

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

GULF COAST ROD, REEL AND GUN §
CLUB, INC. and GILCHRIST §
COMMUNITY ASSOCIATION, §
Plaintiffs, §

v. §

JERRY PATTERSON, in his official §
capacity as Commissioner of the TEXAS §
GENERAL LAND OFFICE; §

TEXAS GENERAL LAND OFFICE; §

U.S. ARMY CORPS OF ENGINEERS; §

COL. CHRISTOPHER W. SALLESE, in §
his official capacity as DISTRICT §
ENGINEER, GALVESTON DISTRICT - §
U.S. ARMY CORPS OF ENGINEERS; §

CIVIL ACTION NO _____

LIEUTENANT GENERAL THOMAS P. §
BOSTICK, in his official capacity as §
COMMANDER AND CHIEF OF §
ENGINEERS, U.S. ARMY CORPS OF §
ENGINEERS; and §

JOHN M. McHUGH, in his official §
capacity as SECRETARY OF THE §
ARMY, §

Defendants. §

PLAINTIFFS' ORIGINAL COMPLAINT

COME NOW Gulf Coast Rod, Reel and Gun Club, Inc. and Gilchrist Community Association, Plaintiffs herein, and complain of the following Defendants, in two groups: (i) Jerry Patterson, Commissioner of the General Land Office and the Texas General Land Office, – collectively referred to as “GLO”; and (ii) the U.S. Army Corps of Engineers, Col. Christopher W. Sallese, District Engineer of the Galveston District of the U.S. Army Corps of Engineers, Lieutenant General Thomas P. Bostick, Commander and Chief of Engineers, U.S. Army Corps

of Engineers, and John M. McHugh, Secretary of the Army - collectively referred to as the “Corps”. The individual defendants are sued in their official capacities.

I. INTRODUCTION AND SUMMARY OF THE CASE

1. This lawsuit complains about the actions of Jerry Patterson, Commissioner of the General Land Office, as well as the General Land Office (GLO) of the State of Texas and the U.S. Army Corps of Engineers (Corps), relating to attempts by the GLO to close Rollover Pass.

2. As the Corps states, Rollover Pass is “a nationally-recognized fishing destination,” flowing between the Gulf of Mexico and eastern Galveston Bay, called East Bay.

3. The Texas Parks and Wildlife Department historically has maintained this excellent fishing venue on the Bolivar Peninsula as part of the state’s recreational fishing program, free and open to all members of the public, pursuant to an easement on property owned by the Gulf Coast Rod, Reel and Gun Club, Inc. (Club).

4. The GLO has no ownership or other right to the property within which Rollover Pass is situated and has no legal right to take any action on property that it does not own. Notwithstanding that absence of any ownership or other property right, the GLO applied for and received a permit from the Corps to close Rollover Pass, dated August 10, 2012.

5. This lawsuit alleges that the GLO made false representations in order to obtain a Corps of Engineers permit. As part of its application, federal law (33 CFR 325.1(d)(8)) required GLO to confirm that the agency “possesses or will possess” a property ownership right to close and fill Rollover Pass, but GLO had – and to this day has – no such right.

6. Plaintiff Club alleges that this GLO action, to obtain a permit by this false assertion of ownership, violates fundamental due process rights in violation of the 5th and 14th Amendment of the United States Constitution.

7. Moreover, even if the GLO could have obtained the requisite authority, this lawsuit alleges that the Corps violated the National Environmental Policy Act (NEPA), the Clean Water Act, and Section 504 of the Rehabilitation Act of 1973 in its decision to issue a permit allowing the closure of Rollover Pass.

8. As NEPA and Clean Water Act violations, this lawsuit alleges that the Corps failed to fully analyze cumulative impacts of the closure of Rollover Pass relative to change in salinity and loss of marine fishery productivity that will result in East Bay from the increased freshwater inflows from the Needmore Diversion and the closure of Rollover Pass.

9. As additional NEPA and Clean Water Act violations, this lawsuit alleges that the Corps failed to correctly do three analyses required by law: an analysis of alternatives, including consideration of groins and jetties; a public interest review; and a full analysis of the socio-economic impacts that closure of Rollover Pass would cause to users of Rollover Pass, many of whom travel from far away to fish at this fine venue.

10. Under the Rehabilitation Act, this lawsuit alleges that the Corps' decision to grant the requested permit unlawfully discriminates against persons with disabilities, particularly those with mobility impairments who use wheelchairs or scooters – including members of the Gilchrist Community Association, because it would allow destruction of this unique, high quality, accessible fishing venue without any commitment to create a comparable, accessible, place for public fishing, so people with mobility impairments will not have equal access to fish.

11. This lawsuit also alleges that, if it somehow were to implement the existing permit without sufficient accessible replacement facilities, the GLO would discriminate against persons with disabilities in violation of the Americans With Disabilities Act, as well as Section 504 of the Rehabilitation Act, in its actions to close Rollover Pass.

12. This lawsuit seeks declaratory and, if needed, injunctive relief to prevent use of this permit from the Corps of Engineers to allow GLO to close Rollover Pass.

II. JURISDICTION AND VENUE

13. This Court has federal question jurisdiction pursuant to 28 U.S.C. §§ 1331 & 1343, with authority for declaratory relief under 28 U.S.C. §§ 2201 & 2202.

14. This action arises under the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (“APA”), the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* (“NEPA”) and Section 404 of the federal Clean Water Act, 33 U.S.C. § 1251; 1344 (“§ 404”), together with their implementing regulations; Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 as well as Title II of the Americans with Disabilities Act (“ADA”) of 1990, 42 U.S.C. § 12132, together with their implementing regulations; and the Civil Rights Act, 42 U.S.C. § 1983, for violation of the United States Constitution.

15. Venue is proper pursuant to 28 U.S.C. § 1391 (b) and (e) because the claim arose in this district and the United States or an agency of the United States is a defendant.

III. PARTIES

16. The Plaintiff, Gulf Coast Rod, Reel and Gun Club, Inc. is a domestic non-profit corporation located at 148 S. Dowlen Road #704, Beaumont, Texas 77707, and is suing on behalf of itself and its members.

17. The Plaintiff, Gilchrist Community Association, is a domestic nonprofit corporation located at P. O. Box 186, High Island, Texas 77623, and is suing on behalf of itself and its members, including members with disabilities, particularly with mobility impairments.

18. Jerry Patterson is sued in his official capacity as Commissioner of the Texas General Land Office and may be served at 1700 N. Congress Avenue, Austin, Texas 78701-1495.

19. The Texas General Land Office is sued as a state agency that is undertaking actions to close Rollover Pass and may be served through Jerry Patterson, Commissioner of the Texas General Land Office located at 1700 N. Congress Avenue, Austin, Texas 78701-1495.

20. The United States Army Corps of Engineers is sued as an agency of the United States and is served through Lieutenant General Thomas P. Bostick, Commander and Chief of Engineers of the U.S. Army Corps of Engineers at 441 G Street, NW, Washington, D.C. 20314.

21. Col. Christopher W. Sallese is sued in his official capacity as District Engineer and Commanding Officer of the Galveston District of the U.S. Army Corps of Engineers and may be served at 2000 Fort Point Road, Galveston, Texas 77550 in person or by mail at P.O. Box 1229, Galveston, Texas 77553-1229.

22. Lieutenant General Thomas P. Bostick is sued in his official capacity as Commander and Chief of Engineers of the U.S. Army Corps of Engineers and may be served at 441 G Street, NW, Washington, D.C. 20314.

23. John M. McHugh is sued in his official capacity as Secretary of the Army and may be served at 101 Army Pentagon, Washington, D.C. 20310-0101.

IV. STANDING

24. The Gulf Coast Rod, Reel and Gun Club, Inc. (Club) owns the property where Rollover Pass is located and that is the subject of the permit sought by the GLO and issued by the Corps.

25. Wayne Stupka is President of the Gulf Coast Rod, Reel and Gun Club, Inc. Mr. Stupka has fished at Rollover Pass and plans to continue fishing there as long as the Pass stays open.

26. The Gilchrist Community Association (GCA) includes as members, and represents, many residents of the community of Gilchrist whose sole economy is based upon fishermen and women and birdwatchers using the Rollover Pass area.

27. Ted Vega is the President of the GCA. Mr. Vega has a local business that benefits economically from the operation of Rollover Pass.

28. Fred Schroeder is a member of the Gilchrist Community Association. Mr. Schroeder is 67 years old and has fished at Rollover Pass since the early 1960s. He has been disabled for the last five years. He uses oxygen and uses a motorized scooter to ambulate. He enjoys getting out and fishing next to his automobile (which holds his supplies), and he plans to continue fishing at the Pass as long as it stays open.

29. Keith Susberry is a member of the Gilchrist Community Association. He has multiple sclerosis, and uses a wheelchair or a scooter. He can travel only short distances using a walker. Rollover Pass is one of the few places he can go and fish, both because of its accessibility and because he needs his gear nearby as he is unable to carry it distances. Mr. Susberry has been fishing at Rollover Pass for at least 30 years, and he plans to continue fishing there.

30. Jean Scurtu another member of the Gilchrist Community Association, also has mobility impairments. He requires a walker. Mr. Scurtu has been fishing at Rollover Pass for about 10 years. At Rollover Pass he sits on his ice chest, near to his car, and fishes in the Pass

and catches nice fish. He comes about two times a week. He is on a very limited income but plans to continue fishing at the Pass as long as it is open.

V. FACTS

31. Rollover Pass is part of the navigable waters of the United States, opened as a large cut through Bolivar Peninsula in 1955 to connect the Gulf of Mexico with East Bay, the easternmost bay in the Galveston Bay system.

32. Rollover Pass was constructed as a joint project of the Gulf Coast Rod, Reel and Gun Club, Inc. and the Texas Game and Fish Commission, now Texas Parks and Wildlife Department (TPWD).

33. Rollover Pass was constructed by the Game and Fish Commission on land owned by the Gulf Coast Rod, Reel and Gun Club, Inc. under the terms and conditions of an easement granted to the Game and Fish Commission by the Club in 1954.

34. The easement granted by the Club is for the sole purpose of construction and maintenance of Rollover Pass by the State, and specifically states that the easement “shall be used for no other purpose.”

35. The Corps of Engineers, Galveston District issued a permit to the Game and Fish Commission on May 27, 1954 under Section 10 of the River and Harbor Act of 1899, “to dredge a channel and an area, the dredged material to be deposited in Rollover Bay and on shore, and to construct a retaining wall in the Gulf Intra-Coastal Waterway ...”

36. For nearly six decades, Rollover Pass has remained subject to the easement, and provided excellent local fishing, for free, from the channel walls.

A. Rollover Pass Was Built to Enhance the Fishery in East Bay, And Succeeded

37. When Rollover Pass was opened, the stated purpose was to enhance the salt water fishery of East Bay which at that time was dominated by freshwater inflows from Oyster Bayou at the northeastern tip of East Bay as well as other smaller bayous draining the mainland of central and southern Chambers County, and to provide additional opportunity for travel of marine fish to and from spawning and feeding areas in the bay.

38. Over the years since the Pass was opened, fishing has improved in East Bay, making it now one of the best speckled trout fisheries on the Texas coast.

39. Over the years since the Pass was opened, the location of oyster reefs in East Bay have altered to reflect the salinity patterns after the opening of Rollover Pass.

40. Today, an excellent oyster fishery exists in East Bay near its confluence with Galveston Bay as well as within East Bay.

41. An official Texas Historical Marker erected at Rollover Pass detailed the result of constructing the pass i.e. “[c]reation of Rollover Fish Pass has greatly improved salt water fishing conditions for the thousands of sportsmen who flock to East Bay throughout the year.”

42. As a general proposition, reflecting the success of Rollover Pass, the ecology of East Bay is quite robust and healthy, and significantly different from the ecology of East Bay prior to the construction of Rollover Pass.

43. Closing Rollover Pass would, necessarily, cause changes to the salinity balance throughout East Bay, altering the existing environment.

B. Erosion Will Occur Along Bolivar Peninsula Whether Rollover Pass Is Open Or Closed

44. Beach erosion along Bolivar Peninsula occurred before construction of Rollover Pass, and would occur with or without Rollover Pass due to the reduction of sediment from dams

up the Mississippi River that catch sediment that would otherwise flow out of the mouth of the Mississippi and otherwise be moved westward by the nearshore current.

45. As originally proposed, the construction of the Pass was to be accompanied by the construction of two groins or jetties, permitted to be on either side of the channel extending 2500 feet into the Gulf of Mexico.

46. These jetties were never constructed by the State of Texas, or anyone else.

47. Some years after the construction of Rollover Pass, a weir was placed within the Pass to slow the current movement and to reduce beach erosion.

48. Since then, over the decades, beaches along the Bolivar Peninsula both up and down current of Rollover Pass have experienced modest erosion.

49. Beach erosion occurs each year but is much more pronounced during and after a major tropical storm and/or hurricane.

50. Hurricane Ike struck the Bolivar Peninsula in September, 2008.

51. Hurricane Ike caused severe beach erosion along Galveston Island and the Bolivar Peninsula, both near and far from Rollover Pass.

52. Following the devastation of Hurricane Ike, the 81st Legislature authorized the GLO to “undertake the modification or closure of a man-made pass or its environs between the Gulf of Mexico and an inland bay” if the Commissioner determines “that the pass causes or contributes to significant erosion of the shoreline of the adjacent beach. *Acts 2009, 81st Leg., ch. 66, §1, eff. Sept 1, 2009*, (adding new Section 33.613 to the Texas Natural Resources Code).

53. At the time of the passage of this legislation, GLO interpreted the law to be that Texas beaches were public.

54. After the *Severance* decision, in 2011, Texas beaches appear to be subject to private ownership. *Severance v. Patterson*, 345 S.W. 3d 18 (Tex. 2011). Opinion withdrawn by, substituted opinion at *Severance v. Patterson*, 370 S.W. 3d 705 (Tex. 2012).

55. On information and belief the GLO never advised the Corps of Engineers of this status of the change in beach ownership (from public to private) as part of this permit process.

56. As part of the review required by Corps of Engineers permit issuance regulations, a public interest review is required. 33 C.F.R. § 320.4(a).

57. In the Public Interest Review associated with the permit to close Rollover Pass, the Corps of Engineers gave great weight to a supposed benefit of protecting public beaches south and west of Rollover Pass. However, no mention is contained in this Public Interest Review that the beaches supposedly to be benefited by the closure of Rollover Pass are now considered private beaches as opposed to public beaches. Nor is there any mention of the relatively small number of homes that might obtain some benefit by protection from erosion obtained at immense cost by closing Rollover Pass.

58. Indeed, the Corps makes no mention that the beaches may now be private.

59. Despite widespread publicity concerning the *Severance* decision and GLO decisions to halt sand replenishment on Galveston Island due to the private nature of Galveston beaches, the Corps of Engineers ignored this new information resulting from this Texas Supreme Court decision.

C. Rollover Pass Offers Unparalleled Fishing for Persons With Disabilities, and Attracts Many Visitors Who Provide the Foundation for the Economy of Gilchrist

60. Since its opening in 1955, Rollover Pass has been a major public access fishing venue for all citizens, some of whom live locally, but many of whom travel long distances because of the extraordinary high quality of fishing it offers.

61. Part of the quality of the Rollover Pass site reflects its direct connection between the Gulf of Mexico and Galveston Bay: many large fish, and diverse fish swim through this pass and can be caught while fishing from shore.

62. Fishing at Rollover Pass during certain times of the year, such as the golden croaker run and flounder migration, is renowned and extremely popular.

63. To the best of Plaintiffs' knowledge, no shoreline location offers any comparable opportunity to catch so many types of fish, particularly large fish, on Galveston Bay. Indeed, even if one travels a great distance from Galveston Bay, no shoreline location offers a comparable opportunity to catch such fish. This is part of the reason why, in the words of the Corps, Rollover Pass is "a nationally-recognized fishing destination."

64. The Corps also recognizes a second distinguishing characteristic of Rollover Pass: it is "accessible for handicapped fishing enthusiasts". It is possible to drive up to the Pass, park and fish literally out of the back of a truck, with no need to move through any water, to get on any boat, or to transport any gear.

65. The accessibility of Rollover Pass makes it of particular importance for persons with mobility impairments, including (but by no means limited to) Messers. Schroeder, Susberry, and Scurtu. No comparable accessible fishing site is known to exist, so Rollover Pass provides benefits that persons with disabilities cannot find elsewhere.

66. They cannot readily wade into the water to fish.

67. Also, they face significant difficulties and particular dangers in fishing from boats.

68. There are, of course, other on-shore locations from which people can fish, but none known to Plaintiffs offer any opportunities that compare to the direct access that Rollover

Pass provides for persons with mobility impairments to catch so many large and varied kinds of fish.

69. Other on-shore sites also create barriers to use by persons with mobility impairments, because they have difficulties fishing if they must transport fishing tackle, bait, food and drinks, and other gear over significant distances (rather than fish from near to their vehicles).

70. In short, while persons without disabilities have other opportunities, Rollover Pass provides the only fishing access for persons with disabilities to catch large and varied fish of any place on the Texas coast because it is accessible, and there is a chance of catching a truly spectacular fish – for examples, see photographs in Attachment A and B.

71. Messers. Schroeder, Susberry, and Scurtu are thus among many persons with disabilities who are devout fans of this fishing venue.

72. Of course it is not only persons with disabilities who flock to Rollover Pass.

73. Rollover Pass is used by an economically diverse group of users.

74. Rollover Pass thus provides an important component of the recreational fishing program offered by the State of Texas, free and open to all.

75. The community of Gilchrist exists adjacent to Rollover Pass.

76. As operated by the Gulf Coast Rod, Reel and Gun Club, Inc. Rollover Pass has become a major recreational venue, with camping, birdwatching and fishing activities.

77. The economy of Gilchrist primarily is based upon recreational users coming to and utilizing Rollover Pass.

D. The GLO Applied to Close Rollover Pass, Which it Did Not Own or Possess

78. In 2010, the GLO applied to the Corps of Engineers for a permit to close Rollover Pass, even though the agency lacked any ownership interest in Rollover Pass.

79. The regulations of the U.S. Army Corps of Engineers state at 33 C.F.R. § 325.1(d)(8) that “... The applicant’s signature on an application is an affirmation that the applicant possesses or will possess the requisite property interest to undertake the activity proposed in the application,” with only one exception for land under the Corps’ own control.

80. The GLO does not own Rollover Pass.

81. The GLO lacks the power of eminent domain and has no ability to condemn Rollover Pass.

82. The GLO has no rights under the 1954 easement to close the Pass.

83. The GLO has been denied permission to close the Pass by the legal owner of the Pass.

84. The GLO has no legal right to close Rollover Pass.

85. By applying for a permit to close the Pass, the GLO falsely represented to the Army Corps of Engineers that it actually “possesses or will possess” Rollover Pass.

E. Cumulative and Socio-Economic Impacts

86. The permit application by the GLO to close Rollover Pass was submitted to the Corps of Engineers, Galveston District, under the provisions of Section 10 of the River and Harbor Act of 1899 and § 404 of the Clean Water Act and the implementing regulations found at 33 C.F.R. §§ 320-330.

87. The issuance of a permit by the Corps of Engineers is a major federal action.

88. The request for a permit triggers the provisions of the National Environmental Policy Act (NEPA).

89. Pursuant to NEPA, the Corps was required to prepare an Environmental Assessment (EA) to assess the impacts of the closure of Rollover Pass in order to determine whether or not significant impacts would ensue from the closure.

90. A NEPA document must consider cumulative impacts. 40 C.F.R. § 1508.7.

91. Cumulative impacts are the incremental impacts of the action when added to the past, present and reasonably foreseeable future actions.

92. The Needmore Diversion initially was permitted by the Corps in 2007 and will divert water southward from Taylor Bayou into the Gulf Intracoastal Waterway about twelve miles inland from East Bay.

93. The Needmore Diversion will divert stormwater from Sabine Lake estuary into East Bay.

94. When the Needmore Diversion was permitted, Rollover Pass was a baseline existing condition for East Bay salinity.

95. By closing Rollover Pass, the freshwater diverted by the Needmore Diversion will no longer be offset by salinity from the Gulf of Mexico into East Bay.

96. The cumulative effect of the closure of Rollover Pass and the operation of the Needmore Diversion was not analyzed in any serious manner in the EA prepared by the U.S. Army Corps of Engineers.

97. A NEPA document must consider socio-economic impacts.

98. Among other things, Rollover Pass is a recreational facility.

99. There is substantial usage of Rollover Pass by visitors throughout the year.

100. The Corps did recognize that, if the Pass is closed, “[r]egionally speaking, those seeking fishing opportunities will either have to travel to another location or fish from a boat.”

101. The Corps recognized that, at some otherwise unspecified time in the future, specifically “[t]o offset the lost recreational benefits, the Texas General Land Office [GLO] intends to investigate additional recreational fishing amenities.”

102. The GLO did not tell the Corps, and the Corps did not analyze, what such future “amenities” might or might not include.

103. The GLO did not make any commitment to the Corps to provide any such future “amenities” and, so far as Plaintiffs are aware, has not made any such commitments to anyone else. See Tex. Natural Resources Code § 33.613(b).

104. The Corps, in its ultimate decision to grant the permit, did not include any condition, or requirement, that any such “amenities” be developed.

105. Although the Corps did recognize the importance of Rollover Pass as being “accessible for handicapped fishing enthusiasts” it did not evaluate how the closure of Rollover Pass would impact their participation in the Texas recreational fishing program.

106. No effect of this closure on persons with disabilities was evaluated in the EA.

107. No information about the physical disabilities or socio-economic composition of the users of Rollover Pass was included in EA.

108. No information about recreational users was included in the EA.

109. The lack of information on recreational users matters, because the economy of the Gilchrist community depends so totally on such visitors.

110. Regarding Rollover Pass, the EA states:

Rollover Pass, a nationally-recognized fishing destination, provides recreational fishing opportunities that would no longer exist after project construction. Fishing at the site is

free, and accessible for handicapped fishing enthusiasts. Regionally speaking, those seeking fishing opportunities will either have to travel to another location or fish from a boat. To offset the lost recreational benefits, the Texas General Land Office intends to investigate additional recreational fishing amenities. Texas Senate Bill 2043 provides the legislative authority for this project and contains the following language regarding recreational impacts:

If the closing of a man-made Pass under this section results in a loss of public recreational opportunities, the commissioner shall develop, in consultation with the Parks and Wildlife Department and the county and, if applicable, the municipality in which the Pass is located, and approve a plan to mitigate the loss. In developing the plan, the commissioner is strongly encouraged to assess the feasibility of installing fishing piers, boat ramps, and other facilities that provide public recreational opportunities. The plan must be presented to the public for comment before the commissioner approves it.

111. Having reviewed this language, the Corps actually knew that neither the GLO nor any other state agency had authorized funds to construct or otherwise undertaken any obligation to create facilities to replace the loss of Rollover Pass.

112. The permit to close Rollover Pass was issued August 10, 2012.

VI. CAUSES OF ACTION

CAUSE OF ACTION NO. 1, UNDER NEPA & CLEAN WATER ACT, AGAINST THE CORPS OF ENGINEERS: FAILURE TO FULLY DISCLOSE CUMULATIVE IMPACTS

113. The factual assertions in the above paragraphs are incorporated by reference.

114. Throughout the Corps' Environmental Assessment for Permit SWG 2009-00833, the assertion is made that closing Rollover Pass will represent an attempt to restore East Bay to ecological conditions that existed before the decision was made to open the Pass.

115. Full disclosure under the National Environmental Policy and the Clean Water Act requires that cumulative impacts be fully evaluated.

116. Cumulative Impact is 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. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time. 40 C.F.R. § 1508.7.

117. In 2007, the Corps of Engineers initially issued the permit for the so-called Needmore Diversion that connected Taylor Bayou in Jefferson County with the GIWW approximately 15 miles east of the easternmost portion of East Bay.

118. The purpose of the Needmore Diversion was to divert flood flows from the Taylor Bayou watershed southward into the GIWW.

119. Before the construction of Rollover Pass, the Taylor Bayou watershed was not part of the watershed of East Bay.

120. The Taylor Bayou watershed flows eastward into the Sabine Neches waterway.

121. According to Corps documents, flood flows from Taylor Bayou will move down the Needmore Diversion, enter the GIWW and then flow into East Bay.

122. Taylor Bayou floodwaters have the potential to significantly alter the salinity regimen of East Bay.

123. When the Needmore Diversion was permitted, Rollover Pass was assumed to be open and all hydrologic and environmental assessments of the impact of the diversion on East Bay were made with the assumption that there was exchange between East Bay and the Gulf of Mexico through Rollover Pass.

124. With Rollover Pass closed, there is no salt water to mitigate the impacts of freshwater inflows on East Bay.

125. While it is important that an estuary such as East Bay receive sufficient freshwater inflows to maintain its character as an estuary as a place where salt and fresh water come together, an estuary can be impaired by too much freshwater inflow.

126. The Corps of Engineers undertook no analysis of the cumulative impact of Rollover Pass being closed with the Needmore Diversion operational.

127. Historically, the Needmore Diversion did not exist.

128. With the Pass closed and the Needmore Diversion operational, there is a very real threat to the ecological health of East Bay.

129. As a supposed benefit of closing Rollover Pass, the Corps provided a cursory discussion of supposed ecological benefits due to restoration of the Bay but that analysis disregarded the numerous changes to East Bay and Galveston Bay over the last 50 years including the Needmore diversion which represents a major alteration of past freshwater inflow patterns to East Bay.

130. The Corps of Engineers violated the full disclosure requirements of NEPA by failing to fully disclose the cumulative impacts of the closure of Rollover Pass in combination with the full operation of the Needmore Diversion that the Corps itself permitted.

CAUSE OF ACTION NO. 2, UNDER NEPA & CLEAN WATER ACT, AGAINST THE CORPS OF ENGINEERS: FAILURE TO FULLY DISCLOSE SOCIO-ECONOMIC, ENVIRONMENTAL JUSTICE AND DISABLED CITIZEN IMPACTS

131. The factual assertions in the above paragraphs are incorporated by reference.

132. As provided by the federal Administrative Procedure Act, Plaintiffs are alleging that the Corps of Engineers acted in an arbitrary and capricious manner or otherwise violated the National Environmental Policy Act and Clean Water Act by failing to fully disclose the socio-economic, environmental justice and disabled citizen impacts arising from the decision to allow a permit to issue regarding the closure of Rollover Pass.

133. As part of the determination of compliance with the National Environmental Policy Act, the Corps of Engineers compiled environmental data, some of which was submitted by the applicant GLO.

134. After receipt and consideration of such data, the Corps of Engineers, Galveston District prepared an environmental assessment that was required to evaluate the socio-economic environmental effects of the proposed closure of Rollover Pass.

135. As part of its analysis of impacts, the Galveston District purported to evaluate socio-economic impacts of the closure of Rollover Pass, by considering impacts on residents of the local community, including Gilchrist.

136. As part of its analysis of socio-economic and environmental justice impacts, the Corps reported on the socio-economic characteristics of the people living in the census tract adjacent to the Pass.

137. As part of its analysis of impacts, the Galveston District never identified the number of Pass users who do not reside locally, or the socio-economic characteristics of those users which are quite different than those people living in the census tract covering Rollover pass.

138. In its section on socio-economic impacts and environmental justice, the Galveston District failed to evaluate disparate impacts on racial minorities, the poor or the disabled users of Rollover Pass that would result from the closing.

139. In the section on Relevant Presidential Executive Orders, the response to “Environmental Justice”, states:

“the proposed project does not directly, or through contractual or other arrangements, use criteria, methods, or practices that discriminate on the basis of race, color, or national origin. Available population data indicate that town of Gilchrist has a very low proportion of minority residents and the percentage of low income residents closely

compares to countywide statistics. The proposed project should not disproportionately affect minority, low income, or disadvantaged populations.”

140. Plaintiffs assert that the users of the Pass are ethnically diverse, often of lower income and include a substantial number of persons with mobility impairments.

141. To fail to evaluate the impact of the closure of the Pass on those who use the Pass is to fail to fully disclose the socio-economic and environmental justice impacts arising from the closure, in violation of the legal requirements that the National Environmental Policy Act requires honest and full disclosure.

CAUSE OF ACTION NO. 3, AGAINST THE CORPS OF ENGINEERS: VIOLATION OF SECTION 504 OF THE REHABILITATION ACT OF 1973

142. The factual assertions in the above paragraphs are incorporated by reference.

143. As a federal agency subject to Section 504 of the Rehabilitation Act of 1973, and its implementing regulations, the Corps of Engineers may not discriminate in any of its programs or activities, including its decision to grant permits. See 32 C.F.R. § 56.1 *et seq.*

144. As stated above, the Corps has recognized the importance of Rollover Pass as a facility that is “accessible for handicapped fishing enthusiasts.”

145. As also noted, the Corps failed even to study how closing Rollover Pass would have discriminatory effects on persons with mobility impairments.

146. In fact, closing Rollover Pass would have significant discriminatory effects on such persons, including, among others, Messers. Schroeder, Susberry, and Scurtu – each of whom is a qualified person with disabilities and a member of Plaintiff Gilchrist Community Association.

147. Granting a permit is a final action of the Corps with respect to the closure of Rollover Pass, and this permit discriminates against persons with disabilities under Section 504 of the Rehabilitation Act of 1973.

**CAUSE OF ACTION NO. 4, AGAINST JERRY PATTERSON AND THE GLO:
VIOLATION OF THE AMERICANS WITH DISABILITY ACT AND SECTION 504**

148. The factual assertions in the above paragraphs are incorporated by reference.

149. Title II of the Americans with Disabilities Act (“ADA”) as amended provides:

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in, or be denied the benefits of services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132.

150. The ADA defines “public entity” as (a) any state or local government; (b) any department, agency, special purpose district, or other instrumentality of a State or States or local government 42 U.S.C. § 12131.

151. GLO is a public entity, subject to the anti-discrimination provisions of the ADA.

152. Under 28 C.F.R. § 35.130(b)(4), a public entity may not, in determining the site or location of a facility, make selections (i) that have the effect of excluding individuals with disabilities from, denying them the benefits of or otherwise subjecting them to discrimination or (ii) that have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the service, program, or activity with respect to individuals with disabilities.

153. Fishing is part of the recreational services, programs, and activities promoted by the State of Texas, for which Rollover Pass is very important as described above.

154. As the Corps recognized, persons with disabilities fish at Rollover Pass, which is an accessible location that provides them benefits not found elsewhere.

155. The closure of Rollover Pass will take away this public access fishing for persons with mobility impairments on the Texas coast.

156. Persons who do not have disabilities can replace the benefits of Rollover Pass by alternatives, but these alternatives are not available to Messers. Schroeder, Susberry, and Scurtu, or to other persons with mobility impairments.

157. Although the Corps has speculated about the possibility that, at some unknown time, with some unknown funds, some unknown agency may decide to construct a facility that might somehow enable persons with disabilities to replace some benefits of Rollover Pass, the GLO makes no commitment to do so, anywhere – nor does anyone else.

158. No provision has been made for the replacement of the access to high quality public fishing that will occur if the Pass is closed.

159. Accordingly, for GLO to close Rollover Pass according to the terms of this permit would discriminate in violation of the ADA, and the Gilchrist Community Association has standing to bring this claim on behalf of its above-named members with disabilities including, among others, Messers. Schroeder, Susberry, and Scurtu – each of whom is a qualified person with disabilities and a member of the GCA.

160. In addition, as a recipient of federal financial assistance, the GLO is subject to the requirements of Section 504 of the Rehabilitation Act.

161. The foregoing facts, incorporated by reference, also establish that, for GLO to close Rollover Pass according to the terms of this permit would discriminate in violation of Section 504 of the Rehabilitation Act, and the Gilchrist Community Association has standing to bring this claim on behalf of its above-named members with disabilities including Messers.

Schroeder, Susberry, and Scurtu – each of whom is a qualified person with disabilities, and others.

CAUSE OF ACTION NO. 5, AGAINST JERRY PATTERSON: VIOLATION OF THE CONSTITUTIONAL RIGHTS OF GULF COAST ROD, REEL AND GUN CLUB, INC.

162. The factual assertions in the above paragraphs are incorporated by reference.

163. Plaintiff Gulf Coast Rod, Reel and Gun Club, Inc. owns the property underlying, and on both sides of, Rollover Pass.

164. Plaintiff Gulf Coast Rod, Reel and Gun Club, Inc. has conveyed an easement that allows the Texas Parks and Wildlife Department to maintain Rollover Pass, not to close or fill it.

165. Neither the easement granted to the Texas Parks and Wildlife Department, nor any other document, conveys any right for Jerry Patterson as Commissioner of the GLO, or any other person, to close and fill Rollover Pass.

166. Plaintiff Gulf Coast Rod, Reel and Gun Club, Inc. recognizes the possibility that certain government agencies may have rights to condemn the land underlying Rollover Pass, but – so far as Plaintiff knows – no entity even has initiated condemnation proceedings. So far as Plaintiff Gulf Coast Rod, Reel and Gun Club, Inc. knows, no entity with eminent domain power has made any commitment, to any official at GLO, to condemn the property at Rollover Pass.

167. By virtue of its ownership, at this time only Plaintiff Gulf Coast Rod, Reel and Gun Club, Inc. has the possessory right that would be required to close and fill Rollover Pass, which Plaintiff does not want to do.

168. The Corps of Engineers, in 33 C.F.R. § 325.1(d)(8), recognizes that, to apply for a permit, applicants must possess a significant property interest. It provides:

The application must be signed by the person who desires to undertake the proposed activity (i.e., the applicant) or by a duly authorized agent. ... **The signature of the applicant or the agent will be an affirmation that the applicant possesses or will**

possess the requisite property interest to undertake the activity proposed in the application, except where the lands are under the control of the Corps of Engineers, in which cases the district engineer will coordinate the transfer of the real estate and the permit action.

33 C.F.R. § 325.1(d)(8) (emphasis added).

169. Under these circumstances in the application to the Corps, Defendant Jerry Patterson, Commissioner of the GLO, falsely has affirmed “that the applicant possesses or will possess the requisite property interest” to close Rollover Pass.

170. Based on this false affirmation, for which no reasonable basis exists, Defendant Jerry Patterson has claimed a property interest that GLO does not have, in derogation of the property rights of Plaintiff Gulf Coast Rod, Reel and Gun Club, Inc. This false affirmation has prevented Plaintiff from realizing the full benefits of its property by creating a cloud on Plaintiff’s title and caused a reduced value of Plaintiff’s property.

171. By the affirmative step, in an official federal submission, of falsely asserting the required property interest to obtain a permit, when GLO has no ownership interest or eminent domain power, Defendant Jerry Patterson has denied the due process rights of Plaintiff Gulf Coast Rod, Reel and Gun Club, Inc., in violation of the Fifth and Fourteenth Amendments of the United States Constitution. Defendant Patterson has violated procedural due process by asserting – indeed, specifically affirming to the Corps – that GLO has this property interest without giving Plaintiff any opportunity to be heard on the falsity of the assertion. Likewise Defendant Patterson has violated substantive due process because there is no rational basis for falsely asserting the required property interest.

CAUSE OF ACTION NO. 6, AGAINST THE CORP OF ENGINEERS: VIOLATION OF PUBLIC INTEREST REVIEW 33 C.F.R. § 320.4(a)

172. The factual assertions in the above paragraphs are incorporated by reference.

173. The Corps of Engineers was arbitrary and capricious and violated its own regulations by failing to include all of the facts associated with the change in status of Texas beaches after the *Severance* decision.

174. 33 C.F.R. § 320.4(a) Public Interest Review provides:

The decision whether to issue a permit will be based on an evaluation of the probable impacts, including cumulative impacts of the proposed activity and its intended use on the public interest. Evaluation of the probable impact which the proposed activity may have on the public interest requires a careful weighing of all those factors which become relevant in each particular case. The benefits which reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments. The decision whether to authorize a proposal, and if so, the conditions under which it will be allowed to occur, are therefore determined by the outcome of this general balancing process. ...

175. No mention is made in the Statement of Findings or anywhere else as far Plaintiffs know, that following the *Severance* decision (see above), that the beach erosion complained about may be to “private beaches” owned by a small number of private individuals (and only a small number of them) rather than public beaches.

176. No balancing of benefits and detriments can occur when the Corps doesn’t know all the facts.

177. This is in direct violation of the requirements of the public interest review contained at 33 C.F.R. § 320.4(a).

CAUSE OF ACTION NO. 7, AGAINST THE CORPS OF ENGINEERS: VIOLATION OF THE ALTERNATIVES REQUIREMENTS OF THE NATIONAL ENVIRONMENTAL POLICY ACT AND THE CLEAN WATER ACT

178. The factual assertions in the above paragraphs are incorporated by reference.

179. The regulations implementing the National Environmental Policy Act at 40 C.F.R. § 1502.14 require that alternatives to the proposed action be evaluated.

180. The regulations implementing the Clean Water Act § 404(b)(1) are binding upon the Corps of Engineers.

181. 40 C.F.R. § 230.10(a) requires the Corps of Engineers to permit the least environmentally damaging practicable alternative that achieves the project purposes.

182. If the groins or jetties originally proposed and permitted in the late 1950s were to be constructed, sediment movement into the Gulf Intracoastal Waterway would be effectively halted while preserving all environmentally beneficial effects of the pass bringing water and fish into East Bay.

183. Plaintiffs allege that the evaluation of alternatives improperly considered the groins and jetties as an alternative. To whatever extent the Corps considered beach erosion south and west of Rollover Pass, it did not discuss and did not take into account the private nature of the beaches owned by a relatively few people after the *Severance* decision.

184. As such, the full disclosure provisions of NEPA are violated.

185. As such, the affirmative obligation to adopt the least damaging alternative was circumvented.

VII. RELIEF REQUESTED

186. The interest of Plaintiffs Gulf Coast Rod, Reel and Gun Club, Inc. and Gilchrist Community Association, along with the specific interest of its individual members with mobility impairments, will be irreparably harmed by closing and filling of Rollover Pass. These interests are germane to the purpose of the Plaintiffs and their members.

187. Plaintiffs request that this Court declare that Jerry Patterson and the GLO do not have any present or future possessory or other interest in the property underlying Rollover Pass and did not lawfully apply for or obtain a permit to close Rollover Pass.

188. Plaintiffs request that this Court declare that the Corps of Engineers did not issue a permit that lawfully can be used by the GLO Defendants as the basis to close and fill Rollover Pass.

189. To whatever extent may be appropriate in addition to declaratory relief, Plaintiffs request that this Court issue an order directing the Corps to revoke this permit as a basis for the GLO Defendants to close and fill Rollover Pass.

190. All conditions precedent to Plaintiffs' claims for relief have been performed or have occurred.

191. Plaintiffs are entitled to attorney fees, expert fees, and costs under the Equal Access to Justice Act, 24 U.S.C. § 2412, the Americans with Disabilities Act, 42 U.S.C. § 12205, the Rehabilitation Act of 1973, 29 U.S.C. § 794a, and the Civil Rights Act, 42 U.S.C. § 1988.

192. The Plaintiffs request any other relief that will redress Plaintiffs' harm.

VIII. PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiffs request that upon a final hearing hereof, that a declaration and permanent injunction be issued as requested above, and for other and further relief to which Plaintiffs may show itself justly entitled.

BLACKBURN CARTER, P.C.

by: s/ James B. Blackburn, Jr.

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Attachment B: Jean Scurtu



CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

(b) County of Residence of First Listed Plaintiff (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

DEFENDANTS

County of Residence of First Listed Defendant (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff, 2 U.S. Government Defendant, 3 Federal Question, 4 Diversity

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, PTF DEF, Incorporated or Principal Place of Business In This State, Incorporated and Principal Place of Business In Another State, Foreign Nation

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Table with 5 columns: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES. Contains various legal categories and checkboxes.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding, 2 Removed from State Court, 3 Remanded from Appellate Court, 4 Reinstated or Reopened, 5 Transferred from Another District, 6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

Brief description of cause:

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE DOCKET NUMBER

DATE SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

CIVIL COVER SHEET

Gulf Coast Rod, Reel and Gun Club, Inc., et. al. v. Jerry Patterson, et.al.

I. DEFENDANTS (continued)

United States Army Corps of Engineers – **Colonel Christopher W. Sallese**, in his official capacity as District Engineer of the U.S. Army Corps of Engineers, Galveston District.

United States Army Corps of Engineers – **Lieutenant General Thomas P. Bostick**, in his official capacity as Commander and Chief of Engineers.

United States Army – **John M. McHugh**, in his official capacity as Secretary of the Army.