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Army Corps Gets Chance To Fix 'Cancer Alley' Plant Permit

By [Clark Mindock](#)

Law360 (January 4, 2021, 2:12 PM EST) -- Rather than consider in court alleged permit defects for a plant in Louisiana's "Cancer Alley," a federal judge will allow the U.S. government to fix things on its own despite attempts by environmental groups to keep litigating.

Describing as a "close" call the decision on whether to retain jurisdiction over the permit dispute, U.S. District Judge Randolph D. Ross said Friday that the [Army Corps of Engineers'](#) decision to suspend the Clean Water Act permit it issued to Formosa Plastics Corp. would likely result in further agency action and therefore a different administrative record.

Because a new administrative record would be made when the Corps reinstates or modifies the permit, Judge Ross said the suit brought by environmental groups like the [Center for Biological Diversity](#) over alleged violations of the Administrative Procedure Act was no longer relevant, for now.

"If the Corps subsequently reinstates the permit or issues a modified permit to which plaintiffs object, plaintiffs can, in the view of the Corps and [Formosa], simply bring a new action; there is no reason, however, to retain jurisdiction pending the agency's further decision."

The Corps moved for remand without vacatur in early December, which the environmental groups didn't contest, though they argued it isn't uncommon for the courts to retain jurisdiction during remand.

The Corps first issued permits for the Formosa project in 2019 after a public notice period that began the year before and attracted hundreds of comments from individuals and organizations with concerns about the impact the plant would have on the environment and nearby communities, according to court documents.

The complex would emit more than 13.6 billion tons of carbon pollution each year once constructed, making it the largest greenhouse gas emitter in Louisiana. In addition to that pollution, the project would permanently destroy 116.2 acres of wetlands and waters and would exacerbate air and water pollution issues in a community already beleaguered by industry, according to the [complaint filed in January 2020](#). The original plans would have destroyed a former slave burial site as well.

The environmental groups alleged in their suit that the Corps' environmental review contained flaws, including a failure to consider alternatives and cumulative impacts from the site, which sits along an 85-mile stretch of the Mississippi River known as Cancer Alley, which has a high concentration of refineries, chemical plants and petrochemical plants. The region has recorded elevated rates of cancer and other illnesses.

After filing suit, the environmental groups [requested a preliminary injunction](#) in July. They dropped a request for a stop-work order weeks later after Formosa [promised it would not build](#) on the former slave burial grounds.

In November, just before a summary judgment filing deadline, the Corps [notified the court](#) that it had identified new defects in its environmental review, including a failure to take into account alternatives in its approval of plans to excavate and fill portions of wetlands. The Corps then moved for voluntary remand without vacatur in December.

Julie Teel Simmonds, an attorney with the Center for Biological Diversity, told Law360 on Monday that the campaign against the Formosa plant is "far from over."

"Our lawsuit forced the Corps to suspend its permit for Formosa Plastics' super-polluting Louisiana complex," she said. "If it again approves a plant of this scale in St. James Parish, with its enormous air quality, water quality and environmental justice impacts, we'll file another lawsuit to block it."

Formosa and the Corps didn't immediately respond to requests for comment.

The environmental groups are represented by Catherine Kilduff, Emily Jeffers and Julie Teel Simmonds of the Center for Biological Diversity.

The Army Corps of Engineers is represented by Jacqueline M. Leonard and Andrew D. Knudsen of the [U.S. Department of Justice](#)'s Environment and Natural Resources Division.

Formosa is represented by Alexander N. Breckinridge, Michael Drew and Marjorie A. McKeithen of [Jones Walker LLP](#) and William S. Scherman and David Debold of [Gibson Dunn & Crutcher LLP](#).

The suit is Center for Biological Diversity et al. v. [U.S. Army Corps](#) of Engineers et al., case number [1:20-cv-00103](#), in the [U.S. District Court for the District of Columbia](#).