

FACTUAL BACKGROUND

Back Bay and the Back Bay National Wildlife Refuge

55. Back Bay is located within the barrier islands of southeastern Virginia and constitutes the northern-most end of the Albemarle-Pamlico sound system, primarily located in North Carolina, which has been designated by the EPA as an “estuary of national significance.” EA at 2. North and Shippys Bays are lesser included bays and tributaries to Back Bay. See EA at

1-2. They are more confined than the other waters of Back Bay, and are bounded by the Sandbridge marsh to the north and the Back Bay NWR islands and adjacent marshes to the south. See Exhibit 1.

56. Back Bay is a shallow estuarine system with an average water depth of four feet, which fluctuates based on wind direction rather than lunar tides. Winds, especially from the northeast, can influence the water depth by as much as three feet and sometimes even blow the water entirely out of North and Shipps Bays exposing the mud bottom. EA at 2; Letter from Karen L. Mayne, Supervisor of the Virginia Field Office, FWS to Colonel Yvonne J. Prettyman-Beck, Norfolk District, at 1 (29 April 2005) (hereinafter “FWS 29 April 2005 Letter”). Wind-tidal marsh communities like Back Bay are “considered globally rare.” EA at 3.

57. With large expanses of open water, emergent wetlands and scattered beds of SAV, Back Bay is a significant aquatic resource providing valuable habitat for a variety of fish and wildlife, including many state-listed rare plant and animal species. *Id.* It is “one of the most diverse and extensive ecosystems in southeastern Virginia.” *Id.* Both the FWS and the Corps consider Back Bay to be an Aquatic Resource of National Importance. See *id.* at 31.

58. Back Bay has been an important wintering area for waterfowl since the 1800’s, and, in 1938, Back Bay NWR was established to protect habitat for migrating and wintering waterfowl. *Id.* at 2. When first established, the Back Bay NWR included islands within the waters of Back Bay as well as part of the barrier island in Virginia that separates the Bay from the Atlantic Ocean, north of False Cape State Park. *Id.* Back Bay NWR has since been expanded to also include property along much of the western shoreline of North Bay and Back Bay. *Id.* The Back Bay NWR currently encompasses approximately 9,000 acres of land and is managed to provide habitat for all migratory shorebirds and waterbirds, including neotropical

migrants. FWS 29 April 2005 Letter at 4. Since 1939, an additional 4,600 acres of Bay waters within the NWR boundary have been closed to migratory bird hunting by Presidential Proclamation. EA at 18.

59. As the Corps acknowledged, Back Bay serves as an “important breeding and foraging habitat for nesting shorebirds and a wide variety of wildlife including two bald eagles, ospreys, clapper rails, black ducks, great egrets, snowy egrets and many other common species of waterfowl.” Id. at 6. Additionally, Back Bay serves as a winter refuge for waterfowl and a “significant stopover for migratory shorebirds and water birds.” Id. Of the over 300 species of birds which have been observed at the Back Bay NWR, 30 have been identified as “Birds of Conservation Concern for the Southeastern Coastal Plain.” Id. These include the least bittern (*Ixobrychus exilis*), the king rail (*Rallus elegans*), the Virginia rail (*Rallus limicola*) and the sora rail (*Porzana carolina*). The Corps recognized further that “the habitat for these resources depends on high water quality and the health and density of submerged aquatic vegetation (SAV).” Id.

60. The health and density of SAV are vital to the productivity of Back Bay: SAV is a major source of food for waterfowl and other wildlife; it plays an important role in the energy transfer in the food chain; it provides habitat and nursery areas for many species of fish and invertebrates; it absorbs nutrients, stabilizes bottom sediments, and removes suspended sediments from the water column; and it retards shoreline erosion by reducing wave energy. Id. at 8.

61. Though once abundant in Back Bay and North and Shipps Bays, SAV began to decline in the mid-1980’s, mostly because of declines in water quality caused by increased nutrient and sediment loading. See FWS 29 April 2005 Letter at 3. The decline in SAV in Back

Bay has led to a decline in the abundance and diversity of the fish and waterbird populations it supports. See EA at 8.

62. Because of the decline in water quality, SAV, and fish and bird populations, numerous local, state, and federal efforts have been underway since at least the mid-1980's to study and address these problems. *Id.* at 3-4. A significant amount of federal, state, and private funds have also been invested in these efforts, which include: the \$2 million Currituck Sound and Back Bay feasibility study currently being prepared by the Corps' Wilmington, North Carolina District, along with other state and federal partners; and the SAV Cooperative Habitat Mapping Project, initiated in 2003 by FWS, the North Carolina Department of Environmental and Natural Resources, the Albemarle-Pamlico National Estuary Program, and Elizabeth City State University, in North Carolina, to map existing SAV habitat, compare its distribution and abundance to historical data and to use the information to conduct SAV restoration. *Id.* at 8.

63. Studies show that SAV is returning to Back Bay and that these restoration efforts are making progress. See *id.*; Email from Karen L. Mayne, Supervisor of Virginia Field Office, FWS, to Colonel Dionysios Anninos (5 Sept. 2008) (hereinafter FWS 5 Sept. 2008 Email). The FWS offered evidence showing a significant increase in SAV distributions between 2003 and 2008, including areas in the vicinity of the proposed facility. FWS 5 Sept. 2008 Email.

64. Motorized recreational boat activity in Back Bay poses a serious threat to existing SAV beds as well as to SAV reestablishment and the continued overall recovery of the Back Bay ecosystem. The 10-week long summer boating season (second week of June through the third week of August) coincides with the peak growth and flowering period for SAV in North and Shipp's Bays and Back Bay. EA at 9. As the Corps recognized, "[i]t is well documented that prop driven or jet propelled vessels can sever fragile flowers and tendrils on the water surface,

uproot and destroy entire plants, and significantly damage SAV beds.” *Id.* Such “damage and destruction by boat propellers can be a major factor in the loss of SAV.” *Id.* at 8.

65. Recreational motorboat activity can also substantially harm SAV and benthic communities by increasing turbidity and suspension of solids as a result of grounding incidents and constant wave action. See Letter from William J. Hoffman, Chief Environmental Programs Branch, EPA Region 3, to Lynette Rhodes, Chief Southern Virginia Regulatory Section, Norfolk District at 2-3 (2 May 2005) (hereinafter “EPA 2 May 2005 Letter”); EA at 18. The impacts of sediment resuspension, shoreline erosion, and destruction of SAV from motorized boating activity will be amplified in Back Bay because of its shallow waters. See FWS 29 April 2005 Letter at 6. Further, because its water exchange is driven by wind rather than lunar tides, Back Bay’s ability to “flush” out suspended sediment and other pollutants is extremely limited.

66. In addition to destroying the SAV on which many species of fish and wildlife depend, motorboat activity can adversely affect wildlife by disturbing their resting, feeding, breeding, and nesting behaviors. EA at 6-7. In particular, the 10-week boating season on Back Bay coincides with the nesting period for many secretive marsh birds, including the least bittern and king rail, which are species of special concern due to their nationally declining status. *Id.* Motorboat activity can disturb these and other resident and nonresident birds, and cause them to leave their nests or feeding grounds. *Id.* It can also result in nest destruction and egg loss in nests located close to waterways, *id.*, and, in shallow areas, can adversely impact fish and invertebrates by destroying eggs and larvae directly or by burying organisms in sediment. See Letter from Raymond T. Fernald, Nongame and Environmental Programs, VDGIF to Curtis Davey, DEQ, at 2 (23 March 2006) (hereinafter “VDGIF 23 March 2006 Letter”).

Section 404 Permit and NEPA Review for the Wilkins Facility

67. On 1 March 2005, the Corps issued a public notice of Wilkins' proposal to construct the project in North Bay, less than 3,000 feet from the Back Bay NWR boundary. FWS 29 April 2005 Letter at 2; EA at 1. The 76-slip Wilkins Facility will consist of a 95-foot long walkway across the waterway connecting two sections: one section of forty slips, 12-feet wide by 25-feet long, and another section of 36 slips, 8-feet wide by 20-feet long. EA at 1. The Wilkins Facility will also include a concrete boat ramp, measuring 16 by 40 feet. *Id.* The project will require dredging to provide sufficient water depth in the mooring and boat ramp areas. *Id.*

68. As permitted, the project will operate as a members-only mooring and launching facility, serving, in descending order, the owners of a proposed 158-unit condominium that will be constructed atop the dredge disposal area, the occupants of the existing 249-unit condominium across the street known as the Sanctuary at False Cape complex, and the non-waterfront residents of Sandbridge. *Id.* at 2.

69. The public comment period, initially intended to last thirty days, was extended until 2 May 2005 at the request of the EPA, FWS, and local residents. The Corps received over 350 comment letters, electronic messages, and postcards, the "overwhelming majority of which were in opposition to the project." Statement of Findings, Permit Application Number 04-V2213, at 1 (10 Oct. 2008) (hereinafter "Statement of Findings"). The 2005 comment period was the only official opportunity for the public to comment on the proposed project. However, when it was reported on 23 February 2008 that the Corps was ready to issue a permit, the Corps received in excess of 350 additional comments, again almost all opposing the project. EA at 28.

70. The FWS, in a letter dated 29 April 2005, recommended that the project be denied because of the potential for “substantial and unacceptable impacts to aquatic resources of national importance.” FWS 29 April 2005 Letter at 8. The FWS commented that, at the very least, an environmental impact statement was necessary because of the potential for significant impacts on federal trust resources. *Id.* at 7-8. In recommending that the project be denied, the FWS highlighted the sensitive nature of the Back Bay system and its resources, and the potential conflict between the project and ongoing efforts to restore the Bay. Specifically, the FWS stated that the increase in motorboat traffic from the Wilkins Facility would: result in sediment resuspension, directly through contact with the bottom and indirectly through the production of turbulence and wave action, which would also result in shoreline erosion; cause direct and indirect destruction of SAV beds and habitat; disturb feeding, breeding, and resting resident and migratory birds; increase user conflicts among jet skiers, motorboat enthusiasts, fishing enthusiasts, birders, canoe and kayak users; and result in continued environmental degradation. See generally FWS 29 April 2005 Letter.

71. In comments dated 2 May 2005, EPA Region 3, likewise “strongly recommend[ed] that the Corps deny the applicant’s request” for a Section 404 permit. EPA 2 May 2005 Letter at 3. EPA stated that it was “deeply concerned about direct, indirect and secondary impacts of the proposed project to the Back Bay Area” and believed “that the proposed project [was] contradictory to the environmental goals of several federal, state, local resource agencies and the public interests with respect to the Bay.” *Id.* EPA’s letter also incorporated by reference the concerns raised by FWS about impacts to estuarine habitat, SAV, birds, fish, and endangered species. *Id.*

72. The VDGIF similarly, and repeatedly, expressed its concern that the proposed Wilkins Facility could result in “significant adverse impacts upon wildlife resources.” See Letter from Raymond T. Fernald, Nongame and Environmental Programs, VDGIF to Curtis Davey, DEQ (6 June 2005); VDGIF 23 March 2006 Letter; Letter from Robert W. Duncan, Executive Director, VDGIF to Pamela Painter, Corps (3 March 2008) (hereinafter “VDGIF 3 March 2008 Letter”). Specifically, VDGIF stated that “[t]he increase in boating activity could have a direct adverse impact upon wildlife during nesting, feeding, and resting activities” and “is likely to result in physical damage to existing submerged aquatic vegetation (SAV) beds and increased sedimentation into Back Bay, thereby reducing the ability of SAVs to sustain growth.” VDGIF 3 March 2008 Letter. These impacts would in turn “greatly hamper[]” the “significant Back Bay SAV restoration efforts that have been ongoing since the mid-1980s.” Id.

Purported Mitigation: The No-Wake Zone Regulation and the Permit Conditions

73. After the public comment period on the Wilkins Facility closed in 2005, the Corps determined that the existing recreational motorboat activity in Back Bay was already causing unacceptable harm to the aquatic environment and decided to develop a no-wake zone regulation in waters surrounding the Back Bay NWR. The Corps first issued a no-wake zone regulation in 2006, stating that “[i]n the past several months, numerous site inspections and multiple interviews with the U.S. Fish and Wildlife Service, local residents, recreational users and developers has clearly shown that unrestricted use of the waters in and around the Refuge is creating safety problems.... That use is also adversely impacting subaqueous vegetation (SAV) and nesting, feeding and breeding birds as well as causing shoreline erosion from boat wakes.” Public Notice, Public Information Meeting Announcement, Norfolk District (28 June 2006). The Corps’ regulation initially required a no-wake zone extending 150 yards from the ordinary high

water along the shoreline of the Back Bay NWR proclamation boundary but the Corps reduced the zone to 100 yards on 16 May 2008. EA at 14.

74. On 18 August 2008, the Norfolk District Commander provided the FWS with advance copies of the draft permit and decision documents, which for the first time introduced the Corps' intent to rely on the no-wake zone regulation and special permit conditions as mitigating measures. The Corps explained that because "denying [the Wilkins Facility] proposal would arguably necessitate the denial of all future private piers, boat ramps and mooring projects in Back Bay due to the potential for cumulative impacts," it had determined a no-wake zone was the most effective way to protect the Bay and also permit the project. *Id.* The Corps stated that it included the special permit conditions to "compliment [sic] and augment" the no-wake zone regulation "[i]n order to ensure that boaters using the facility will not adversely impact the ecologically sensitive Back Bay/North Bay area." *Id.* at 4, 15, 24; Statement of Reasons at 13; Permit at 2-4. The most relevant of the special permit conditions include: (1) restricting jet skis use to the 12 slips owned and operated by the existing rental operation; (2) limiting the horsepower ("HP") of vessels moored at the proposed additional 64 slips or launched from the boat ramp to 75 HP, with the exception of pontoon boats, which shall not exceed 90 HP; (3) requiring Wilkins to provide each member of the facility with an "information packet concerning the ecological sensitivity of Back Bay/North Bay," and including a copy of the no-wake zone regulation; and (4) requiring Wilkins to serve on and participate in a committee of local, state, and federal agencies to "attempt to establish a funding program for enforcement of the no-wake zone." Permit at 2-4.

75. On 5 September 2008, the FWS responded to the Corps by email with comments on the draft permit and decision documents, calling into question the basis for the Corps' environmental assessment and decision to issue the permit. FWS 5 Sept. 2008 Email.

76. The FWS faulted the Corps' reliance on the no-wake restriction "as the mitigation 'keystone' to prevent/minimize indirect and cumulative impacts" to the Back Bay without providing any mechanism to fund, staff, or otherwise enforce the regulation. *Id.* The FWS stated that such measures are "essential for the successful implementation and for the restrictions to provide benefit to the natural resources of Back Bay." *Id.* The FWS acknowledged that education is a valuable tool but added that "enforcement is an integral part of successful implementation of any regulations." *Id.* The FWS recommended that, even if the Corps incorporated an enforceable no-wake zone into the permit, it should limit the Wilkins Facility to canoes, kayaks, and vessels with electric motors—instead of diesel or gas—along with one or two pontoon boats, which the FWS believed to be the least environmentally damaging practicable alternative. *Id.*

77. The FWS reiterated its opposition to the project and also expressed concern that the Corps' environmental assessment lacked sound support, stating: "Throughout our discussions, the Service has provided scientific literature and relevant examples that support our concerns. In our opinion, the [draft] EA does not adequately identify scientific support for the decisions and conclusions upon which [the] proposed permit issuance is based." *Id.* The FWS expressed concern with HP limits as high as 75 HP for motorboats and 90 HP for pontoon boats because such limits were not supported with any data or analysis regarding the effects of such high limits on the sensitive resources in Back Bay. *Id.* FWS recommended that much lower HP limits be selected to minimize impacts to Back Bay. *Id.*

78. The FWS disputed the Corps' assertion that permitting the Wilkins Facility would result in environmental impacts no different than those that would result from permitting 76 private mooring slips. The FWS noted that: (1) commercial boating slips receive more intensive or frequent use than do private slips because vacationers make use of commercial boat slips daily, whereas individual local residents make use of their private slips less frequently; (2) the location of the proposed Wilkins Facility would funnel users into the most sensitive habitats within the Back Bay NWR; and (3) the Wilkins Facility would concentrate large numbers of boats within a small area, causing an intense environmental impact within that area. *Id.*

79. The FWS also pointed out that contrary to the Corps' conclusion, SAV was coming back to the Back Bay, including in areas close to the proposed project site. *Id.*

80. On 10 October 2008, the Corps issued the Final EA, FONSI, Statement of Findings, and Section 404 Permit without making any material changes to the draft documents earlier provided to FWS. In its final EA and Statement of Findings, the Corps found that recreational motorboat activity can adversely affect the sensitive and unique natural resources of Back Bay and the Back Bay NWR, including sensitive bird species; significantly damage SAV beds on which these resources depend; contribute to shoreline erosion and turbidity; and create boating safety problems. EA at 6, 8, 9, 13; Statement of Findings at 12.

81. The Corps relied on the no-wake zone regulation as a mitigating measure but it plainly recognized that there are no city or state marine patrols within Back Bay and that the no-wake zone was not otherwise "being actively enforced." EA at 15; Statement of Findings at 11.

82. Neither the permit nor the final EA are conditioned on: the implementation of, continued existence of, adequate funding for, or the actual enforcement of the regulation now or for the life of the project; or on any monitoring for the effectiveness of the no-wake zone.

83. The Corps, nevertheless, concluded that the no-wake zone regulation, aided by the special permit conditions, would reduce the project's adverse impacts to the resources of Back Bay and the Back Bay NWR and, thus, that "the project had been modified and the permit conditioned sufficiently" so that it would no longer result in substantial adverse impacts on the Aquatic Resource of National Importance. EA at 31; Statement of Findings at 17-18. See also EA at 7, 9, 14, 16; Statement of Reasons at 14. The Corps determined that the project, as modified, would not be contrary to the public interest, that it complied with the Section 404(b) (1) Guidelines, and that it did not warrant an EIS. EA at 31; see also Statement of Findings at 17-18.

Current Status of No-Wake Zone Regulation

84. On 23 March 2009, the Corps held a public meeting to solicit public comments on the future of the no-wake zone regulation, including whether to "[e]liminate the regulation entirely." Public Notice, Public Meeting Announcement, Norfolk District (23 February 2009).

85. On 13 May 2009, the Norfolk District Commander circulated via email attachment the Corps' determination regarding the results of the March 2009 public meeting. The email left the status of the no-wake zone regulation in question. See Email from Dionysios Anninos, Norfolk District Commander to Aaron Proctor et al., Follow Up: Back Bay Meeting 4 Dec. Action Items (13 May 2009).

86. On or about 24 September 2009, the FWS sent a letter to Colonel Backus to respond to the Corps' determination. The letter stated that "[i]n almost every case, the [Corps]

determined that no further action [pertaining to mitigation measures] would be pursued.” Letter from FWS to Colonel Andrew Backus, Norfolk District (Sept. 2009) (hereinafter “FWS Sept. 2009 Letter”). The FWS stated that, as a result, the FWS “continue[d] to view the permitted project as having substantial and unacceptable impacts to an [Aquatic Resource of National Importance].” Id.

CLAIMS FOR RELIEF

Count I

(Clean Water Act – Violation of 404(b)(1) Guidelines – Significant degradation of the waters of the United States)

87. Paragraphs 1 through 86 above are incorporated herein by reference.

88. The Corps’ issuance of the Section 404 permit violates 40 C.F.R. § 230.10(c), which prohibits the Corps from issuing a permit for any discharge of fill material that will “cause or contribute to significant degradation of the waters of the United States.”

89. The short- and long-term negative impacts of the increase in recreational motorboat activity from the construction and operation of the Wilkins Facility, including but not limited to SAV destruction, wildlife disturbance, and water quality impacts, will result in significantly adverse effects on the fish, wildlife, and special aquatic sites in Back Bay, including the Back Bay NWR. The adverse effects on SAV and water quality will result in significant adverse impacts on life stages of aquatic life and other wildlife dependent on aquatic ecosystems, and in turn, reduce the aquatic ecosystem diversity, productivity, and stability of Back Bay. EA at 6, 8, 9, 13; Statement of Findings at 12. By destroying and preventing the recovery of SAV, the increased recreational motorboat activity will also result in, among other things, the loss of critical fish and wildlife habitat and the capacity of Back Bay, and in particular the more isolated North and Shipps Bays, to purify water and reduce wave energy. See EA at 8. These short- and

long-term effects will cause or contribute to significant degradation of Back Bay and the Back Bay NWR. See FWS 29 April 2005 Letter.

90. The EA recognized that recreational motorboat activity has already been responsible for, among other impacts, damage to SAV beds and shoreline erosion. EA at 23. The EA also recognized the importance of SAV to the overall productivity of Back Bay, serving as a major source of food and habitat, and providing important ecological services like absorbing nutrients, stabilizing and removing suspended sediments from the water column, and reducing wave energy. Id. at 8.

91. The FWS found that the project would have “substantial and unacceptable impacts to aquatic resources of national importance.” FWS 29 April 2005 Letter at 8; FWS Sept. 2009 Letter. EPA and VDGIF similarly expressed deep concern about the adverse impacts the project would have on Back Bay, including its estuarine habitat, SAV, fish, and wildlife. See EPA 2 May 2005 Letter at 2-3; VDGIF 23 March 2006 Letter; VDGIF 3 March 2008 Letter.

92. The Corps concluded that the proposed Wilkins Facility would not cause or contribute to significant degradation of waters of the United States, including the Back Bay NWR, however, on the sole grounds that the potential impacts “have been minimized through special permit conditions and by implementation of the Corps’ [no-wake zone] regulation.” EA at 36-37.

93. The no-wake zone is not a condition of the permit; nor is the permit conditioned on the continued existence of the no-wake zone regulation. The no-wake zone regulation has never been enforced, and there is no mechanism to fund, staff, or otherwise implement and enforce the regulation, now or for the life of the project. The no-wake zone also has never been formally monitored for effectiveness, and there is no requirement that it ever be monitored for

effectiveness. The Corps has completely failed to explain how this measure would prevent significant degradation of waters of the United States.

94. The Corps has completely failed to explain how the HP limits, educational requirements, and other special permit conditions will minimize the impacts of the Wilkins Facility to prevent significant degradation of waters of the United States.

95. The Corps' reliance on the no-wake zone regulation and special permit conditions for its determination that the Wilkins Facility would not cause or contribute to significant degradation of waters of the United States violates Section 404 of the CWA and the 404(b)(1) Guidelines that no permit shall issue for a discharge that will cause or contribute to significant degradation of the waters of the United States. The Corps' approval and issuance of the Section 404 permit for the Wilkins Facility is therefore arbitrary and capricious, an abuse of discretion, and not in accordance with law.

Count II

(Clean Water Act – Violation of 404(b)(1) Guidelines – Least damaging practicable alternative)

96. Paragraphs 1 through 95 above are incorporated herein by reference.

97. The Corps' issuance of the Section 404 permit violates the requirement of 40 C.F.R. § 230.10(a) that no permit shall issue if there remains available a "practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem."

98. The EPA and FWS recommended that the Corps deny the permit. FWS 29 April 2005 Letter at 8; EPA 2 May 2005 Letter at 2-3. The FWS recommended that, at the very least, the Corps limit the Wilkins Facility to canoes, kayaks, and vessels with electric motors, along with one or two pontoon boats as the least environmentally damaging practicable alternative.

FWS 5 Sept. 2008 Email. The Corps failed to consider this and other practicable, less environmentally damaging alternatives.

99. The Corps' failure to select the least environmentally damaging, practicable alternative violates Section 404 of the CWA and the Section 404(b)(1) Guidelines. The Corps' approval and issuance of the Section 404 permit is therefore arbitrary and capricious, an abuse of discretion, and not in accordance with law.

Count III

(Clean Water Act – Violation of 404(b)(1) Guidelines – Minimization of potential adverse impacts on aquatic ecosystem)

100. Paragraphs 1 through 99 are incorporated herein by reference.

101. The Corps' issuance of the Section 404 permit violates the requirement of 40 C.F.R. § 230.10(d) that it not issue a permit for any discharge of fill material if “appropriate and practicable steps” remain available to “minimize potential adverse impacts of the discharge on the aquatic ecosystem.”

102. The Corps' 1990 Memorandum of Agreement with EPA directs that mitigation must be achieved through project modifications and permit conditions that minimize adverse impacts to the extent practicable, and that all mitigation requirements must be conditions of a Section 404 permit. MOA at III.E. It further provides that monitoring is an important aspect of mitigation for ensuring that the purpose “intended to be served by the condition is actually achieved.” Id. at III.D. In addition, it states that “[i]f the mitigation plan necessary to ensure compliance with the Guidelines is not reasonably implementable or enforceable, the permit shall be denied.” Id. at III.E.

103. The Corps recognized that the Wilkins Facility had the potential to cause significant adverse impacts on the aquatic ecosystem but concluded that these impacts had been

sufficiently minimized “through special permit conditions and by implementation of the Corps’ [no-wake zone] regulation.” EA at 36-37.

104. The Corps’ reliance on the no-wake zone regulation as a mitigation measure violates 40 C.F.R. § 230.10(d) because the no-wake zone regulation is not a condition of the permit. See MOA at III.E.

105. The Corps’ reliance on the no-wake zone regulation as a mitigation measure violates 40 C.F.R. § 230.10(d) because the no-wake zone is not enforceable. It has never been enforced, and there is no mechanism to fund, staff, or otherwise implement and enforce the regulation now or for the life of the Wilkins Facility. The permit merely requires Wilkins to serve on and participate in a committee of local, state, and federal agencies to “*attempt to establish a funding program for enforcement of the no-wake zone.*” Permit at 2-4 (emphasis added). The no-wake zone, thus, is not reasonably implementable or enforceable, and the permit should have been denied. See MOA at III.E.

106. The Corps’ reliance on the special permit conditions violates 40 C.F.R. § 230.10(d) because these conditions do not minimize adverse impacts to the extent practicable. Additional project modifications and permit conditions, such as requiring lower HP limits and fewer boat slips, remain available that would minimize adverse impacts on the aquatic ecosystem. Additionally, the special permit conditions are intended to augment the no-wake zone regulation; thus, in the absence of an enforceable and effective no-wake zone, these conditions on their face do not mitigate the negative impacts of the project to the extent practicable.

107. The Corps’ reliance on the no-wake zone regulation and the special permit conditions violates 40 C.F.R. § 230.10(d) because there is no mechanism to monitor the

effectiveness of these measures to ensure the purpose intended to be served by them is actually achieved. See MOA at III.D.

108. The Corps' issuance of the Section 404 permit where appropriate and practicable steps to minimize adverse impacts of the Wilkins Facility have not been taken violates Section 404 of the Clean Water Act and the Section 404(b)(1) Guidelines. The Corps' issuance of the Section 404 permit is therefore arbitrary and capricious, an abuse of discretion, and not in accordance with law.

Count IV

(Clean Water Act – Violation of the Public Interest Review Requirements - 33 C.F.R. §§ 320.4, 325.4)

109. Paragraphs 1 through 108 are incorporated herein by reference.

110. The Corps' issuance of the Section 404 permit violates 33 C.F.R. § 320.4(a), which prohibits the Corps from issuing a CWA Section 404 permit if “the district engineer determines that it would be contrary to the public interest.” This “public interest review” requires the Corps to weigh the benefits of the project against its reasonably foreseeable detriments, considering all relevant factors and their cumulative impacts. *Id.* § 320.4(a).

111. In addition to considering the general criteria codified at 30 C.F.R. § 320.4(a)(2), the Corps' public interest review must “give full consideration to the views of [FWS and state fish and wildlife] agencies on fish and wildlife matters in deciding on the issuance, denial, or conditioning” of the permit, *id.* § 320.4(c), and “due consideration” to the effects the proposed activity may have on values such as those associated with areas established under federal or state law for historic, cultural, scenic, or recreational values. *Id.* § 320.4(e).

112. When conditions are necessary to satisfy legal requirements, including the 404(b)(1) Guidelines or the public interest requirement, 33 C.F.R. §325.4(a) requires the Corps

to add those conditions as special conditions to the permit and further directs that the conditions be reasonably enforceable. The Corps may take into account the existence of controls imposed under other federal, state, or local programs in “determining whether a proposal complies with the 404(b)(1) guidelines, . . . other applicable statutes, and is not contrary to the public interest.” Id. § 325.4(a)(2). In such cases, the Corps permit must “be conditioned to state that material changes in, or a failure to implement and enforce such program . . . will be grounds for modifying, suspending, or revoking the permit.” Id.

113. If special conditions are necessary to satisfy the public interest requirement but those conditions are not reasonably implementable or enforceable, the Corps must deny the permit. Id. § 325.4(c).

114. The Corps concluded that the Wilkins Facility is not contrary to the public interest because the potential detrimental effects of the project on Back Bay and the Back Bay NWR would be minimized by the no-wake zone regulation and special permit conditions. EA at 21-22, 31; Statement of Findings at 17-18.

115. The Corps’ reliance on the no-wake zone regulation to reach its public interest determination is unlawful because the no-wake zone regulation is not a condition of the permit. See 33 C.F.R. § 325.4(a). In the alternative, the Corps’ reliance on the no-wake zone to reach its public interest determination is unlawful because the no-wake zone regulation is a control imposed under another federal, state, or local program but the permit is not conditioned to state that material changes in, or a failure to implement and enforce the no-wake zone will be grounds for modifying, suspending, or revoking the permit. See id. § 325.4(a)(2).

116. Additionally, the Corps' reliance on the no-wake zone regulation to reach its public interest determination is unlawful because the no-wake zone is not reasonably implementable or enforceable; thus, the permit should have been denied. See *id.* § 325.4(c).

117. The Corps' reliance on the no-wake zone regulation and insufficiently protective special permit conditions precluded an adequate and objective assessment of 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." *Id.*

§ 320.4(a)(2)(i)-(iii). In addition, it undermined the Corps' balancing of the relevant public interest factors enumerated in 33 C.F.R. § 320.4(a), including, among others, conservation, aesthetics, fish and wildlife values, navigation, shore erosion and accretion, recreation, water quality, safety, and the general needs and welfare of the people. *Id.* § 320.4(a).

118. The Corps' public interest review determination failed to give due consideration, as required by 33 C.F.R. § 320.4(c), to the views of the FWS and VDGIF, including the FWS's view that the no-wake zone regulation was not reasonably implementable without any mechanism to enforce it and that special conditions beyond those contained in the final permit were necessary to mitigate the negative impacts of the project on Back Bay and the Back Bay NWR. Because the Corps' public interest determination is premised on the unenforceable no-wake zone regulation and insufficiently protective special permit conditions, the Corps failed to give due consideration to the effects the proposed activity would have on the cultural, scenic, and recreational values of the Back Bay NWR, as required by 33 C.F.R. §320.4(e).

119. The Corps' issuance of the Section 404 permit without having undertaken an adequate and objective "public interest review" violates 33 C.F.R. § 320.4 and § 325.4 and the

Section 404 permit is therefore arbitrary and capricious, an abuse of discretion, and not in accordance with law.

Count V

(National Environmental Policy Act – Failure to Prepare EIS When Impacts Will be Significant)

120. Paragraphs 1 through 119 are incorporated herein by reference.

121. NEPA requires that federal agencies prepare a detailed EIS of every proposal for a major federal action that may “significantly affect[] the quality of the human environment.” 42 U.S.C. § 4332(2)(C).

122. Factors an agency must consider in determining whether a proposal may “significantly” affect the environment include the unique characteristics of the geographic area such as proximity to park lands or ecologically critical areas; the degree to which the proposed action affects public health or safety; the degree to which the possible effects on the environment are highly uncertain, the degree to which the effects on the environment are controversial; and whether the proposed action is related to other actions with individually insignificant but cumulatively significant impacts. 40 C.F.R. § 1508.27(b).

123. As documented in letters from the FWS, EPA, and VDGIF, and as admitted by the Corps, the Wilkins Facility will result in significant adverse impacts on the Back Bay NWR and the sensitive environment of Back Bay, including adverse impacts on water quality, existing SAV, fish and wildlife, resident and migratory birds, and the overall ecological health and value of these resources. These impacts would in turn seriously hamper the ongoing efforts to conserve, preserve, and restore Back Bay, and conflict with the environmental goals of resource agencies and the public interest with respect to the Bay. See EPA 2 May 2005 Letter; FWS 29 April 2005 Letter at 8; VDGIF 6 June 2005 Letter; VDGIF 23 March 2006 Letter; VDGIF 3

March 2008 Letter; FWS 5 Sept. 2008 Email; EA at 6, 7, 9, 13, 16, 18, 22. These impacts are significant within the meaning of NEPA, and require preparation of an EIS.

124. As the Corps recognized, the Wilkins Facility is related to other actions with individually insignificant but potentially cumulatively significant impacts. See EA at 14. Because it is reasonable to anticipate a cumulatively significant impact on the environment, significance within the meaning of NEPA exists, and requires preparation of an EIS. See 40 C.F.R § 1508.27(b).

125. The Corps' reliance on the no-wake zone and special permit conditions to conclude that the impact of the Wilkins Facility on the environment would not be significant violates NEPA and its implementing regulations because there is no mechanism to monitor, enforce, or otherwise ensure the efficacy of these measures, and because there is no evidence that the no-wake zone and permit conditions would, in fact, mitigate the impacts below the level of significance.

126. The Corps' conclusion that the project would have no significant effects on the environment and the decision not to prepare an EIS violate NEPA and its implementing regulations and is arbitrary, capricious, and otherwise not in accordance with law. The Corps' issuance of the Section 404 permit without preparation of an EIS, therefore, violates NEPA, is arbitrary, capricious, and not in accordance with law.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

127. Declare that the Department of the Army Permit number 04-V2213, issued on 10 October 2008 by the Norfolk District of the Corps of Engineers to Kenneth Douglas Wilkins, was unlawfully issued in violation of the CWA, NEPA, and the APA.

128. Issue a permanent injunction requiring the Corps to revoke the permit as in violation of the CWA and the Section 404(b)(1) Guidelines and the public interest review requirements.

129. In the alternative, issue an injunction requiring the Corps to withdraw the permit and to prepare an EIS and remand the matter to the Corps.

130. Award plaintiffs all costs and expenses related to this action, including reasonable attorneys' fees, pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412, or other applicable laws.

131. Award such additional relief as the Court deems proper.

Respectfully submitted this ____ day of December 2009.

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