IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

FREDERICK STUHR, SARAH LEGARE STUHR, EDWARD THOMAS LEGARE, MARK T. CASHEL, ASHLEY CASHEL, CARY WRIGHT, HARRIETT MIDDLETONWRIGHT, CAROLINE PADGETT, LOUISE JENKINS MAYBANK, DENNIS W. VANE, and VIRGINIA LEGARE TOWNSEND, Plaintiffs, v. UNITED STATES ARMY CORPS OF ENGINEERS, CHARLESTON DISTRICT, LTC ANDREW JOHANNES, in his official capacity as Commander and District Engineer of the Charleston District, CHRISTINE WORMUTH, in her official capacity as Secretary of the United States Army, and LTG SCOTT A. SPELLMON, in his official capacity as Chief of Engineers, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, MICHAEL S. REGAN, in his official capacity as Administrator of the US Environmental Protection Agency, JEANEANNE GETTLE, in her official capacity as Acting Regional Administrator, Region IV, US Environmental Protection Agency, Defendants.	)	**COMPLAINT** C.A. No. 2:23-cv-3357-RMG

INTRODUCTION

1. This action challenges the United States Army Corps of Engineers' ("Corps") and United States Environmental Protection Agency's ("EPA") unlawful approval of Point Farm MB, LLC's ("Point Farm") plan to establish the Point Farm Mitigation Bank ("PFMB") in the North Edisto River watershed in South Carolina.

2. The authorization approves a mitigation bank that allows PFMB to generate millions of dollars of revenue by proposing to preserve already protected public trust tidelands which cannot be developed, which a state court judge has ruled PFMB does not own or control, by adding a 100' buffer on highlands that does not appreciably protect those tidelands more than the 50' buffer that already exists by local ordinance, and by keeping over 700 acres of highlands out of conservation, and available, according to its owner, for intensive residential development that would harm the tidelands, whether the buffer is 150 feet or 50 feet.

3. On June 4, 2021, the United States Army Corps of Engineers, Charleston District ("Corps") issued an official approval of Point Farm's Mitigation Banking Instrument ("MBI") attached as Exhibit A, along with an authorization under the Clean Water Act pursuant to Corps Nationwide Permit 27 ("NWP 27") attached as Exhibit B, which is available only for aquatic habitat restoration, establishment, and enhancement activities.

4. The Corps' decision was unlawful because the more than 1,100 acres of adjacent salt marsh is not "under threat of destruction or adverse modifications." The salt marsh is tidelands, held in public trust by the State of South Carolina and cannot be disturbed or developed, under state law. Point Farm does not have sufficient control over the salt marsh to take any action affecting it. As determined by a state court ruling, Point Farm does not own the salt marsh, the State does, as part of the public trust.

5. If the tidelands are under any threat, it is from intensive inappropriate development on the adjoining highlands, which Point Farm owns, and the provisions of the MBI that allows for potential intensive development on the 700+ acres kept out of conservation does not remove, but instead magnifies, that threat.

6. In issuing this approval, the Corps failed to consider the well-reasoned and clearly stated objections of state and federal agencies and the public as it is required to do by law.

7. Plaintiffs seek a declaration that the Corps' and EPA's decision to approve the final MBI and associated work at the site pursuant to NWP 27 was unlawful, arbitrary, and capricious in violation of the CWA and the APA. Plaintiff asks this Court to vacate the final MBI approval and NWP 27 authorization, and to order the Corps to comply with the APA in connection with all further actions relating to this project.

JURISDICTION AND VENUE

8. Jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 11 (federal officer action), 28 U.S.C. §§ 2201 and 2202 (declaratory judgment), 5 U.S.C. §§ 551 *et seq.* (Administrative Procedure Act, or "APA"), and 42 U.S.C. §§ 4321 *et seq*. (NEPA).

9. The violations of law alleged herein have occurred within the District of South Carolina. Venue for this action is proper in this Court pursuant to 28 U.S.C.A. § 1391 and Local Civil Rule 3.01(A)(1).

PARTIES

A. Plaintiffs

10. Plaintiffs Frederick and Sarah Legare Stuhr are citizens and residents of Wadmalaw Island, Charleston County, South Carolina owning property at 6862 Point Farm Road.

11. Plaintiff Edward Thomas Legare is a citizen and resident of Wadmalaw Island, Charleston County, South Carolina owning property at 6860 Point Farm Road.

12. Mark T. and Ashley Cashel are citizens and residents of Wadmalaw Island, Charleston

County, South Carolina, owning property at 6691 Point Farm Road.

13. Cary and Harriett Middleton Wright are citizens and residents of Wadmalaw Island, Charleston County, South Carolina, owning property at 6695 Point Farm Road.

14. Caroline Padgett is a citizen and resident of Wadmalaw Island, Charleston County, South Carolina, owning property at 6850 Point Farm Road.

15. Louise Jenkins Maybank is a citizen and resident of Wadmalaw Island, Charleston County, South Carolina, owning property at 2129 Brigger Hill Road.

16. Dennis W. Vane is a citizen and resident of Wadmalaw Island, Charleston County, South Carolina, owning property at 1340 Polly Point Road.

17. Virginia Legare Townsend is a citizen and resident of Wadmalaw Island, Charleston County, South Carolina, owning property at 6861 Point Farm Road. (All the individuals described in paragraphs 7-17 herein are, collectively, "Plaintiffs").

18. The Plaintiffs own property, live, work, and recreate in the immediate and general vicinity of the proposed project and have an ongoing interest in protecting water quality and conserving wildlife and wildlife habitat in the areas impacted by the project. The project will impact the entire Wadmalaw Island ecosystem, an area used, enjoyed, and depended upon by the Plaintiffs for recreation, fishing, aesthetic enjoyment, wildlife observation, and other uses. Degradation of Wadmalaw Island, its surrounding rivers, natural areas, and tidal estuaries, including its wildlife habitat and aesthetic value, will impair the Plaintiffs' use and enjoyment of the area and damage and devalue their Property. The project will ultimately be used as mitigation for impacts to salt marshes throughout Charleston County, leading to the impairment of use and enjoyment of those resources as well.

19. Plaintiffs have been and continue to be injured by the Corps' authorization of this project for use as a mitigation bank to offset harms to salt marshes elsewhere in Charleston County and in other areas of South Carolina. Plaintiffs reasonably believe that this project sets an unlawful precedent for mitigation banking pursuant to Section 404 of the CWA, which will ultimately result in the net loss of wetlands in the State of South Carolina. Plaintiffs will be injured unless there is an order from this Court vacating the approval of the MBI and authorization pursuant to NWP 27, prior to PFMB undertaking activities affecting the environment of South Carolina as well as the Plaintiffs in this case.

20. The intensive development that remains possible despite the approval of this unlawful and flawed mitigation bank would harm the natural beauty and environmental health of Wadmalaw Island and its surrounding areas, resulting in a loss of value to the property of the Plaintiffs and immeasurable and irrevocable loss of the Plaintiffs' quality of life including activities such as recreation, fishing, shrimping, oystering, aesthetic enjoyment, and wildlife observation.

21. As set forth above, the Plaintiffs have interests that will be adversely affected and irreparably harmed by Point Farm's project, due to the Corps' arbitrary and capricious decision-making under the APA. Because the Corps' decision to authorize the PFMB in violation of federal law is the cause of Plaintiffs' injuries, an order from this Court requiring compliance with the law would redress Plaintiffs' injuries.

B. Defendants

22. Defendant Corps is an agency within the United States Department of Defense charged with permitting construction in the waters of the United States. The Corps' Charleston District is responsible for implementing Section 404 of the CWA in South Carolina and is

headquartered in Charleston, SC.

23. Defendant Lieutenant Colonel Andrew Johannes is the Commander and District Engineer for the Corps and is sued in his official capacity. He supervises and manages all Charleston District decisions and actions.

24. Defendant Christine Wormuth is the Secretary of the Army and is sued in her official capacity as the head of the federal agency that took the final agency action challenged by this Complaint.

25. Defendant Lieutenant General Scott A. Spellmon is the Commanding General and Chief of Engineers of the Corps and is sued in his official capacity.

26. Defendant EPA is charged with administration of the CWA. EPA has an oversight role in Corps decisions made under Section 404 of the CWA, and ultimate responsibility for all decisions made under Section 404 of the CWA related to permitting. See., e.g., 33 U.S.C. Sec. 1344(c).

27. Defendant Michael Regan is the Administrator of the EPA and is sued in his official capacity. Pursuant to the CWA and the regulations promulgated thereunder, Administrator Regan is charged with the supervision and management of all EPA decisions and actions, including the administration of the CWA.

28. Defendant Jeaneanne Gettle is the Acting Regional Administrator of Region IV of the US EPA, which is based in Atlanta, Georgia, and is the region encompassing the state of South Carolina. She is sued in her official capacity.

LEGAL BACKGROUND

A. Corps Regulations Governing Nationwide Permits and NWP 27

29. In 1972, Congress passed the CWA "to restore and maintain the chemical, physical, and

biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To achieve this objective, Section 301 of the CWA prohibits "the discharge of any pollutant" into "the navigable waters of the United States" except in accordance with permits issued under the CWA. 33 U.S.C. § 1311(a). "Pollutants" include dredged spoil, rock, dirt, and sand, among other materials. 33 U.S.C. § 1362(6).

30. Section 404 of the CWA 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. 33 U.S.C. § 1344. The Section 404 permitting program is administered by the Corps, with ultimate authority for the program residing with the U.S. Environmental Protection Agency.

31. The term "waters of the United States" includes wetlands. The definition of "wetlands" used by the Corps and the EPA is as follows:

> The term "wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

33 C.F.R. § 328.3(b) (Corps); 40 C.F.R. § 232.2(r) (EPA).

32. 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 under a Section 404 permit issued by the Corps.

33. Issuance of all Section 404 permits is subject to the Section 404(b)(1) Guidelines found at 40 C.F.R. § 230 *et seq*. These guidelines provide, *inter alia*, that no discharge of dredge or fill material may be permitted if there is a less damaging "practicable alternative" available, or if it will "cause or contribute to significant degradation" of waters of the United States.

40 C.F.R. § 230.10.

34. The Section 404(b)(1) Guidelines further provide that "the degradation or destruction of special aquatic sites is considered to be among the most severe environmental impacts covered by these Guidelines. The guiding principle should be that degradation or destruction of special sites may represent an irreversible loss of valuable aquatic resources." 40 C.F.R. § 230.1. Wetlands are designated "special aquatic sites" under the Guidelines. 40 C.F.R. § 230.41.

35. There are two types of Section 404 permits: individual permits that authorize specific activities on a case-by-case basis, and general, "Nationwide" permits ("NWP") that provide standing authorization for all activities that fit the description in the permit. *See* 33 U.S.C. § 1344(a), (e).

36. NWPs are available only where the authorized activities will have minimal adverse cumulative or individual effects on the environment, are noncontroversial, and are in the public interest. *See* 33 U.S.C. § 1344(e); 33 C.F.R. § 330.1; 64 Fed. Reg. 39,348 (July 21, 1999); 77 Fed. Reg. 10,185 (Feb. 21, 2012) ("NWPs authorize activities that have minimal individual and cumulative adverse effects on the aquatic environment that would likely generate little, if any, public comment if they were evaluated through the standard permit process with a full public notice."). Moreover, "[n]o activity is authorized under any NWP which is likely to directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation . . .." 77 Fed. Reg. 10,283 (Feb. 21, 2012).

37. If the Corps "finds that the proposed activity would have more than minimal individual or cumulative net adverse effects on the environment or otherwise may be contrary to the

public interest," it must "modify the NWP authorization to reduce or eliminate those adverse effects, or [] instruct the prospective permittee to apply for a regional general permit or an individual permit." 33 C.F.R. § 330.1(d); *see id.* at 325.2(e)(1)(i); 77 Fed. Reg. 10,287 (Feb. 21, 2012).

37. Any activity authorized under an NWP must avoid and minimize adverse effects, include mitigation to minimize such adverse effects, and include, at a minimum, one-for-one compensatory mitigation for all wetland losses exceeding one-tenth of an acre. 77 Fed. Reg. 10,285 (Feb. 21, 2012).

38. Before authorizing a project under a nationwide permit, the district engineer must "consider any comments from federal and state agencies concerning the proposed activity's compliance with the terms and conditions of the NWPs and the need for mitigation," and must "indicate in the administrative record . . . that the resource agencies' concerns were considered." 77 Fed. Reg. 10,287 (Feb. 21, 2012).

39. The NWP at issue in this case – Nationwide Permit 27 – is by its terms limited to restoration, establishment, and enhancement activities that "result in net increases in aquatic resource functions and services." 77 Fed. Reg. 10,275 (Feb. 21, 2012) ("NWP 27"). It is not available to authorize "the conversion of a stream or natural wetlands to another aquatic habitat type." *Id.*

40. "Compensatory mitigation is not required for activities authorized by [NWP 27] since these activities must result in net increases in aquatic resource functions and services." 77 Fed. Reg. 10,188 (Feb. 21, 2012).

B. Corps Regulations on Mitigation Banks

41. Corps regulations establish standards and criteria "for the use of all types of

compensatory mitigation . . . to offset unavoidable impacts to waters of the United States authorized through the issuance of Department of the Army ("DA") permits pursuant to section 404 of the Clean Water Act (33 U.S.C. §1344) and/or sections 9 or 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. §§ 401, 403)." 33 C.F.R. § 332.1.

42. The preferred method for accomplishing such mitigation is the sale of credits from centralized "mitigation banks." 33 C.F.R. § 332.3(b)(2). A mitigation bank is "a site, or suite of sites, where resources (e.g., wetlands, streams, riparian areas) are restored, established, enhanced, and/or preserved for the purpose of providing compensatory mitigation for impacts authorized by DA permits. In general, a mitigation bank sells compensatory mitigation credits to permittees whose obligation to provide compensatory mitigation is then transferred to the mitigation bank sponsor. The operation and use of a mitigation bank are governed by a mitigation banking instrument." *Id.* at 332.2.

43. According to Corps regulations, mitigation banks are preferable to individual permit-specific mitigation requirements, because [m]itigation banks typically involve larger, more ecologically valuable parcels, and more rigorous scientific and technical analysis, planning and implementation than permittee-responsible mitigation. Also, development of a mitigation bank requires site identification in advance, project-specific planning, and significant investment of financial resources that is often not practicable for many in-lieu fee programs." 33 C.F.R. § 332.3(b)(2).

44. Before a site may be used as a mitigation bank, the Corps must approve the Mitigation Banking Instrument pursuant to the procedure laid out at 33 C.F.R. § 332.8.

45. The District Engineer is required to give "full consideration to any timely comments and advice of the [Interagency Review Team]," convened as part of the required

regulatory process for approval of mitigation banks. 33 C.F.R. § 332.8(b)(4). Further, "[t]he district engineer will seek to include all public agencies with a substantive interest in the establishment of the mitigation bank . . .." *Id.* at (b)(2).

FACTS

46. The proposed site for the PFMB is claimed to be a 2,026-acre tract of land located on the western end of Wadmalaw Island in Charleston County, approximately 22 miles west-southwest of Charleston. The tract includes 878.43 acres of uplands and freshwater wetlands and 1,148.21 acres of salt marsh.

47. Point Farm also proposes to "preserve" 1,107.57 acres of salt marsh on the property by placing the salt marsh and an upland buffer along the saltmarsh in a conservation easement. But the remaining 713.53 acres of land on the site will remain outside the bank boundary and conservation easement, allowing for the placement of a development next to this "preserved" salt marsh.

48. On June 4, 2021, the United States Army Corps of Engineers, Charleston District ("Corps") issued an official approval of Point Farm's Mitigation Banking Instrument ("MBI") attached as Exhibit A, along with an authorization under the Clean Water Act pursuant to Corps Nationwide Permit 27 ("NWP 27") attached as Exhibit B, which is available only for aquatic habitat restoration, establishment, and enhancement activities.

49. In its decision to issue this official approval, the Corps acted in an arbitrary and capricious manner, not in accordance with law.

50. The Corps approved a preservation proposal that does not meet the Corps' regulatory definition of preservation—i.e., the resource is under threat of destruction or adverse

modification and that threat is removed. The salt marsh is not under threat because it is held by the State as a public trust.

51. Alternatively, to the extent the threat posed to the salt marsh is upland development, that threat has not been removed. By only adding a 100' buffer to an already existing 50' buffer, while leaving 700+ acres of adjoining highland available, according to the property owner, to intensive residential development, the mitigation bank owner has increased, not decreased, the threat of harm to the property it purportedly protects, the public trust tidelands it does not own or control.

52. In fact, the Corps approval of a preservation proposal despite the Applicant not having sufficient control to protect the resources to be preserved is further unlawful error.

53. Additionally, the Corps erred by failing to consider the objections of sister agencies and the public. *See* 33 C.F.R. § 332.8(b)(2), (4). The Corps violated its regulatory mandate to consider agency "comments and advice" by minimizing and misrepresenting the fundamental objections lodged by expert agencies in its decision document approving the Final MBI.

54. The Corps is required by law to meaningfully consider the objections and comments lodged by its sister agencies and the public. The district engineer is required to give "full consideration to any timely comments and advice of the [Interagency Review Team]," convened as part of the required regulatory process for approval of mitigation banks. 33 C.F.R. § 332.8(b)(4). Further, '[t]he district engineer will seek to include all public agencies with a substantive interest in the establishment of the mitigation bank…." Id. at (b)(2).

55. Letters from SCDNR relating to Point Farm's eligibility as a preservation candidate

and OCRM's concerns and comments relating to Point Farm's lack of ownership of the salt marsh show that these expert agencies had fundamental concerns about the project.

56. The U.S. Fish and Wildlife Service ("USFWS") also objected to the proposed restoration portion of the project as follows: "[b]ecause the impoundment currently provides habitat for a federally protected species; the Service recommends removing this Unit from the proposed mitigation work and maintaining the area in its current state." See Ex 2, USFWS letter.

57. The Corps failed to meaningfully consider the objections by its sister agencies and the public.

CLAIMS FOR RELIEF

FOR A FIRST CLAIM FOR RELIEF

(Violation of the APA)

(The Corps Acted Arbitrarily and Capriciously and Not In Accordance with Law in Approving Point Farm's MBI When the MBI Does Not Meet the Corps' Preservation Criteria)

58. Plaintiffs incorporate the allegations of the preceding paragraphs as if set forth in full.

59. The Corps' MBI Approval violates the agency's own regulations by failing to require that the project fit the above-described basic definitional criteria.

60. The Corps failed to follow its own regulations which require that the over 1100 acres of adjacent saltwater marshland be "under threat of destruction or adverse modifications." The salt marsh is not actually threatened and thus does not meet the Corps' preservation criteria. Additionally, the MBI does not add any protection to the saltwater marshland that does not already exist.

61. The general compensatory mitigation requirements rule provides five requirements for preservation as compensatory mitigation:

    a. The resources to be preserved provide important physical, chemical, or biological functions for the watershed,

    b. The resources to be preserved contribute significantly to the ecological sustainability of the watershed,

    c. Preservation is determined by the district engineer to be appropriate and practicable,

    d. *The resources are under threat of destruction or adverse modifications*, and

    e. The preserved site will be permanently protected through an appropriate real estate or other legal instrument (e.g., easement, title transfer to state resource agency, or land trust). 33 C.F.R. § 332.3(h) (emphasis added).

62. The rules further define preservation as "[T]he removal of a threat to, or preventing the decline of, aquatic resources by an action in or near those aquatic resources. Th[e] term includes activities commonly associated with the protection and maintenance of aquatic resources through the implementation of appropriate legal and physical mechanisms. Preservation does not result in a gain of aquatic resource area or functions." *Id.* at § 332.2.

63. Last, the mitigation rules provides that where credits are provided by buffers, the credits that protect "[n]on-aquatic resources can only be used as compensatory mitigation . . . when those resources are essential to maintaining the ecological viability of adjoining aquatic resources." *Id.* at § 332.8.

64. Point Farm and the Corps cited the following to argue that the preserved area is under

threat from three sources:

a. The main threat to salt marsh comes primarily from development of the adjacent upland areas. The areas adjacent to the preserved marsh are threatened by potential development as current zoning ordinances allow for the creation of multiple lots along the marsh boundary and throughout the bank site.

b. Many of these lots qualify for docks with pier heads in either Leadenwah Creek or to the tributaries that flow through the marsh.

c. Cattle were allowed to graze in the space in the upper marsh within the preservation unit until the property was purchased by the owner.

65. The Corps erred in finding that (b) docks and (c) grazing cattle were threats that would be remedied by the PFMB and erred in finding that the bank would remove or ameliorate in any way the threat described in (a) intensive residential development.

66. The Corps explained that development threatens the aquatic resources on the property. With regard to the removal of intensive residential development, though, Corps erred in two respects:

a. First, existing zoning regulations on Wadmalaw already require a 50-foot setback for development. Accordingly, there is no threat of development to that 50-foot area because regulations prohibit development. Point Farm should not be allowed to generate mitigation credits for protected land that is already protected.

b. Second, even with the mitigation bank and conservation easement, development *still* threatens the aquatic resources on the property because Point Farm can develop the property next to the buffer, and more importantly, on the over 700 acres next to

the mitigation bank.

67. Put simply, the Corps identified a threat, but failed to require Point Farm to remove that threat.

68. Point Farm agreed to place an average 150-foot buffer, ranging from 50 to 150 feet, along salt marsh boundaries, but this additional 100-feet beyond what is already required by local ordinance does not remove the threat posed by development. The Corps failed to require any evidence or research supporting the adequacy or efficacy of the particular width of this buffer, and in fact there is no evidence that 150 feet provides any additional protection over 50 feet or that 150 feet is adequate to protect the saltwater marsh from residential development on the highland.

69. The MBI acknowledges that the area adjacent to the bank—the approximately 700 acres not placed in the conservation easement—may be used for "development."

70. Point Farm has only agreed to begin development 100-feet farther from the marsh than would be allowed by local zoning regulations. This minimal setback does not reduce the threat the Corps identifies.

71. In fact, research and evidence over the past 50 years concludes that buffers of this sort are not adequate to protect the chemical and biological functions and properties of aquatic ecosystems. Uplands must retain the capacity to absorb and purify rainfall if aquatic function and diversity is to be maintained. This extends far beyond the 150-foot buffer included in the mitigation bank.

72. The Corps did not address this in any way and ignores the fact that such a small setback does not remove a threat posed by development, including stormwater runoff from impervious services, septic tanks installed in the area, and harmful pollutants in runoff

associated with development like fuels and fertilizers, impacts that could degrade the salt marsh. The Corps failed to follow its own guidelines which state: "Upland buffers may not be acceptable if their potential benefit to the adjacent aquatic resources is of questionable value due to shape, condition, location, inadequate or excessive width, or other reasons."

73. The purpose of a mitigation is to permanently offset impacts to wetland ecosystems. The Corps acknowledges this by requiring the buffer to be established by a perpetual easement held and enforced by a third party. Yet the zoning on the upland 700 acres unencumbered by the easement can be easily changed by local government action. Zoning change applications are submitted and acted on regularly. Thus, the current zoning limiting upland development to 15 acre lots is insufficient to provide the permanent safeguard that the unencumbered 700 acres will not be extensively developed with houses, roads, driveways, golf courses and other land uses that generate runoff into surface waters. For these reasons, the bank is vulnerable to contamination and degradation within a few years of its creation, rather than providing the permanent benefits envisioned by the CWA.

74. The 150-foot average upland buffer is not therefore merely of "questionable value," it is of virtually no value for the reasons discussed above. The marshland is already protected as public land by the State of South Carolina. It is also protected by a 50-foot critical line buffer. So, the addition of 100 feet to the existing buffer has at best a negligible contribution to preserving the already protected marshland.

75. Point Farm has filed suit against County Council challenging the County's long-standing rule that three acre lots must touch the critical line. Point Farm's intention is clear: to develop the property intensely by creating many more three acre lots in violation of the current zoning rules.

76. In fact, by approving millions of dollars in mitigation credits for preserving the marshland, the Corps did exactly the opposite of what it was supposed to do: it actually facilitated the development of the adjacent property, which will in fact threaten the marshland.

77. The Corps erred in pointing to the construction of docks as a threat that justifies preservation. However, the South Carolina Department of Natural Resources ("SCDNR") found that docks did not constitute a meaningful threat.

78. The placement of docks across the salt marsh is regulated by the State of South Carolina which is charged by law with protecting these public trust tidelands from harm. The vast majority of the shoreline of this property is ineligible for dock construction due to the fact that the distance between the upland and a navigable creek exceeds 1000 feet in all but a few places. State policies prohibit docks longer than 1000 feet and prohibit docks that simply extend into salt marsh without access to creeks.

79. The Corps further erred in identifying grazing cattle as a threat the justifies preservation. There does not appear to be any evidence that cattle are currently grazing, or will begin grazing, in the upper marsh. The Corps only noted that, historically, cattle were allowed to graze in the upper marsh when someone else owned the land. Indeed, SCDNR noted that "a [2018] site visit showed no impacts to marsh as a result of cattle grazing." The Corps failed to support its finding that cattle grazing is a threat to the salt marsh.

80. Further, allowing grazing on the "upper marsh" would be trespassing on land owned by the State and the owner of the highland has no authority to do so.

81. SCDNR objected to the Corps' decision to approve the PFMB and stated: "in order for mitigation in the form of preservation to be appropriate and provide compensatory

mitigation value, the resources to be protected must be under threat of destruction or adverse modification. This is very difficult to demonstrate in the open tidal environment, given the location of this project and the protection afforded by existing regulations. The construction of docks within this area does not constitute a major impact or threat to this system and a recent site visit showed no impacts to marsh as a result of cattle grazing. The DNR does not consider the preservation of tidal salt marsh under little to no threat as viable mitigation."

82. The Corps ignored SCDNR's conclusions that there is no threat to the marshland.

83. For all of the above reasons, Corps' decision was clearly arbitrary and capricious. An agency decision is arbitrary and capricious "if the agency has . . . entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 2867, 77 L. Ed. 2d 443 (1983).

FOR A SECOND CLAIM FOR RELIEF
(Violation of the APA)
(The Corps Acted Arbitrarily and Capriciously and Not In Accordance with Law in Approving Point Farm's MBI When Point Farm Does Not Meet Have Sufficient Control Over the Aquatic Resources in the PFMB)

84. Plaintiffs incorporate the allegations of the preceding paragraphs as if set forth in full.

85. Point Farm does not own the salt marsh in the mitigation bank and, the Corps' decision to approve the bank based on protection of that aquatic resource was arbitrary and capricious.

86. Though there is no explicit "ownership requirement" in the Corps' Mitigation Bank regulations, the Corps' Guidelines for Preparing a Compensatory Mitigation Plan ("Corps SOP") state that, in determining wetlands credits for upland buffers, "[i]f the permit

applicant does not have sufficient control to protect all or a portion of an aquatic resource, the proposed mitigation site should not be eligible for preservation or upland buffer credits." Corps SOP App. C at 7. The regulations require information on "[t]he proposed ownership arrangements and long-term management strategy for the mitigation bank" 33 C.F.R. § 332.8(d)(2)(v) and "[a] description of the legal arrangements and instrument, including site ownership, that will be used to ensure the longer-term protection of the . . . site" *id.* at § 332.4(c)(4)

87. Point Farm, as its fundamental basis for its asserted ecological value of the mitigation bank claims that it owns the aquatic resources that the bank purportedly preserves. It stated that it "has traced the title to the land, including the salt marsh, to the original land grant to the Lord Proprietor in 1700 [and] [t]he salt marsh extending to Leadenwah Creek and the Edisto River is therefore included in the ownership boundaries of the property." Prospectus at 1. Point Farm also included a list of deeds that trace back to the original land grant in Appendix A of the Prospectus.

88. South Carolina Department of Health and Environmental Control's Office of Coastal and Resource Management ("OCRM"), however, submitted comments on Point Farm's proposal stating that, under S.C. Code 48-39-220(A), "in order for the bank owner to establish title to the marsh, the nature of marsh ownership must be decided by the circuit court or a court of competent jurisdiction."

89. South Carolina's public trust doctrine provides that lands below the high-water mark are presumptively owned by the State and held in trust for the benefit of the public. *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Env't Control*, 411 S.C. 16, 29, 766 S.E.2d 707, 715 (2014); *Estate of Tenney v. S.C. Dep't of Health & Envtl. Control*, 393 S.C. 100,

106, 712 S.E.2d 395, 398 (2011) ("Under the public trust doctrine, the State holds presumptive title to tidal land below the high-water mark to be held in trust for the benefit of all people of South Carolina.").

90. The doctrine forbids the State from permitting activities substantially impairing the public interest in marine life, water quality, or public access. A private party may rebut this presumption of State ownership by proving its own good title but must convince the court that the State intended to include the tidelands within the boundaries expressed in a deed. S.C. Code § 48-39-220 governs "legal action to determine interest in tidelands" and section (A) states that "[a]ny person claiming an interest in tidelands . . . may institute an action against the State of South Carolina for the purpose of determining the existence of any right, title, or interest of such person in and to such tidelands as against the State."

91. Complying with this request, Point Farm filed an action in the South Carolina Ninth Judicial Circuit Court of Common Pleas seeking a declaration of title to tideland areas below mean high water located on the property. The Court concluded in February 2021 that Point Farm had failed to establish, by clear and convincing evidence, title to interior saltwater wetlands located on the property. Order at 2–3, *Point Farm Investors, LLC v. South Carolina*, No. 2020-CP-10-01841 (Feb. 2021).

92. The subsequent appeal was dismissed by consent of the parties. Therefore, there is a binding South Carolina court decision concluding that Point Farm does not own the salt marsh that is included as a significant part of the PFMB.

93. Despite this, Point Farm has moved forward with placing a conservation easement across the entire bank property, including the salt marsh. The filed Conservation Easement and Acceptance that was approved by the Corps states erroneously that

"Grantor is the owner in fee simple of certain real property, . . . consisting of approximately 1,313.11 acres of land ("Protected Property").

94. The State of South Carolina owns the marshland and has not consented to the easement. In an email dated May 20, 2021, OCRM's counsel stated that "[w]ithout some favorable resolution for [Point Farm] from the Courts of Appeals, OCRM cannot recognize dual tidelands ownership interests that include the state as primary owner and a private citizen/corporation with a subservient ownership interest."

95. Point Farm does not have "sufficient control" to protect the salt marsh.

96. Though the Corps acknowledged OCRM's position, it ultimately concluded that "in light of the Bank Sponsor's representation that it is legally empowered to place a conservation easement on the marshland associated with the Bank, it is the Corps' position that approval of the . . . Bank . . . is appropriate and practicable." *Id.*

97. The Corps failed to follow its own guidelines requiring mitigation bankers to have "sufficient control" to protect the resources adjacent to upland buffers. Based on that lack of control (ownership) the Corps' decision to approve the MBI contrary to its own regulations was arbitrary and capricious and without basis in law or fact.

98. Here, the Corps "failed to consider an important aspect of the problem" because it did not meaningfully question the ownership issue. Instead, the Corps simply took Point Farm at its word.

99. Further, the Corps' "explanation . . . runs counter to the evidence before [it]." The evidence before the Corps is, on the one hand, a South Carolina state court opinion finding that Point Farm does not own the saltmarsh and an email from OCRM stating that it cannot recognize Point Farm's claim to the saltmarsh, and on the other hand, Point Farm's

"belief" and tax counsel's memo that it owns the land and Point Farm's deed.

100. The Corps erred in relying on a self-interested memorandum and a deed that a court determined was insufficient to establish ownership over a Circuit Court's decision and the position of a state agency.

101. As a result of this error, the Corps has allowed the mitigation bank owner to claim protection over land it does not own or control, and which, as argued previously, is not itself likely to be developed. In fact, since the salt marsh is not owned by PFMB, any action taken regarding the marsh by the mitigation bank or subsequent owners of the upland would be trespassing. Second, tidelands and salt marsh are heavily and tightly regulated by the State of South Carolina's DHEC/ OCRM and the Corps. Permits for alteration are virtually never given. So, the mitigation bank could not be construed to be "protecting" the salt marsh.

102. For all of these reasons, the action by the Corps in approving the MBI was arbitrary, capricious, and contrary to law, and should be reversed by this Court.

FOR A THIRD CLAIM FOR RELIEF

(Violations of the CWA and the APA – The Corps Acted Arbitrarily and Capriciously and Not In Accordance with Law in Granting NWP 27 Approval for this Project)

103. Plaintiff incorporates the allegations of the preceding paragraphs as if set forth in full.

104. As noted above, NWP 27 authorizes "[a]ctivities in waters of the United States associated with the restoration, enhancement, and establishment of tidal and non-tidal wetlands and riparian areas. . . provided those activities result in net increases in aquatic resource functions and services." 77 Fed. Reg. 10,275 (Feb. 21, 2012).

105. The Corps erred in authorizing this project – in spite of substantial expert agency

objections – under any nationwide permit, because nationwide permits are available only where the authorized activities will have minimal adverse cumulative or individual effects on the environment, are noncontroversial, and are in the public interest. *See* 33 U.S.C. § 1344(e); 33 C.F.R. § 330.1; 64 Fed. Reg. 39,348 (July 21, 1999); 77 Fed. Reg. 10,185 (Feb. 21, 2012).

106. Because EPA has the ultimate responsibility under the CWA to implement the Section 404 permitting program, EPA's failure to override or block the Corps' actions in granting authorization for this project pursuant to NWP 27 is a failure by the Administrator to perform her non-discretionary duties under Sections 301 and 404 of the CWA. 33 U.S.C. §§ 1311 & 1344; *Nat'l Wildlife Fed'n v. Hanson*, 859 F.2d 313 (4th Cir. 1988).

107. For all of these reasons, the Corps' and EPA's actions in granting authorization for this project pursuant to NWP 27 are arbitrary, capricious, an abuse of discretion, and in violation of the CWA and APA, 5 U.S.C. § 706(2).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that the Court:

A. Declare that the Defendants' approval of the Point Farm Mitigation Bank violated the Administrative Procedure Act, and applicable regulations as described above.

B. Declare that the Corps' Letter of Approval granting the Point Farm Mitigation Bank mitigation bank status violated APA, the CWA, and applicable regulations as described above.

C. Vacate both the Corps' NWP 27 authorization and MBI.

D. Enjoin the Defendants from authorizing any action or construction associated

with the MBI and NWP 27 verification until they fully comply with the Administrative Procedure Act, CWA, and all implementing regulations.

E. Allow Plaintiffs their costs of suit, including reasonable attorneys' fees pursuant to 16 U.S.C. § 470w-4, and expert witness fees; and

F. Grant Plaintiffs such further and additional relief as this Court deems to be necessary and appropriate.

Respectfully submitted this 13th day of July 2023.

s/ *W. Andrew Gowder, Jr.*
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