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TULANE ENVIRONMENTAL LAW CLINIC

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May 24, 2022

**Re: Comments Submitted on Behalf of the Atchafalaya Basin Coalition and Waterkeeper Alliance for the Proposed Ecological Swamp Enhancement Project (East Grand Lake) in the Atchafalaya Basin, in Iberville Parish (MVN 2016-01163-CM)**

Dear Mr. Gauthier,

This comment letter is submitted on behalf of Atchafalaya Basinkeeper, Healthy Gulf, the Louisiana Crawfish Producers Association-West, Sierra Club and its Delta Chapter and Waterkeeper Alliance (the Commenters) to the U.S. Army Corps of Engineers (the Corps) in response to the April 25, 2022 Public Notice for the Coastal Protection and Restoration Authority's (CPRA) Proposed Ecological Swamp Enhancement Project (East Grand Lake) in the Atchafalaya Basin, in Iberville Parish. On April 29, 2022, the undersigned sent a letter requesting a reasonable extension of the deadline to submit comments. On the same date Project Manager Neil Gauthier with the Corps Regulatory Division responded by email granting our request and extending the comment deadline an additional 10 days.<sup>1</sup> These comments are therefore timely submitted for consideration by the Corps.

The Atchafalaya Basin Program now under CPRA has submitted a new application to the Corps for a Department of the Army permit to authorize dredge and fill activities in jurisdictional waters under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act. 33 U.S.C. §§ 403, 1344. The permit application bears the same identification (MVN-2016-01163-CM) as the original request for joint permit authorization submitted by the Louisiana

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<sup>1</sup> However, the extension was not subsequently advertised on the Corps' public notices webpage, or reflected on the pre-existing public notice, which still shows the expiration date for comments to be 5/14/2022. Other interested stakeholders outside the Coalition have presumably not been notified of the comment extension.

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Department of Natural Resources (LDNR) in 2018.<sup>2</sup> The Atchafalaya Basin Coalition members submitted comments in response to the 2018 Public Notice for the then-proposed dredge and fill activities in East Grand Lake on April 19, 2018,<sup>3</sup> and sent supplemental comments to the agencies while the project was still pending Corps permit approval on April 22, 2020.<sup>4</sup> The Corps officially withdrew the 2018 East Grand Lake DA permit application on March 23, 2021, and ceased evaluation of the project at the time.<sup>5</sup> The present proposed project (2022 EGL) resembles in many respects the prior proposal (2018 EGL) with a few significant exceptions identified and discussed herein.

The Atchafalaya Basin Coalition (hereinafter, the Coalition or Commenters) is comprised of the following organizational members. **Atchafalaya Basinkeeper** (Basinkeeper or ABK) is a non-profit organization comprised of over 1,600 members dedicated to protecting and restoring the ecosystems within the Atchafalaya Basin for future generations. **Healthy Gulf** is a nonprofit organization composed of a network of local, regional and national environmental and public interest groups dedicated to uniting people to protect and restore the natural resources of the Gulf Region. **Sierra Club** is a national grassroots organization whose mission it is to explore, enjoy and protect the wild places of the Earth; to practice and promote the responsible use of the Earth's ecosystems and resources; and to educate and enlist people to protect and restore the quality of the natural and human environment. **Louisiana Crawfish Producers Association-West** (LCPA) is a nonprofit organization whose purpose is to educate the public and advocate for the right to access navigable waters. Its members are commercial and recreational fishermen, hunters and nature photographers. Its members regularly use the Atchafalaya Basin and other public waters and lands in pursuit of these interests. The members of LCPA have economic, recreational, cultural, historic, spiritual and aesthetic interests in the Basin.

Commenters reserve the right to rely on all comments to this permit application submitted by any party and incorporate by reference their comment letters submitted on April 19, 2018 and April 22, 2020 in response to the Corps' 2018 Public Notice for the East Grand Lake project. The content and concerns raised in those comment letters are fully incorporated herein. Commenters request that the Corps send the undersigned counsel a copy of any comment responses provided to the Corps by the applicants when the Corps receives them, and that the

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<sup>2</sup> The 2018 Joint Public Notice similarly solicited public comment on both the pending application for Corps permitting per Sections 404 and 10, but also for Water Quality Certification by the Louisiana Department of Environmental Quality (LDEQ) pursuant to La. R.S. 30:2074(A)(3) and Section 401 of the Clean Water Act. The application for water quality certification was identified as WQC 180312-01.

<sup>3</sup> ABK et al. EGL Comments, April 19, 2018 [Exhibits Group 1].

<sup>4</sup> ABK et al. Supplement EGL Comments, April 22, 2020 [Exhibits Group 1].

<sup>5</sup> 5.6.21 Response Letter re EGL status, from the Corps to M. Mitchell, responding to request for confirmation of the withdrawn status of the 2018 EGL application. The letter provides that, should the DA permit application be resubmitted, the Corps evaluate the need for a new Public Notice based on such factors as "a substantial change in project plans from what was previously advertised; increased wetland impacts; re-submitting the application more than a year after being withdrawn; or change in purpose and need[.]" [Exhibits Group 1]. We speculate that the substantial change to the project plans for discharge/disposal of dredged material contributed to the Corps issuing a new Public Notice for the 2022 EGL project application.

Corps send a written response, notice of decision and associated documents to the undersigned counsel as the decision is made.

The Corps must ensure procedural and substantive compliance with all applicable laws and regulations, including the Clean Water Act (CWA) (regulations and 404(b)(1) Guidelines for Section 404 Individual Permits, and Section 401 Water Quality Certification), the National Environmental Policy Act (NEPA), the Endangered Species Act (Section 7) and Fish & Wildlife Coordination Act, the Rivers and Harbors Act (Sections 10 and 408), the Migratory Bird Treaty Act, the National Historic Preservation Act (Section 106), the Coastal Zone Management Act, the Magnuson Stevens Fishery Conservation and Management Act (Essential Fish Habitat consultation), as well as state and local approvals including but not limited to the Atchafalaya Basin Levee District (La. R.S. 38:291). The project must also be consistent with all applicable state and federal policies and guidelines, including the Atchafalaya Basin State Master Plan, Reports of the Environmental Protection Agency and Executive Orders.

For the myriad reasons discussed herein, Commenters request that the Corps deny the permit for the proposed East Grand Lake project. At a minimum, Commenters request that the Corps reissue a public notice including all required and necessary information sufficient to allow for meaningful comment; prepare an environmental impact statement (EIS)<sup>6</sup> including publication of a notice of intent to prepare an EIS including public participation in the scoping process and commenting on the draft and final EIS; and ultimately a Record of Decision denying the permit for the proposed East Grand Lake project in accordance with applicable state and federal laws, congressional mandates, defensible science and the public interest.

## **I. INTRODUCTION**

The origins of the Atchafalaya Basin Program (ABP) are rooted in the recognized need to act on threats to the Atchafalaya Basin (including sedimentation and water quality) and for coordinated management to implement the mission and goals of the Atchafalaya Basin State Master Plan to “conserve, restore, and enhance (where possible) the natural habitat and give all people the opportunity to enjoy the Atchafalaya Experience.”<sup>7</sup> The Atchafalaya Basin Program, originally housed within the Louisiana Department of Natural Resources (LDNR) and now under

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<sup>6</sup> When considering environmental impacts of a dredge and fill permit application, the Corps must complete an Environmental Assessment (EA), which can lead to an Environmental Impact Statement (EIS). 40 C.F.R. § 1501.4. NEPA requires federal agencies to prepare an EIS when reviewing federal actions significantly affecting the quality of the natural and human environment. *See* 39 C.F.R. § 775. The Corps must evaluate not only the direct and indirect impacts on the human environment the project will cause, but also the cumulative effects of past, present, and reasonably foreseeable future activities in the area to determine whether the project is sufficiently major to trigger the preparation of an EIS. The 5,560 acres of claimed beneficial footprint of the project alone triggers the preparation of the more extensive EIS, and when considered in tandem with the range of probable adverse impacts, illustrates how the proposed activities will significantly affect the quality of the natural and human environment in the project area.

<sup>7</sup> *See* ABK et al. 2018 EGL Comments at 3-5 (quoting the Atchafalaya Basin State Master Plan at 1-1, 2-2).

the purview of the Coastal Protection and Restoration Authority (CPRA), first identified degradation in the East Grand Lake/Flat Lake/Upper Belle River area of the Basin and introduced early modification proposals for the area in 2009-2010. The ABP then initiated study of the area to develop a plan “to realign water flow patterns and *strategically redirect sediment*” with the intent to “improve water quality and habitat and *reduce* sedimentation of waterways and lakes.”<sup>8</sup> At all times prior to the revival of the project in 2015-16, the ABP has not shied from recognizing water quality and sedimentation to be coexisting and necessary factors for consideration in the management of this area.

After stalling for several years, the project was revived by LDNR in partnership with The Nature Conservancy (TNC), and in 2018 they applied to the Corps and LDEQ for necessary permits and approvals to move forward with construction in the Upper EGL area. The 2018 EGL proposal included all of the elements proposed today, with an additional element (former Element 4) below Elements 1-3 along the Gulf Intracoastal Water Way (GIWW).<sup>9</sup> However, the project versions differ in the location and method of dredged material discharge insofar as the 2018 version proposed clearly defined, upland disposal locations to pile spoil adjacent to the dredged cuts whereas the present proposal modifies the location and contours of disposal at various elements. Overall, the 2018 and 2022 versions are similar in purported purpose, need, and alleged beneficial impacts of the project, but the more recent version’s slightly smaller dredging footprint, coupled with the modifications to the discharge methods and locations make that aspect of this project appreciably distinct from its earlier version.

Irrespective of these modifications, the Commenters’ carry-over concerns around sediment deposition patterns in backswamp areas remain constant as the project has consistently proposed cuts to introduce river water into the area. The discharge modifications here present new, additional concerns over the misrepresentation of discharged dredge material into wetlands as a beneficial use to obfuscate responsibility to avoid, minimize and mitigate for adverse impacts; the continued reluctance of the project proponents to identify, represent and address the inseparable accretionary process that coincides with creating new river water inputs from main channels into backswamp areas in public notice, application materials and representations of the project purpose, need and impacts to the public; and the harmful precedent these misrepresentations and withholdings provide for future dredge and fill projects.

## **II. THE PROJECT PROPOSAL LACKS REQUIRED INFORMATION AND PRESENTS MODIFICATIONS THAT NEITHER MEET LEGAL REQUIREMENTS NOR CURE DEFECTS IDENTIFIED IN THE PRIOR PROPOSAL**

In the over 12 years of study, consideration and proposal of this project in the upper East Grand Lake area, the present application offers the least descriptive proposal by far. The April

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<sup>8</sup> *Id.* (quoting FY 2018 Annual Plan, Atchafalaya Basin Program, at 4) (emphasis added).

<sup>9</sup> All public notice and application materials for both versions of the EGL project are attached in Exhibits Group 2.

25, 2022 Public Notice (2022 PN) describes the character of the work proposed by CPRA and TNC<sup>10</sup> as follows:

“to clear, grade, excavate, and place fill to improve the north to south hydrologic flow in Bayou Sorrel during moderate river stages for improved circulation and ecological function throughout the back swamp of the East Grand Lake Area of the Atchafalaya Basin.”

The applicants have modified the description of the activity from the 2018 PN; changing the language used to describe both the dredging activities and the discharge of material in the project area. Having since removed the term “dredge” from the project description, the applicants now present the dredging as “reconnecting existing bayou” (Elements 1-3), “spoil bank removal” (Elements 4-10) and “clear existing bayou” (Elements 11 and 12). Similarly, the proposal now represents the discharge/deposit of dredged material to “create marsh” (used generally in character description) and as “wetland creation” (Elements 2 - 10) and “wetland nourishment” (Elements 1, 11 and 12) allegedly to “provide for nourishment for forested areas within the project site.”

Although these new representations of the activities create the appearance of being more beneficial, and less deleterious, they do not substantively alter the character of the work to be—evidenced by the Section 404 permit approval sought—proposed dredging of cuts in existing spoil banks and the discharge of dredge material into wetlands. There is nothing in the new public notice materials that identifies or explains how the discharge modifications transform a discharge of dredge material into wetlands into a beneficial project. The public notice contains no specific explanation or representation of the discharge as a beneficial use of dredge materials, or how the proposed modifications meet this standard. Merely claiming that the discharge of dredge materials here will create marsh wetlands and contribute to wetland nourishment, without qualification in support, is insufficient and potentially deceptive. It gives the impression that any dredge and fill project proposal may now claim that the impacts have been minimized because the discharge will nourish and/or create new wetlands.

Similar to the 2018 PN, here the applicants represent the project purpose to “improve the north to south hydrologic flow in Bayou Sorrel during moderate river stages for improved circulation and ecological function throughout the back swamp of the East Grand Lake Area of

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<sup>10</sup> The Joint Permit Application submitted to LDNR’s Office of Coastal Management identifies CPRA as the applicant, TNC as the landowner, and represents that the applicant is the landowner. So, these comments refer to CPRA and TNC as the project applicants, in recognition of these representations in the application, and the Memorandum of Understanding between CPRA and TNC [*see* attached in Exhibits Group 1]. It is unclear whether this complies with the requirements at 33 C.F.R. 325(d)(8), requiring the application to be signed “by the person who desires to undertake the proposed activity” with the signature as an “affirmation that the applicant possesses or will possess the requisite property interest to undertake the activity proposed in the application[.]” It is likewise unclear from the information provided whether TNC, CPRA, or both are the “applicants”, or if CPRA is the proper applicant, whether TNC has submitted a statement designating CPRA as its agent.

the Atchafalaya Basin[,]” some 5,560 acres of swamp habitat.<sup>11</sup> They further claim, without mention of sediment that accompanies introduced river water or a proposed mitigation plan for unavoidable adverse impacts, that the project “will enhance and improve existing forested wetlands and they expect the benefit gained in enhancement will offset any wetland losses associated with the construction of this project.” The representations are perfunctory without any qualification or supporting explanation. It also suggests that the project will have no adverse impacts.

The 2022 Public Notice describes the impacts to include the conversion of 4.4 acres of forested wetlands to “other waters of the U.S.,” the creation of 2.25 acres of fresh marsh and the enhancement of 3.6 acres of bottomland hardwoods wetlands. The 2018 Public Notice described the direct impacts in terms of acres of forested wetlands “clear[ed] and conver[ted] to open water, ... cleared and excavated to become open water, and ... cleared and filled.” The changes here frustrate public review, making it prohibitively difficult to understand the project’s impacts and how these changes transform the discharge of dredge materials into waters of the U.S. into wetland creation and nourishment.

#### Enclosed Maps, Plats and Diagrams

The enclosed maps, plats and diagrams to the 2022 Public Notice offer little to no support for the conclusory claims and are significantly less detailed than those included in the 2018 Public Notice.

Sheet 1 of the enclosures attached to the 2022 Public Notice shows that the proposed sites for dredging in the existing wetlands largely mirror those in the prior proposal except that former Element 4 has been removed.<sup>12</sup> However, despite removal of one of the elements, and some reductions in the width and length of most cuts, the applicants claim the project will benefit the same acreage of wetlands.

Sheet 2 shows the dredge section plan generally for all elements, but with substantially less information included than in the 2018 PN. For example, it lacks specific mention of existing elevations, the relationship between existing elevations and the ordinary low and highwater marks, as well as an impact summary, forestry legend or representation of the types of native and/or invasive trees present in the dredge and discharge areas. Although the dredging in most of the proposed elements appears to be shorter in overall length of the cut there are not specific estimates for existing elevations along the proposed cuts. The information in the PN, therefore, fails to allow for meaningful comment on the amount of material to be dredged and deposited back in the wetlands.

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<sup>11</sup> Applicants claim the same acreage will benefit from the present proposal as was proposed in 2018, despite the removal of one of the elements (Element 4 in 2018 EGL) and modifications to discharge methods and sites.

<sup>12</sup> The Element 4 cut in the 2018 Public Notice was located south of the proposed Element 3, west of the East Atchafalaya Guide Levee along the GIWW.

Sheet 3 shows the “wetland nourishment” plan for Elements 1, 11 and 12, which does not explain how spreading dredged material over existing elevated contours will nourish the wetland area, what native trees exist in the areas or otherwise explain what native trees will be planted and/or kept (lacks forestry legend), what invasive species are present and how the applicant will manage them in the “nourished” area, what the existing soil elevations are along the proposed dredge sites/cuts, and why the amount of excavated material to be spread over existing soil elevations differs for Element 11 and is not represented on sheet 3 (8’ rather than 8” at Element 11, per information provided on sheets 11 – 12). Creation of spoil banks along waterways contributes to the channeling of sand and silt sediments deeper into wetlands at higher water levels and impedes overbank flows. The harms of this disposal method are evident throughout the Basin and defy management requirements.<sup>13</sup> As stated throughout these comments, sedimentation is converting swampland into bottomland hardwood forests, further restricting flow. The deposited excavation material could raise the elevation to up to 10’10”. Although 8” might not seem like a lot, it can mean the difference between swampland and upland.

These enclosures present a large margin of potential widths for the proposed dredged cuts (compare sheet 2 dredge section plans and the individual elements’ plans in the subsequent sheets) as well as substantial discrepancies in the description of deposited spoil areas/height (compare sheet 3 wetland nourishment plans with sheets 11 and 12 for Element 11) which frustrate the public’s ability to quantify project impacts directly from dredging and the resulting channeling of river water and sediments into the backswamps.

“Reconnect Existing Bayou” and “Wetland Nourishment/Creation” – Elements 1-3 (cuts and fill perpendicular to the GIWW, moving south of the Florida Gas pipeline canal)

Sheet 4 shares information regarding **Element 1**, which corresponds to Element 1 of the 2018 EGL but differs in the location and method of disposal of the dredged material and the elimination of “clearing and snagging” from the present proposal. Element 1 here claims the dredged area will reconnect an existing bayou channel. However, the existing bayou channel – now filled in with sand and vegetation typical of elevated contours – had previously been a conduit for the distribution of sandy sediment laden river water into the wetlands. One would expect the “reconnection” of this bayou with river water will lead to much the same result – channeling river water into the wetlands, depositing sand and silt and eventually filling and damming this bayou again. A prime example of this scenario playing out is seen north of the proposed site for Element 1 in the Florida Gas pipeline canal where introduced river water has deposited more than 12 feet of sand in the canal, and it continues to rise with high water events. Any inflow of water into the area during moderate river stages would be temporary until the level of accretion cuts off flow once again.

The vegetation on the elevated spoil bank on the west side of the GIWW in the area of the proposed cut at Element 1 includes trees such as green ash and swamp privet. Attempting to

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<sup>13</sup> See ABK et. al. Supplemental Comment and attachment (1979 EPA Report) [Exhibits Group 1].

create either marsh or cypress-tupelo swamp wetlands here is not likely to be successful or consistent with surrounding vegetation.<sup>14</sup>

Sheets 5 and 6 discuss **Elements 2 and 3**, which correspond to Elements 2 and 3 of the 2018 EGL, but again differ in the location and method of disposal of dredged material. Like Element 1, these elements also characterize the dredging as reconnecting an existing bayou. Element 3 was previously dredged by the Corps in 1999 and subsequently contributed to filling the upper part of Cow Bayou and many acres of swamps with sandy sediment before the cut completely filled in. Opening Elements 2 and 3 will restart the accretion process. These elements characterize the deposition of dredged material as “wetland creation” in man-made canals running perpendicular to the dredged cut sites. However, there is no man-made canal apparent in the area corresponding to Element 2’s proposed deposit site, and the proposed deposit sites for Element 3 include a forested ditch running parallel to the GIWW. The public notice does not include specific measurements for the dredge and deposit sites (*e.g.*, length, width and height for the cuts and deposit sites) nor existing and anticipated elevations pre and post implementation of the elements. Again, the public notice materials fail to explain how marsh wetlands can be created with dredged material deposited in “man-made” canals.

Vegetation on the elevated spoil bank on the west side of the GIWW in the area of the proposed cut at Element 2 includes trees such as black willow, green ash, sugarberry and swamp privet, indicative of species on elevated contours in the wetlands. The vegetation in the elevated spoil bank on the west side of the GIWW near Cow Bayou in the area of the proposed cut at Element 3 consists primarily of sycamore, green ash, sugarberry, hickory and swamp privet, indicative of plant species occurring on elevated contours in the wetlands. The public notice does not make clear what type of wetland the applicants intend to create here, the expected efficacy of wetland creation in these elevated areas and, without assurances of efficacy, how the modifications here are appreciably different from any other dredge and fill project.

“Spoil Bank Removal” and “Wetland Creation” – Elements 4-10 (cuts perpendicular to existing spoil along the Florida Gas pipeline canal, moving west from the GIWW, and depositing fill in the pipeline canal adjacent to the cuts)

Sheets 7 through 10 discussing **Elements 4 through 10** (which correspond to Elements 5-11 of the 2018 EGL) characterize the dredging activity at these sites as “spoil bank removal” and the deposit of dredged material at these sites as “wetland creation.” These elements consist of dredging 100-foot gaps<sup>15</sup> in the existing, illegal spoil running parallel to the Florida Gas pipeline canal and depositing fill adjacent to the dredged cuts in the existing, elevated (but still inundated in highwater) Florida Gas pipeline canal. As with the other elements, the location of the dredge cut sites appears similar to the prior project plans, but the discharge sites differ and the information in these enclosures are much less descriptive than were included in the

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<sup>14</sup> Decl. of William Connor, Ph.D., *Basinkeeper v. U.S. Army Corps of Eng’rs*, filed Jan. 29, 2018, attachment to Plaintiffs’ Motion for Preliminary Injunction, ECF No. 15-43, at 10-11, 12-13, 15. [Exhibits Group 3].

<sup>15</sup> Except for Element 10, which proposes a 50’ gap.



enclosures to the 2018 public notice – there is minimal information regarding existing elevations and measurements relative to both the dredge and deposit sites. The pipeline canal has been filling overtime since its creation, but it still carries water seasonally throughout the year. A filled pipeline canal is not a location where wetlands (including marsh) creation can be achieved. Filling in the canal will elevate existing contours, remove any possibility of remediation along the Florida Gas pipeline canal, and contribute to the loss of wetlands in this area.

The information provided offers no explanation or support for how depositing the dredged material in the existing, already elevated pipeline canal constitutes “wetland creation” that will benefit the area. Vegetation on the elevated spoil bank on the north and south sides of the Florida Gas pipeline canal area for elements 4 through 10 to consist primarily of sycamore, swamp privet, black willow and green ash. Again, it is impractical, if not impossible, to dump deposited dredge material onto an already accreted area and expect to establish productive wetlands.

“Clear Existing Bayou” and “Wetland Nourishment” – Elements 11 & 12 (cuts and fill just south and perpendicular to Bayou Sorrel, north of the Florida Gas pipeline canal and west of the GIWW)

Sheets 11 through 14 discussing **Elements 11 and 12** (which correspond to Elements 12 and 13 of the 2018 EGL) characterize the dredging activity as clearing an existing bayou channel and the deposit of dredged material at these sites as wetland nourishment (similar to Element 1). In addition to the public notice information deficiencies identified above, including not identifying maximum existing and fill elevations, these elements again appear similar in location of the dredge cut sites proposed in 2018 but the location and method of discharging the dredged material differ. Although Sheet 3 suggested that wetland nourishment would consist of depositing and spreading dredged spoil up to **8” inches** thick running alongside proposed cuts, Element 11 at sheets 11 and 12 identifies spoil deposits up to **8’ feet** thick alongside the cuts. This significant discrepancy in the manner and amount of disposal, coupled with the failure to identify existing and anticipated elevations, frustrates the public’s ability to understand the elements’ footprint and impacts.

Vegetation on the elevated spoil bank on the south side of Bayou Sorrel for the areas of elements 11 and 12 includes trees such as sycamore and green ash, but also live and water oaks. Without knowing existing elevations and proposed additions to the elevations along the proposed cut by disposal of dredged material, the reader is unable to appreciate and meaningfully comment on the representation that this discharge method constitutes “wetland nourishment” in the area. Most of the trees in this area are already stunted because of built up sediment. Spreading 8 inches of more spoil over existing spoil may kill native trees, and as little as 2 inches more may stunt tree growth. Too much fill around mature trees can permanently harm root systems and ultimately kill trees.

We know generally that the existing elevations at the proposed dredge cut site for Element 11 are quite high such that to reach the +6’ elevation for the proposed cut will result in a large amount of material dredged. But the public notice does not include the amount and depth

that will have to be dredged to reach this marker. Additionally, there is no known existing bayou here. With the information provided it is evident that the amount of sand and silt that will be introduced by this element alone can fill the swamp between Bayou Sorrel and the Florida Gas pipeline canal in a single highwater season. This trend is already evident in LIDAR elevation maps showing the formation of large deltas south of prior openings made in the area. Similarly, in the area for Element 12, LIDAR elevation maps show a large delta formed south of an old bayou that has since filled in with sediment. Reopening this bayou will once again open the area between Bayou Sorrel and the Florida Gas pipeline canal to sedimentation and unsustainable accretion.<sup>16</sup> The elements proposed will not restore the hydrology of the area, and instead will exacerbate and accelerate the irreparable loss of the forested wetlands.

The information deficiencies and discrepancies in the 2022 PN are particularly glaring in light of the many concerns raised by the Coalition organizations throughout the over 12 years of development of this project. Neither the public notice nor the applicants make any attempt to dispel common wisdom gleaned from similarly marred “water quality enhancement” projects already pursued in the Basin (*e.g.*, Beau Bayou, Buffalo Cove), or to substantiate conclusory claims that this dredge and fill project will establish new wetlands (marsh or otherwise) and ultimately benefit the project area. The applicants’ failure to identify all relevant phenomenon at play – including the coexisting inputs of river water and sediment – frustrates legal requirements for public participation and involvement in the permitting process and discredits the project overall.<sup>17</sup> Unsupported representations that discharged dredged material will create marsh wetlands (a type of non-forested wetland not typically associated with this middle section on the east side of the Basin) and wetland nourishment creates a dangerous precedent for future dredge and fill project applicants to avoid Clean Water Act requirements for the avoidance, minimization and mitigation of adverse impacts.

### **III. THE PROJECT APPLICATION IS INCOMPLETE**

Section 404 authorizes the Corps to issue a permit for the discharge of dredged material only “after notice and opportunity for public hearings.”<sup>18</sup> The Corps must publish notice and solicit public comments after receipt of a complete permit application.<sup>19</sup> A complete application must include, in part:

- a complete description of the proposed activity including necessary drawings, sketches, or plans sufficient for public notice;
- the location, purpose and need for the proposed activity;
- a list of authorizations required by other agencies, including approvals received or denials made;

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<sup>16</sup> See LIDAR imagery at Figs. 1-3 in Section VI.

<sup>17</sup> Ivor van Heerden, Ph.D., Review of Comments of Others as Related to the EGL Project, Nov. 4, 2019 (identifying a lack of acknowledgment, mention or meaningful discussion about sediments by the project proponents, with the exception that years ago TNC claimed that we should “maximize the ecological value of the accretionary process.”). [hereinafter, van Heerden Response to Comments] [Exhibits Group 1].

<sup>18</sup> 33 U.S.C. § 1344(a).

<sup>19</sup> 33 C.F.R. § 325.2(a)(2).

- all activities which the applicant plans to undertake which are reasonably related to the same project;
- a description of the type, composition and quantity of the materials to be dredged, the method of dredging and site plans for the disposal of dredged material;
- a statement describing how impacts to waters of the United States are to be avoided and minimized; and
- either a statement describing how impacts to waters of the United States are to be compensated for or a statement explaining why compensatory mitigation should not be required for the proposed impacts.<sup>20</sup>

Unfortunately, the 2022 Public Notice does not attach or otherwise include any reference to how the public can access the project application. Most Corps public notices – including the original 2018 EGL public notice – include information about where and how to access proposed project applications,<sup>21</sup> but not here. Here, we reference the “Joint Permit Application for Work Within the Louisiana Coastal Zone” for the project’s Coastal Use Permit application<sup>22</sup> to suggest that the application does not comply with the CWA regulations governing District of the Army (DA) processing of permits, applications and public notice.<sup>23</sup> Based on the information included in the Joint Permit Application and attachments, these requirements have not been met.

Information expressly required such as authorizations needed by other agencies and approvals or denials already received, reasonably related plans for the larger restoration project in East Grand Lake, composition of the dredged material, and a statement on mitigation are not included in the application materials. Because wetlands are defined by plants, soils and frequency of flooding, at a minimum this information for the project area and wetland nourishment/creation sites, including the portion’s directly and indirectly or cumulatively

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<sup>20</sup> *Id.* § 325.1(d)(1)-(3), (7).

<sup>21</sup> For example, the 2018 PN included the following statements: “The application for this proposed project is on file with the Louisiana Department of Environmental Quality and may be examined during weekdays between 8:00 a.m. and 4:30 p.m. Copies may be obtained upon payment of costs of reproduction.” A similar statement providing information for how/where to access the 404 permit application is not included in the 2022 PN.

<sup>22</sup> Permit No. P20220132, Received on February 14, 2022 and again on April 4, 2022, “Joint Permit Application for Work Within the Louisiana Coastal Zone”, available at [https://sonlite.dnr.state.la.us/sundown/cart\\_prod/pkg\\_crm00100\\_forms.cart\\_menu?pcup\\_num=P20220132](https://sonlite.dnr.state.la.us/sundown/cart_prod/pkg_crm00100_forms.cart_menu?pcup_num=P20220132). Ultimately, the Office of Coastal Management (OCM) found that no coastal use permit is required because the activity is located outside of the LA Coastal Zone. La. R.S. 49:214.25.E.

<sup>23</sup> If there is a separate application distinct from that discussed herein for the Section 404 permit, we request notice and access thereto, and reasonable extension of the comment period to evaluate the 404 application materials in conjunction with the Corps’ public notice for the project. Given the short comment period (30 days with the granted extension), applicable Freedom of Information Act (FOIA) regulations governing the response and production times for FOIA requests to federal agencies, and the Commenters’ experience with the Corps FOIA office and the typical timeframe in which the Corps responds and produces records for FOIA requests (substantially more than 30 days), it was not feasible to submit a FOIA request for application materials to the Corps after the notice was published on April 25, 2022. If public notice is reissued for this project, information regarding access to the application materials, among other things, should certainly be included.

impacted, should be identified for adequate consideration of the proposed activities and required mitigation measures.<sup>24</sup>

The Joint Permit Application states that the project's purpose and need is "to restore hydrologic connectivity and reduce stagnation in a portion of the Atchafalaya Basin by increasing north to south flow through the swamp" and that the strategies used to achieve this goal include "improving existing bayous to convey water through the swamp, gapping spoil banks along a pipeline canal, and creating wetlands."<sup>25</sup> But the applicants do not explain how creating wetlands directly contributes to the goal of increasing water flow in the area, or describe the composition of the dredged spoil material for use in wetland nourishment/creation or fundamentally how dumping dredged material here can create wetlands and nourish trees. On the face of the application, the need for the project is not clearly defined. The applicants fail to plainly state the need and why they believe the area to be degraded, consequentially omitting mention and identification of the project's foreseeable impacts on the rate and pattern of sediment deposition.<sup>26</sup>

The application further suggests that "[w]hen complete, water will be able to flow out of Bayou Sorrel and the GIWW through the adjacent swamps to reduce stagnation, increase dissolved oxygen concentrations in the swamp, improve aquatic habitat for fish and crawfish, and promote the natural regeneration of cypress trees" which, together, "will make the swamp more resilient and able to better withstand future conditions predicted for this area from climate change, such as rising sea levels and tropical storms."<sup>27</sup> Introducing river water and increasing unnatural sediment deposits into the backswamps will destroy these swamp forested wetlands that protect wildlife and human communities from severe weather events, which are expected to be more numerous and substantial with climate change.

The application provides that "[m]aterial removed during construction will be placed within areas previously impacted by the U.S. Army Corps of Engineers for dredged material disposal removed during construction and maintenance of the Gulf Intracoastal Waterway and the Atchafalaya Basin Floodway projects" and that the government "has completed Environmental Impact Statements for the GIWW and Basin Floodway projects that fully assessed use of these lands for dredged material disposal and maintains disposal easements on

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<sup>24</sup> See Cowardin, et al., *Classification of Wetlands and Deepwater Habitats of the United States*, 1979. [Exhibits Group 3].

<sup>25</sup> Joint Permit Application at step 5, a., page 2, and step 8, e., page 4.

<sup>26</sup> Earlier evaluation and discussion of the project area recognized the sediment issue. See, e.g., [in Exhibits Group 4]: 2.22.11 Recommendations for Monitoring East Grand Lake ("Public sentiment at all of the hearings for the 2012 Annual Plan identified sedimentation in the East Grand Lake Planning area as one of the greatest concerns surrounding the suite of construction features proposed in that Plan."); 8.3.10 East Grand Lake Summary Report, at p. 4-5 ("redirecting water flow means redistributing sediment and the strategic redistribution of sediment should be a significant consideration in planning because of its impact on forest health, unwanted filling of open water refuge areas for fish, and the longevity and connectivity of water management projects.").

<sup>27</sup> *Id.* at step 8, e., page 4.

these properties.”<sup>28</sup> But plats attached to the application and public notice represent that dredged material will be used for wetland creation and nourishment in the Florida Gas pipeline canal and along the cut sites south of Bayou Sorrel and the GIWW. Are these upland disposal dredge sites conducive to and/or appropriate for wetland creation and nourishment? Have these disposal sites been approved and recognized to satisfy the legally significant definitions of wetland establishment (creation) and rehabilitation (nourishment)? The application and public notice fail to explain whether review for the GIWW and Basin Floodway projects considered using these dredge disposal sites for these purposes; and whether the easements cover the entire footprint of the proposed discharge sites. The application materials fail to include any additional identifiable reference to these projects to allow the public to access and review them. At a minimum, it would not appear that wetland establishment (creation) in the Florida Gas pipeline canal has been previously considered and approved given the permitted – albeit out of compliance – status of this pipeline canal prohibiting impediments to navigation.<sup>29</sup>

The application represents that 18,261 cubic yards or 4.43 acres will be excavated, and 18,261 cubic yards or 2.14 acres will be filled<sup>30</sup> without explanation for the discrepancy in acreage amounts, particularly compared with Table 1. Project Summary, attached to the application and identifying the area of direct impact from disposal of dredge material as 5.74 acres. Again, the application does not include a description of the composition of the dredged spoil material and thus its efficacy for reuse to create/nourish wetlands, particularly for cypress-tupelo swamps. These representations are evasive, confusing and potentially misleading.

The application claims that wetland impacts will be offset by creating 2.1 acres of wetlands and planting bald cypress trees to enhance the newly created wetland habitat,<sup>31</sup> but these claims are unsubstantiated. Cypress regeneration alone is a slow process, if it can even occur in the proposed locations and conditions (which is not likely), but wetland creation can take years or decades if it is successful at all.<sup>32</sup> There is no evidence to support that cypress-tupelo wetland creation can occur on deposited elevated spoil in areas suffering from high rates of sedimentation; otherwise these elevated areas may already support young cypress trees. And again, the application includes neither a statement describing how the applicants will compensate for impacts nor a statement explaining why compensatory mitigation requirements do not apply to the proposed project. It is insufficient to label discharged dredge as wetland creation and nourishment and assume the project’s impact footprint is reduced or nonexistent. The complexity of this area’s wetland ecosystem and disturbances to its health and function do not support the applicants’ unsubstantiated, implied claim that wetland impacts will sufficiently be offset.

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<sup>28</sup> *Id.*

<sup>29</sup> Florida Gas pipeline permit, Dec. 12, 1962, at special conditions (b) – (f) (“(c) That there shall be no unreasonable interference with navigation by the work herein authorized[.]” and at (f) describes that the U.S. Secretary of the Army can require the owner to remove or alter the work or “obstruction[s] to the free navigation of said water” caused thereby.) [Exhibits Group 2].

<sup>30</sup> Joint Permit Application at Step 10, a. and b., page 4. Although at Step 11, a., page 5 the “Total acres of wetlands and/or waterbottoms filled and/or excavated” is left blank.

<sup>31</sup> *Id.* at Step 11, d., page 5.

<sup>32</sup> *See* Connor Decl., at 10-11, 12-13, 15.

Finally, the Corps must require the applicants to furnish additional information essential for the agency to make a public interest determination in compliance with the CWA Section 404(b)(1) guidelines, including any and all data gathered in pre-construction monitoring and evidence offered in support of the claimed purpose, need and anticipated impacts/outcomes of the proposed activity. Specifically, considering the widely accepted fact that sedimentation is a major concern in the Atchafalaya Basin, the Corps should require the applicants to provide data and evidence that rebuts the reasonable presumption – and scientifically supported findings – that the introduction of sediment laden river water through new cuts will not adversely impact the project area and overburden backswamps with increased sediment deposition.

Completion is defined by the sufficiency of the materials submitted and is controlled by the Corps' regulation governing requirements for the content of the public notice.<sup>33</sup> Based on the information that is publicly available, both the application and public notice for the 2022 East Grand Lake project are administratively and substantively insufficient.

#### **IV. THE PUBLIC NOTICE IS INSUFFICIENT TO ALLOW MEANINGFUL COMMENT**

The public notice is “the primary method of advertising all interested parties of the proposed activity” and “of soliciting comments and information necessary to evaluate the probable impact on the public interest.”<sup>34</sup> Therefore, it must include sufficient information to give interested parties “a clear understanding of the nature and magnitude of the activity to generate meaningful comment.”<sup>35</sup> However, neither the public notice or application materials for the 2022 EGL project provide sufficient information for any interested stakeholder to understand the magnitude of the proposed project's impacts to the East Grand Lake area.

In the context of a dredge and fill project permit under the Clean Water Act, the notice should include, among other things,

A brief description of the proposed activity, its purpose and intended use, so as to provide sufficient information concerning the nature of the activity to generate meaningful comments, including ... a description of the type, composition, and quantity of materials to be discharged or disposed of in the ocean;

A plan and elevation drawing showing the general and specific site location and character of all proposed activities ...; [and]

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<sup>33</sup> 33 C.F.R. § 325.3(a).

<sup>34</sup> *Id.* § 325.3(a).

<sup>35</sup> *Id.*; *Ohio Valley Envtl. Coal. V. U.S. Army Corps of Engrs*, 674 F. Supp. 2d 783, 802 (S.D.W. Va. 2009) (“the Corps unreasonably found the applications were complete and issued public notices that plainly did not contain sufficient information to allow for meaningful public comment.”).

*Any other available information* which may assist interested parties in evaluating the likely impact of the proposed activity, if any, on factors affecting the public interest[.]<sup>36</sup>

The Corps has failed to provide sufficient information regarding the reasoning behind the decision to (1) omit identifying the threat of sedimentation that accompanies any new input of river water into an area in the Basin in defining the purpose and need for the proposed project, particularly in light of the project's original intent to improve water quality *and redirect sediment*,<sup>37</sup> (2) fail to mention plans for compensatory mitigation<sup>38</sup> and (3) fail to make available information necessary for the public to evaluate all probable and foreseeable project impacts, including but not limited to accretionary impacts of sediment deposited into the swamps from the proposed river water inputs and adaptive management responses prepared to allow modification for future actions under the EGL Ecological Enhancement Project plan. Moreover, there are no details provided that show how the proposed locations and method of discharging the dredged material will "enhance" the function of the aquatic ecosystem, particularly with respect to cumulative and long-term impacts in the project area.<sup>39</sup>

The 2018 EGL project application discussed the context for the Upper EGL project as part of the larger ABP East Grand Lake Ecological Enhancement Project plan to restore 202,424 acres of the Atchafalaya Basin bound by Bayou Sorrel, the Atchafalaya River, and the East Atchafalaya Guide Levee. But neither the 2022 EGL application nor public notice mention the relationship between the proposed activity and broader restoration plan for the EGL area. The 2022 PN also fails to identify an adaptive management plan that has or will be created to monitor the status of the project area and collect pre and post construction data to identify baselines and track changes to inform the agencies and the public for future project elements in the greater EGL area. This information is necessary for evaluating the potential impacts of this project on the public interest, particularly if this is a pilot project that informs future actions under the broader EGL plan. The Corps' Buffalo Cove Project was a pilot project that caused severe adverse impacts and filling of wetlands, but we have not seen how these impacts have informed future actions since another harmful element has been proposed and is under review at this time.<sup>40</sup>

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<sup>36</sup> 33 CFR 325.3(a)(5), (6), (13). (emphasis added).

<sup>37</sup> See ABK et al. 2018 EGL Comments, at 4 (discussing the 2010 Annual Basin Plan's Project List).

<sup>38</sup> The Corps must consider mitigation and "[n]othing prevents mitigation from being reevaluated" in the event the agency has already pre-determined that mitigation is not required. Furthermore, if that is the case, it should have been clearly and explicitly noted in the Public Notice. See *Ohio Valley v. Corps*, Case No. 3:08-0979, at \*14 (S.D. W.Va. 2013) (finding "the Corps was required to release *some* project-specific information on mitigation for public review and comment" where the public notices contained no information on proposed mitigation, which was "the single most important" material issue for the Corps' determination).

<sup>39</sup> *Id.*

<sup>40</sup> ABK et al. original (July 18, 2018) and supplemental (Feb. 22, 2021) Comments on Buffalo Cove Element 10 [Exhibits Group 1].

Because the Corps' public notice does not include sufficient information for public comment, the agency must initiate a new notice and comment period, including accurate and necessary information such as: how/where to review the application materials; a clear statement of the project need and status of the project area; an accurate, full description of the project's purpose; the Corps' environmental assessment (unless an EIS is prepared and public process therewith fulfilled); cumulative impacts analysis; accurate details on minimization and avoidance of impacts, including for the proposed wetland creation and nourishment; and information on mitigation planning for unavoidable adverse impacts and adaptive management for future related projects. This information is necessary to meet legal requirements for public participation in the permitting process, and particularly given the contested nature, lengthy history and significant impacts of this project.

**V. THE APPLICANTS AND AGENCIES HAVE FAILED TO DISCLOSE PROBATIVE INFORMATION NECESSARY TO ASSESS PROJECT IMPACTS**

The information deficit in the public notice and joint permit application are glaring considering the projects' over 12-years of development and the proponents' knowledge that the Commenters have been trying to acquire information specifically related to East Grand Lake, and other similar projects, for years. Since this project was initially proposed in 2009-10, the Coalition organizations have been vocal and engaged in public meetings, presentations, and dialogue with the agencies and project proponents to better understand proposed actions, the purpose and intent of the project, probable impacts, and to voice our concerns with the project. The Coalition summarized many of these efforts to engage, educate and understand in comments submitted in response to the 2018 Public Notice.<sup>41</sup> Since then, they have continued to seek information necessary to track and understand project developments and anticipated impacts. Commenters describe ongoing efforts to engage in dialogue with the agencies and applicants throughout these comments.

Since 2018, the Commenters have sent many Freedom of Information Act Requests and Requests for Public Records to the Corps, CPRA, LDNR, USFWS, LDWF, Nicholls University and even The Nature Conservancy to acquire information regarding this project and similar projects in the Basin, including monitoring data used by project proponents that the proposed activity will enhance, rather than irreparably destroy, the aquatic ecosystem and the wetlands in East Grand Lake.

Specific Requests for Records on East Grand Lake

The Commenters have sent many public record and Freedom of Information Act requests for information on the East Grand Lake project as well as on similar water quality enhancement projects in the Basin.<sup>42</sup> Some public records have been produced in response to these requests,

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<sup>41</sup> See, e.g., ABK et al. 2018 EGL Comments, at 4, 8, 11.

<sup>42</sup> Including requests to USFWS, LDWF, LDNR, CPRA, the Corps, Nicholls State University (denied response) and The Nature Conservancy (denied response). Despite these requests, we have still not



but several requests remain outstanding and subject to either ongoing litigation or administrative appeals.<sup>43</sup> The Commenters still have not received all requested information regarding the monitoring data used to support, and which is necessary to understand, the purpose and purported beneficial outcome the project, the proposed dredging and fill locations, the health status of the forest canopy, the proponents' position on the discharge of sediment into the area, and the need to redirect sediment for forest health.<sup>44</sup> Frustrated with the lack of complete response and production of raw data – and the continued production of reports and conclusions that do not provide the specifics needed to independently assess the monitoring efforts employed by TNC<sup>45</sup> (with state and/or federal funding for pre-construction evaluations) Basinkeeper went directly to TNC and Nicholls State University to request the missing data.

On June 2, 2020, Basinkeeper sent a joint Request for Public Records to both The Nature Conservancy and CPRA for records pertaining to the East Grand Lake project. ABK requested records from TNC and/or the organization's Atchafalaya River Basin Initiative "as relates to the organization's partnership with the Louisiana Department of Natural Resources Atchafalaya Basin Program, and its successor the Coastal Protection and Restoration Authority ("CPRA"), regarding coordinated management in the Atchafalaya Basin, and in particular the proposed East Grand Lake project," namely sampling data and monitoring site and conditions information collected for pre-construction project monitoring.<sup>46</sup> The request was made specifically pursuant to terms of the Memorandum of Understanding between TNC and LDNR's Atchafalaya Basin Program providing that "[a]ny records or information furnished to the ABP under [the MOU] are subject to the Louisiana Public Records Law."

CPRA responded, producing a 1st quarter monitoring report for 2020 and the Memorandum of Agreement executed in 2020 between CPRA and TNC regarding the Atchafalaya Basin Program,<sup>47</sup> which specifically provides that TNC agreed to assist with "gathering information related to conservation, restoration and enhancement" in the Basin, "dissemination of information to the public[,] and by "providing timely and cogent scientific evaluation of proposed projects" in the Basin.

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received the raw monitoring, preconstruction data used to support the purpose and need for the project, the proposed dredging and fill locations, the proponents' position on the disposition of sediment into the area, and the need for sediment for forest health.

<sup>43</sup> *Atchafalaya Basinkeeper, et al. v. U.S. Army Corps of Engrs*, Case No. 2:21-cv-00317-JCZ-MBN (M.D. La. 2021).

<sup>44</sup> See van Heerden Response to Comments, at 20-21 (discussing information missing, e.g., GPS, location and other site-specific data, bearing on assessment of the data provided from monitoring efforts, as well as a call for description of maintenance protocols for instruments used).

<sup>45</sup> As well as Nicholls State University, LSU, and USGS since this project was first considered in 2009.

<sup>46</sup> 6.2.20 Public Records Request to CPRA and TNC (attaching TNC-LDNR Memorandum of Understanding). [Exhibits Group 4].

<sup>47</sup> Memorandum of Understanding between CPRA and TNC, May 20, 2020. [Exhibits Group 4].

On June 16, 2020, Basinkeeper's attorney received a response from the law firm of Seale & Ross, retained to represent TNC, Louisiana Chapter, in connection with Basinkeeper's request for public records, denying any obligation to provide records in response to the request.<sup>48</sup>

Atchafalaya Basinkeeper also sent a Request for Public Records to Nicholls State University on June 2, 2020, requesting that the state institution provide:

[s]ampling data collected, referenced, and/or consulted in the creation of the following research article: Lauren M. Kong, et al. (2019). Flood Pulse Characteristics and Physicochemical Influences on Harvested *Procambarus clarkia* and *Procambarus zonangulus* Populations in the Atchafalaya River Basin, Louisiana. A project funded by The Nature Conservancy Fellows Program through a grant from Royal Dutch Shell, and for which TNC staff provided statistical advice, field support and technical advice.

Including but not limited to:

- GPS coordinates (latitude and longitude) for field/monitoring sites
- Complete, original data, including all measured parameters at each site, raw figures, locations of each site, and any other relevant and pertinent data collected, used and/or referenced in the creation of the subject research article<sup>49</sup>

On June 22, 2020, the University's Administrative Office Manager and Coordinator of Requests for Public Records, Carole George, sent an email response conveying the following message: "The research information for the published article was collected by students in performing their class assignments and preparing their graduate thesis. As such, this information is not public information."

Our efforts to acquire data used to support this project, that was collected pursuant to partnerships with state and federal agencies and funding by the government, have been denied. All preconstruction monitoring data collected for the East Grand Lake project should be evaluated by the Corps for its environmental evaluation of the proposed project, and should also be made available to the public and interested stakeholder upon request. Dr. van Heerden identified data missing from key studies and data offered to support the project, and called upon the Corps to require detailed maintenance records, calibration information and close examination of data to ensure evidence offered truly supports the proclaimed outcomes.<sup>50</sup> This project has been in development for more than 12 years, and the lack of transparency surrounding the study

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<sup>48</sup> 6.2.20 Record Request to TNC; 6.16.20 Response Letter from TNC. [Exhibits Group 4].

<sup>49</sup> This information is necessary to evaluate the credibility of the data presented in monitoring reports and available through the CPRA webpage. Although the original proposed project's contractor, Sigma Consulting, in response to public comments submitted to the 2018 EGL project, stated that "[t]his restoration project was planned from a deep basis of science, all of which is publicly available" the reality is that not all of the information is available, and we have continually requested access to information relative to the location and conditions for monitoring sites to no avail. *See* Sigma Response to Comments, at 1.

<sup>50</sup> van Heerden Response to Comments, at p. 19, Appendix A.

and monitoring of the area, as well as the development, certainly does not warrant any vote of confidence from the stakeholders denied access to the truth.

Requests for Records on Similar “Enhancement” Projects in the Basin

We have also submitted FOIA and Public Record Requests for information about other water quality enhancement projects in the Atchafalaya Basin. For example, requests were submitted regarding the proposed enhancement project in the Buffalo Cove Management Unit, as well as the water quality enhancement project in Beau Bayou. Similar to requests on East Grand Lake, we have requested monitoring data and reporting for both the Buffalo Cove and Beau Bayou projects to understand the pre and post-construction status of the project areas, to the adaptive management approach pursued by the regulators, and how the adverse impacts to the project areas can be avoided and elevated as an example to prevent future harms from similar actions taken in the Basin.

Unfortunately, again despite some production of records in response to our requests, some of these requests remain outstanding and subject to ongoing litigation in federal court. Our inability to access state and federal agencies’ monitoring data and evaluation of projects pursued in the vein of enhancing water quality and functionality in the Basin, with public funds, is confounding. If the regulators cannot clearly show that they are following standard and required protocols for monitoring these projects and will not openly discuss whether these projects have succeeded or failed in their purpose and how to use this information to inform future projects, study and environmental assessments, how can the public appreciate whether future, similar projects will benefit or harm their interests?

Since the EGL project’s revival in 2015, water quality – to the exclusion and now complete omission of sedimentation – is the sole focus of the project, its purpose and purported need. The present proposal ignores the need to co-manage water quality and sediment deposition which are inseparable byproducts of introducing more sediment-laden river water into the area. The omission of this critical byproduct of introducing river water into the area misrepresents the status of the project area, the project purpose and need, and impairs the Corps’ identification and assessment of the environmental consequences of the project.<sup>51</sup> The omission of the need to manage sediment inputs in the area invalidates the public notice, project application and any impacts assessment that fails to consider this critical aspect of the project’s purpose, need and probable impacts.

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<sup>51</sup> 33 C.F.R. § 325 app. B (9)(b)(4), (5); *See Friends of the Santa Clara v. Corps*, 887 F.3d 906 (9th Cir. 2018); *Ohio Val. Envir. Coal. v. U.S. Army Corps of Eng.*, 479 F.Supp.2d 607, 627 (S.D. W.Va. 2007) (NEPA requires agencies to adequately identify and evaluate the environmental costs of a proposed action). (internal citation omitted).

## **VI. THE PROJECT WILL SIGNIFICANTLY DEGRADE WETLAND ECOSYSTEMS AND ADVERSELY IMPACT HUMAN AND WILDLIFE USES IN THE BASIN**

The Atchafalaya Basin, located in south-central Louisiana, extends from the confluence of the Mississippi, Red and Atchafalaya Rivers near Simmesport south beyond Morgan City to the Gulf of Mexico. The Lower Atchafalaya Basin Floodway includes 833,000 acres enclosed by U.S. 190 to the north, the Gulf of Mexico to the south, and the east and west Atchafalaya Basin guide levees. The Lower Atchafalaya Basin Floodway System supports two mutually important goals: “to preserve the habitat of the nation’s largest and oldest river-basin swamp and to ensure that the Lower Atchafalaya Basin can pass a floodwater of 1.5 million cubic feet per second as required by the Mississippi River and Tributaries Project (MR&T).”<sup>52</sup> Unfortunately, the Corps’ manipulation of the natural footprint and functions of the Basin by confining this complex ecosystem within a levee system and manipulating water and sediment inputs through the Old River Control Structure, coupled with the effects of oil and gas development, channel dredging and spoil banks, have severely disrupted the functionality of the Basin. These disruptions impede water flow and channel sediment into interior swamps, elevating the Basin’s floor, converting irreparable wetlands and deep-water habitat into uplands and degrading wildlife habitat, and depriving areas in need of sediments.

The EGL project area occurs in the Corps’ designated Lower Atchafalaya Basin Floodway, and is one of the most complex areas in the Basin with regards to hydrology. This area provides invaluable ecological and anthropogenic services in its cypress-tupelo swamp wetlands, wildlife habitat and flood capacity; it is a special aquatic site, with significant importance and productive and valuable public resources that only wetlands can provide.<sup>53</sup> But, as in many parts of the Basin, this area suffers from water stagnation and sedimentation.

Ultimately, the Corps cannot permit the proposed East Grand Lake project because the dredge and fill project fails to satisfy the CWA 404(b)(1) guidelines<sup>54</sup> and implementing regulations of the CWA and NEPA.<sup>55</sup> Both the CWA and NEPA require the Corps to consider direct, cumulative,<sup>56</sup> secondary and indirect<sup>57</sup> impacts of the proposed activity, alternatives and

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<sup>52</sup> See the Corps’ description of the Lower Atchafalaya Basin Floodway system, *available at* <https://www.mvn.usace.army.mil/About/Projects/AtchFldySys.aspx>.

<sup>53</sup> 33 C.F.R. 320.4(b)(1); 40 C.F.R. §§ 230.4(q-1); 230.41.

<sup>54</sup> The CWA 404 (b)(1) narrative guidelines recognize the potential loss of values and adverse impacts dredge and fill activities can have on the physical, chemical and biological characteristics of aquatic ecosystems (Subparts C and D), on special aquatic sites and wetlands (Subpart E), and on human use characteristics of an aquatic area (Subpart F). Fundamental to these guidelines is the principle that dredged or fill material should not be discharged into the wetlands *unless* it can be shown that it will not “have an unacceptable adverse impact” on the ecosystems, either individually or considering the impacts of other activities that affect the ecosystems. 40 C.F.R. § 230.1(c).

<sup>55</sup> CWA, § 404(b)(1) Guidelines (40 C.F.R. Part 230); 33 C.F.R. § 320 and NEPA, 42 U.S.C. §§ 4321-4370; 33 C.F.R. § 325.2(a)(4) and Appendix B.

<sup>56</sup> CEQ regulations implementing NEPA define cumulative impacts as “the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably

efforts to avoid, minimize and mitigate adverse impacts.<sup>58</sup> Because the project will cause and contribute to significant degradation of the wetlands, the Corps cannot grant the permit.<sup>59</sup>

Harm to special sites can cause irreversible loss of valuable aquatic resources; the CWA considers degradation to special sites to be among the most severe environmental impacts.<sup>60</sup> It is imperative that the Corps conduct a thorough review of the proposed activities' full range of impacts to prevent any further irreparable harm to these wetland ecosystems. The Corps must determine, based on a written finding of the potential short and long-term effects of the proposed activity, that the proposal complies with the restrictions on discharge identified at 230.10 and the broader, comprehensive NEPA requirements for impacts analysis.<sup>61</sup> The East Grand Lake project does not satisfy the 401(b)(1) Guidelines, the CEQ regulations implementing NEPA analysis.

**a. The EGL Project Will Irreparably Harm the Forested Swamp Wetlands**

The project area's wetland ecosystems consist of baldcypress and water tupelo swamp with bottomland hardwoods, invasive plants and scrub-shrub occurring on elevated sites and spoil banks along the channels and canals; portions of this area are already suffering from

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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. *See* ABK et al. 2018 EGL Comments at 16-17, discussing cumulative impacts of the EGL project.

<sup>57</sup> CEQ regulations implementing NEPA define indirect impacts as those "which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems." 40 C.F.R. § 1508.8

<sup>58</sup> *See* 40 C.F.R. Part 230; 33 C.F.R. § 320; 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1502.1-.25 (requiring that the Corps consider the environmental impact of any "major Federal action[] significantly affecting the quality of the human environment," and provide a detailed statement on "the environmental impact of the proposed action," "any adverse environmental effects which cannot be avoided should the proposal be implemented," and any "alternatives to the proposed action.").

<sup>59</sup> 40 C.F.R. 230.10(c). Effects on human health and welfare including effects on water supplies, fish, wildlife and special aquatic sites; effects on aquatic ecosystems diversity and productivity; and effects on recreational, aesthetic and economic values contribute to significant degradation. 230.10(c)(1)-(4). Consistent with the Guidelines, the Corps' written findings must be made on compliance, testing and evaluations, and consideration of the impacts of the dredge and fill project on the ecosystems, and the effect on human and wildlife uses in the area.

<sup>60</sup> 40 C.F.R. § 230.1(d).

<sup>61</sup> 40 C.F.R. § 230.10-12 (Subpart B). In evaluating the potential short and long-term effects of the proposed discharge on the physical, chemical, and biological components of the aquatic environment, the Corps must consider such factors as discussed in Subparts C through G. 40 C.F.R. § 230.11-12. The Corps must follow the procedures for review provided in § 230.5(a) through (l), including but not limited to evaluating the restrictions on discharge (§230.10(a) through (d)) including practicable alternatives (§230.10(a)), measures to minimize adverse impacts (subpart H), factual determinations (§230.11) including criteria and evaluations for the proposed disposal site (§230.11(f)), and any special characteristics of the surrounding areas (subparts D-F). 40 C.F.R. § 230.5(a), (c)-(f).

unnatural sediment deposition patterns.<sup>62</sup> These cypress swamps provide essential wildlife habitat and ecological and anthropogenic services including filtration and floodwater containment. Their hydrodynamics and geomorphology are increasingly influenced by the sediment rich alluvial Mississippi and Red Rivers that feed the Basin's wetlands, and their confinement within the levee system. If the proposed activity has the cautioned accretionary effect feared by locals and public interest groups, identified by experts, and already evident on LIDAR under present conditions, it will convert these irreplaceable swamp wetlands to upland forests that no longer provide the valuable services of swamp wetlands, altering the hydrology such that the area may no longer support hydrophytic vegetation or qualify as jurisdictional wetlands.<sup>63</sup> These are exactly the types of impacts the Corps must identify and evaluate in an Environmental Impact Statement. These concerns have been well documented throughout the lifespan of this project in public comments, presentations, meetings and reports, and are no less relevant now for the 2022 EGL proposal.

“From a broad and long-term geomorphic perspective, water flows and wetland position are inextricably linked.”<sup>64</sup> In other words, hydrology or water flow in wetlands is influenced by the landscape position or geomorphic setting and vice-versa. Qualitative changes to an ecosystem's functions occur when water flow and landform gradient interact; in riverine wetlands such as those present in the Basin with horizontal flow, “the supply for deposition and the loss by erosion governs whether the sediment balance for a site is positive or negative.”<sup>65</sup> These “qualitative changes that occur when water flow and landform gradient interact create relatively sharp differences among ecosystem functions. The reasons for such changes in ‘state’ are due to the concomitant changes in many interdependent variables. This is why a classification for wetlands cannot be fragmented into a series of independent variables that can be later reassembled into an unrestricted number of combinations.”<sup>66</sup> Applicants for 404 permits should develop a wetland profile and description of reference wetlands to allow the applicants and agency “to recognize the processes that are responsible when an ecosystem changes from one state to another.”<sup>67</sup> This would require consideration of reference benchmarks and assist in the necessary assessment of the ecological and management impacts of proposed activities in modified wetlands.

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<sup>62</sup> 2019 TNC Annual Monitoring Report, at 5.

<sup>63</sup> Any activity associated with the discharge of dredged material degrades an area if it has more than a *de minimis* effect on the area, and destroys an area where the activity alters it to such a degree that it would no longer be a water of the U.S. 33 C.F.R. § 323.2(d)(4), (5). Unmitigated sediment may convert inundated wetlands with predominantly hydric soils to uplands with predominantly nonhydric soils as is occurring in parts of the Basin, whether by design or accident is unclear.

<sup>64</sup> Brinson, M. M. (1993). “A hydrogeomorphic classification for wetlands,” Technical Report WRP-DE-4, U.S. Army Engineer Waterways Experiment Station, Vicksburg, MS, at 19. [Exhibits Group 3].

<sup>65</sup> *Id.* at 48-49. Brinson discusses the need for functionally based wetland classifications and aims to “improve[] communication among researchers and managers, and perhaps even the public, by focusing on processes that are fundamental to the sustained existence of these ecosystems.” *Id.* at 12. Throughout these comments, we reiterate this need for open communication and transparency from project proponents and agencies in considering the proposed project and similar activities.

<sup>66</sup> *Id.* at 49.

<sup>67</sup> *Id.* at Chapters 4 and 5.

2019 LIDAR imagery data from CPRA shows the kind of sedimentation that occurs in the Basin when cuts are made in cross-basin bayous and canals. Where these cuts occur, deltas begin to form, filling in the surrounding swamp with sediment. As can be seen in the following LIDAR images (courtesy of CPRA),<sup>68</sup> the deltas created by cuts in Bayou Sorrel can raise the elevation to 11.2 feet. The surrounding swamp is at approximately 8-9.5 feet. That is an increase in elevation of 1.7 - 3.5 feet. See Figures 1, 2, and 3 below. These deltas can extend deep into the swamps. The two areas off of Bayou Sorrel used in this example stretch thousands of feet into the swamps and are hundreds of feet wide. Given the elevation data supplied by the CPRA, it is obvious that cuts in these waterways, especially Bayou Sorrel, would result in even more sedimentation in the deeper swamps, threatening to convert them into bottomland hardwood or uplands.

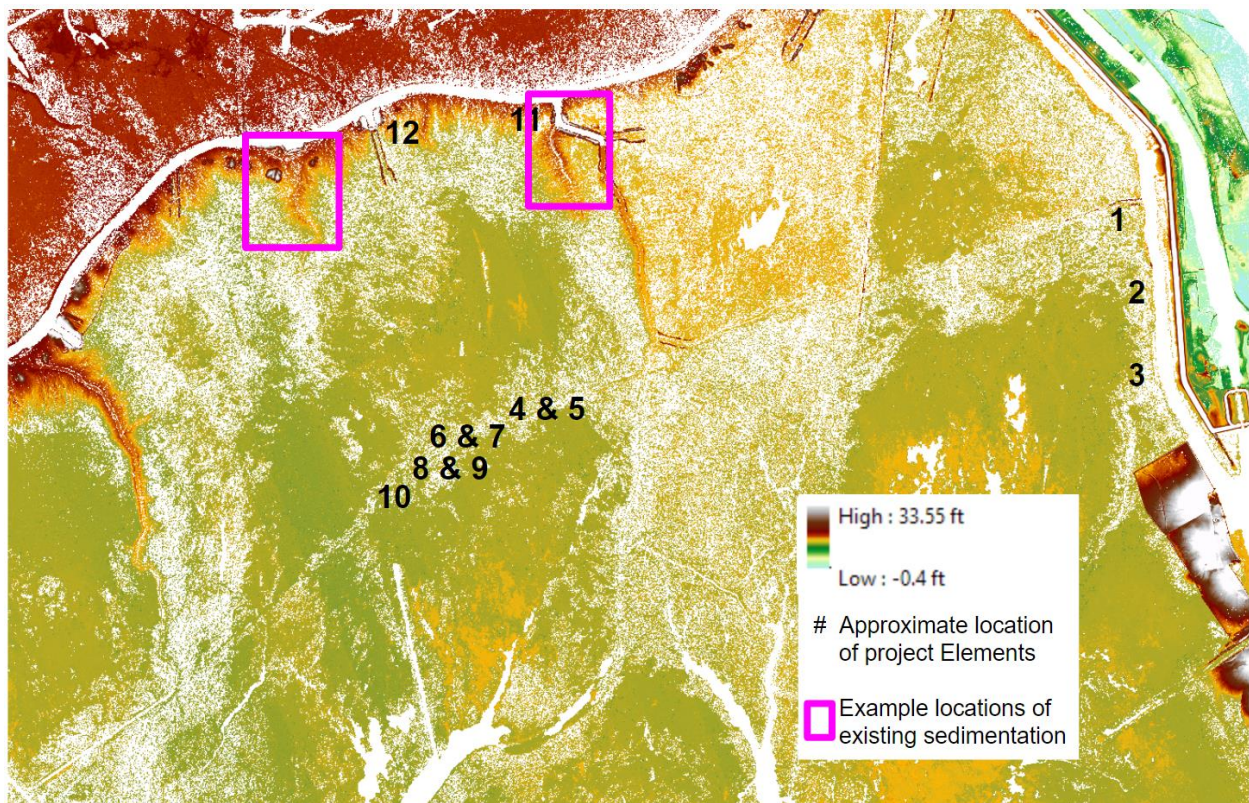


Fig. 1. 2019 LIDAR elevation of the project area. Note areas where gaps in waterways form deltas and raise elevations deep into the swamp.

<sup>68</sup> OCM Partners, 2022. 2019 LaDOTD LIDAR, CPRA, <http://www.fisheries.noaa.gov/inport/item64846>.

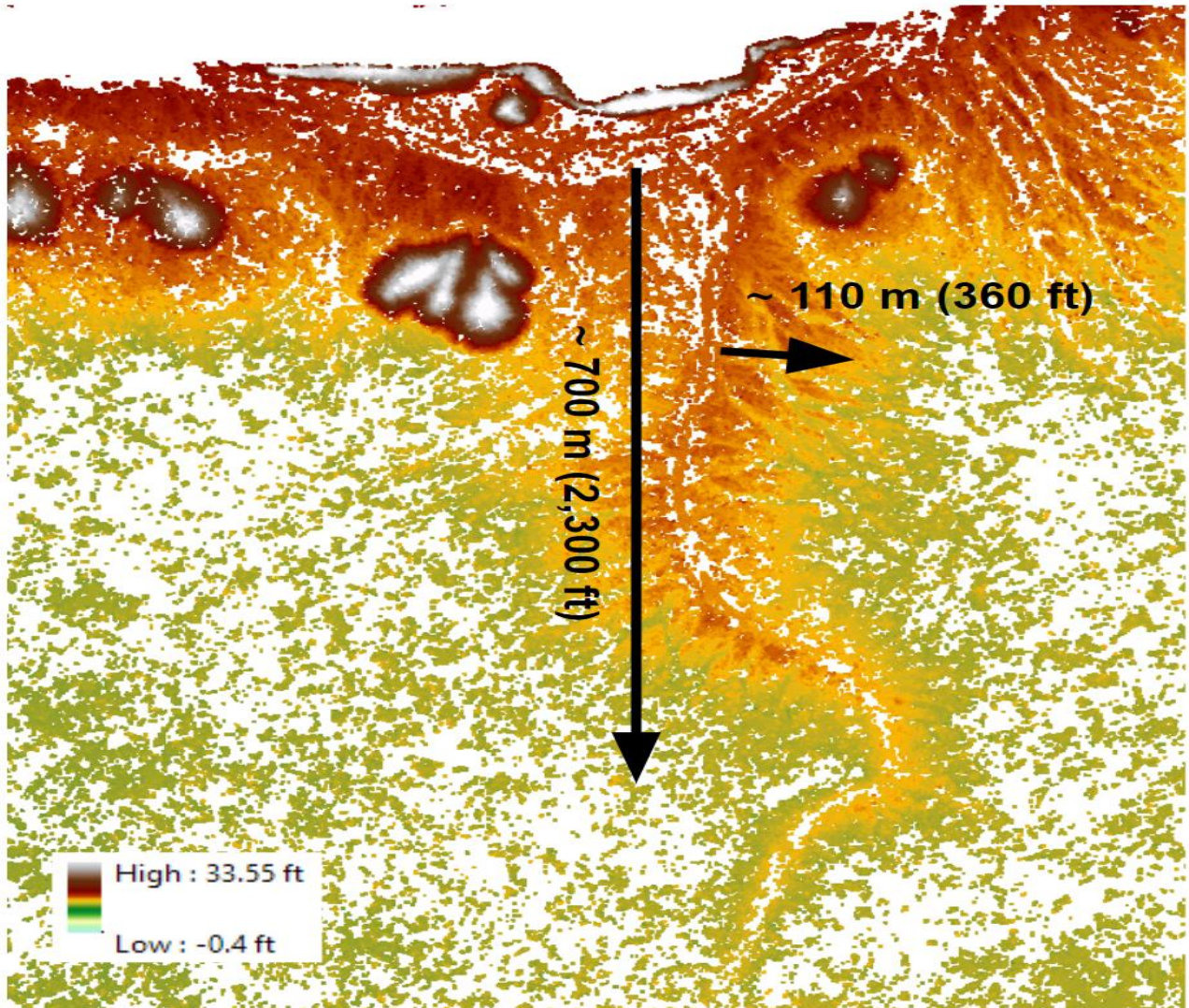


Fig. 2. Western highlighted area from Fig. 1 (2019 LIDAR). Where there is a gap in the levee of Bayou Sorrel, significant elevation increases can be observed. This elevation increase persists approximately 2,300 ft into the swamp, and spreads up to approximately 360 ft on either side.



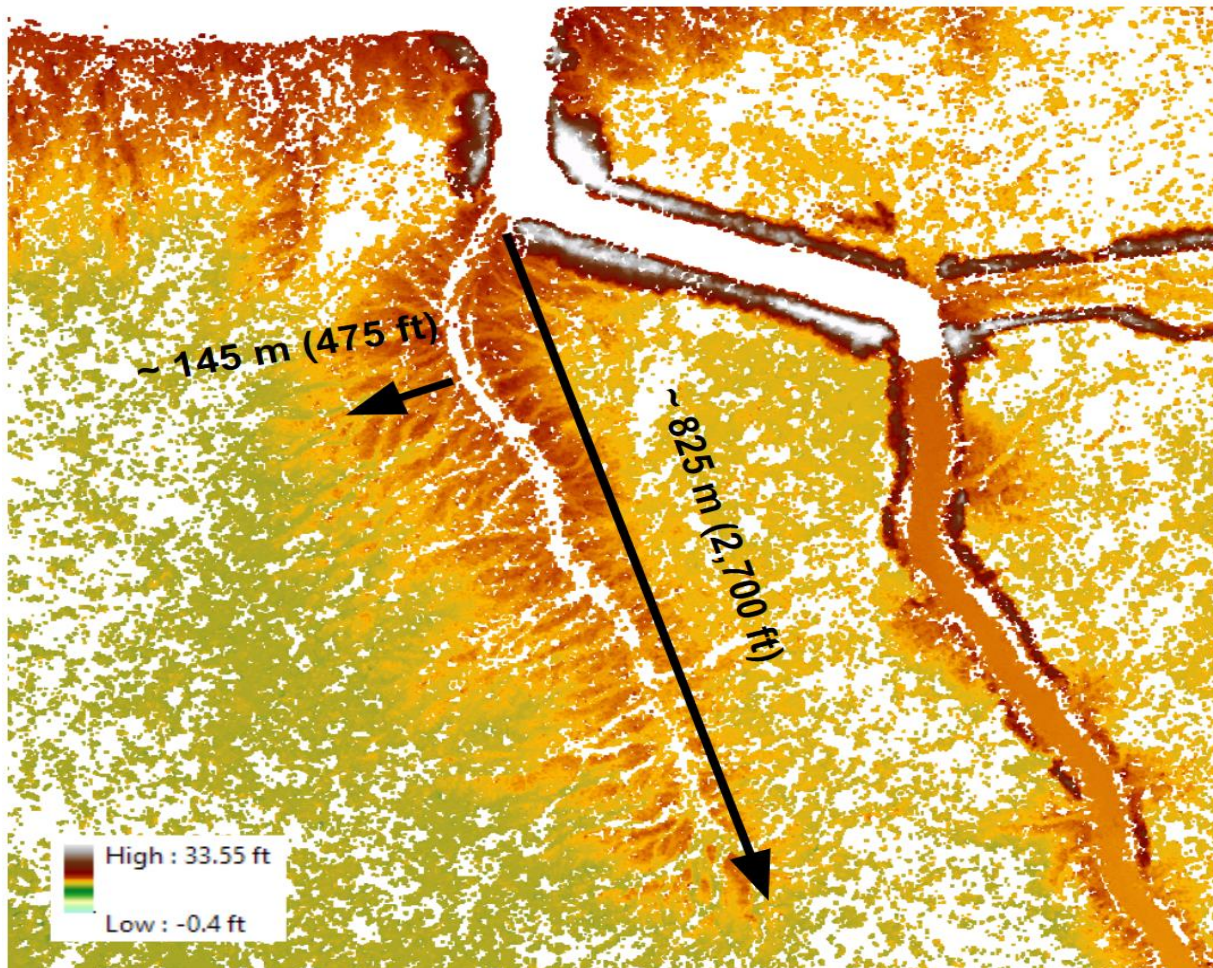


Fig. 3. Eastern highlighted area from Fig. 1 (2019 LIDAR). Where there is a gap in the levee of Bayou Sorrel, significant elevation increases can be observed. This elevation increase persists approximately 2,700 ft into the swamp, and spreads up to approximately 475 ft on either side.

There is ample scientific support for the Commenters' concern that the proposed dredge and fill project has great potential to adversely impact the physical and chemical characteristics of the East Grand Lake area.<sup>69</sup> The Basin suffers from high rates of sediment accretion within the floodplain, especially in and around the East Grand Lake area.<sup>70</sup> In this area, the floodplain

<sup>69</sup> 40 C.F.R. § 230 Subpart C; *see, e.g.*, all of Dr. van Heerden's reports and papers prepared with respect to East Grand Lake and other projects, including in ABK et al. 2018 EGL Comments, at 7, 11, (citing van Heerden, Expert Report on the Proposed East Grand Lake Project (EGL), Exhibit O, at 6, 16, 21); Hupp. et al., Recent Sedimentation Patterns within the Central Atchafalaya Basin, Louisiana. 2008, *available at* <https://doi.org/10.1672/06-132.1>; EPA 1979 Report, at 17; and LIDAR imagery data.

<sup>70</sup> McAlhaney 2018, at 5; Hupp. et. al. 2008, at 127 (identifying the study area between Bayou Sorrel boat ramp and Bayou Benoit boat ramp, including portions of the Upper EGL, and recognizing that "the Basin experiences simultaneous exceptionally high sedimentation rates at sites with high connectivity to the main river and from hypoxia in stagnant areas with little connection to the main river" and efforts to are underway to "maximize freshwater inflows into stagnant areas while *simultaneous minimizing sedimentation.*"; Feasibility Study, Vol. 1, Main Report and Final Environmental Impact Statement,

ecosystem services have declined as a result of “high sediment accretion rates, thus causing reduction in hydrologic connectivity.”<sup>71</sup> A significant contributor to the state of impaired water quality in this area, and across portions of the Basin, is the unsustainable and unnatural dispersal and deposition of sediment. Bayou Sorrel receives direct water flow from the Atchafalaya River.<sup>72</sup> Proximity to a channelized source and flow velocity of sediment-laden river water allows sediment to travel farther into interior swamps and accelerate the accretionary impact.<sup>73</sup> It is scientifically defensible to predict that the excavation of new channels for the input of additional river water into an area will suffer from the same deleterious impacts: modified deposition of suspending particulates including sedimentation rates and distribution overall accelerating changes to the elevations and contours of the area.<sup>74</sup> TAG members have recognized the concern in filling backswamps and the potential that gaps can fill back in. Overtime, these alterations will severely degrade the wetland ecosystem and ultimately create more hydrologic disconnection and water quality impairment.

Changes to the geomorphic setting or landscape in the area resulting from this project would adversely impact the sustainability and productivity of these wetlands by contributing to losses of the wetlands’ values.<sup>75</sup> Dr. van Heerden aptly identified that the proposed project will

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ABFS, Jan. 1892 [1982 ABFS EIS, in Exhibits Group 3] (“The common thread to all change in the basin is sediment” and “[a]s the basin in the area below 1-10 becomes higher and less subject to flooding, it will be subject to the same land use conversion pressures as the lands above 1-10.”).

<sup>71</sup> *Id.*

<sup>72</sup> McAlhaney et al. (2018) at p. 5; *see* ABK et al. 2018 EGL Comments, at 16 (discussing how sediment is directed into the East Grand Lake area from the Atchafalaya River/Whiskey Bay Pilot Channel through Bayou Sorrel, the GIWW and Salt Mine along the Florida Gas pipeline canal. These inputs alone have contributed to sedimentation rates).

<sup>73</sup> *See* van Heerden Response to Comments, at 8, (identifying the “moderate” river stage fallacy of the proposal because “[n]o matter the flood stage the channel because of its width and depth and lack of flow impediments, and in the case of these channels that have very steep gradients ... are very efficient transporters of sediments and nutrients to down channel locations.”); 2010 Annual Plan TAG Recommendations (“Sediment distribution studies confirm that faster moving water in channels carry sediment farther into the WMU. LIDAR imagery shows the development of higher elevations along the banks of delivery channels sustains current velocity and sediment delivery to interior waterways. Sediment is delivered farther and farther into the interior in the process and eventually interior waterways provide a route for most of the water to bypass the floodplain as it segments the WMU into even smaller isolated areas.”). *See also* Hupp. et al. 2008, at 127-128 (“Flow in many of the bayous and canals may carry high sediment loads resulting from the ambient alluvial nature of both the Mississippi and Red rivers and, in some cases, due to substantial resuspension of channel sediment”; “Crevasses in levees and sloughs on the floodplain are typically areas that have increased flow and form flow paths that may inject sediment relatively far into the floodplain. The longer an area on the floodplain is inundated by sediment-laden water, the greater amount of sediment deposition” (p. 133-134); and identifying conditions found to facilitate sediment deposition: “1) high connectivity to sediment-laden water, 2) long hydroperiod (low banks), 3) multiple sources of flow, and perhaps most importantly, 4) hydraulic damming” apparent at site F1 – Florida Gas at Old Bayou Cannon, in the proposed EGL project area (p. 136)).

<sup>74</sup> 40 C.F.R. § 230.20(b).

<sup>75</sup> *Id.* at § 230.41(a)-(b); *see* all van Heerden reports and papers; Hupp. et al. 2008, at 138 (“Increases in suspended sediment directly and indirectly affects aquatic plants and animals” and “high sediment

actually “lead to increased hypoxi[a] in interior swamps as they fill with suspended sediments until they area replaced by bottomland hardwoods.”<sup>76</sup> These observations are consistent with concerns identified by the TAG and TNC above, and documented conversion of deep water habitats to uplands.<sup>77</sup>

Although not represented in either the public notice or application discussing need for the project, proponents have claimed that sediments are needed for forest health and to counteract subsidence and sea level rise. TNC claimed that “the central and southeastern portions of the Atchafalaya Basin are known to have subsidence rates in excess of 20 mm/yr, so sedimentation on the soil surface does not necessarily equal an increase in elevation but may just be offsetting subsidence and sea level rise.”<sup>78</sup> But these representations suggest – without support – that the EGL project area suffers from subsidence and sea level rise sufficient to justify labeling anticipated accretion in the area as beneficial. TNC recognizes the nature of hydrodynamics in the project area, that is water flow and velocity capable of transporting sediments into the forested swamps, but disagrees with the detrimental impact this has on the ecosystem. This position on subsidence and sea level rise threatening the specific project area for 2022 EGL are unsubstantiated.

The study area in the report cited by TNC does not provide subsidence rates for the project area just south of Bayou Sorrel (Elements 11 and 12), and does not provide sedimentation rates for any of the wetlands in the footprint of the project elements.<sup>79</sup> And in the area between the proposed GIWW cuts (Elements 1-3), the Atchafalaya River, and proposed Florida Gas pipeline canal cuts (Elements 4-10), the author identified subsidence rates to be -14 mm/yr, not

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deposition rates may damage other living resources such as riparian vegetation.”); Brinson, at 19 [Exhibits Group 3].

<sup>76</sup> van Heerden Response to Comments, at 6, 17 (Efforts to discredit this position citing Kong et al.’s discussion of the 1:1000 year rain-induced 2017 flood data and the 2016 catchment flood data fail to distinguish the distinguishing features for these outlier events on water flow, velocity and turbidity). different types of water inputs from these outlier events).

<sup>77</sup> For example, in Grand Lake (discussed further in Section XII below). *See also* 2.22.11 Recommendations for Monitoring East Grand Lake (“Grand Lake has been identified as an important feature of the study area and it has experienced sediment accretion that threatens its continued function . . . a better understanding of the pathways and quantities of sediment entering the lake need to be answered in response to public concerns surrounding the proposed projects.”).

<sup>78</sup> 2019 TNC Annual Monitoring Report, at 8, 9, citing Kroes et al., Channel modification and evolution alter hydraulic connectivity in the Atchafalaya River basin increasing vulnerability to sea level rise, July 2019; and Sigma Response to Comments, at 7 (“these silt and clay sediment fractions are important for delivering nutrients to wetland soils and plants, and also for counteracting the effects of subsidence and sea level rise. In fact, these silt and clay factions are used extensively in the Louisiana coastal zone to amend marshes experience submergence due to subsidence and sea level rise . . . two forces that are also affected the ARB. Subsidence rates in the eastern side of the Atchafalaya Basin have been measured by USGS at GIWW . . . see Appendix 1 for subsidence provided by Dan Kroes, USGS. The reported accretion rates of silt and clay fractions show that the project will not fill in the swamp with sands as the commenters assert but rather will ensure that those swamps will remain viable in the face of land subsidence and sea level rise.”).

<sup>79</sup> Kroes et al. 2019, see map at Fig. 4.

the 20 mm/yr noted by TNC.<sup>80</sup> Even with subsidence estimates however, the position is speculative without corresponding rates of sedimentation. Meanwhile, the upper EGL project area occurs in an area already inundated with documented above-average sedimentation rates.<sup>81</sup> Dr. van Heerden identified that many published measurements of annual sedimentation rates exceed the rate of subsidence, and that “TNC[‘s] own data reveals this (Table A12) and most of their samples were taken on levee locations where sedimentation rate is the lowest.”<sup>82</sup> Higher elevations, even if they are subaqueous, experience lower rates of sedimentation than in deeper interior swamps. To achieve any measurable restoration to a specific area in the Basin, it is imperative to accurately identify, characterize and estimate threats and needs in the project area; tailor the project to respond to these threats and needs; and plan mitigating measures to respond to reasonably anticipated outcomes. To appreciate the interconnectivity between sedimentation, subsidence and sea level rise in the project footprint, accurate monitoring data documenting these occurrences at many locations and geomorphic settings (*i.e.*, elevated spoil which TNC has done, but also interior swamps at various locations) must be conducted. To the best of our knowledge, the monitoring performed for this project does not meet these specifications necessary to support the alleged benefit of the project activities in the East Grand Lake area.

It is important to distinguish areas in the Basin threatened by subsidence and sea level rise from those areas filling in and suffering an imbalance in the rate of sediment to subsidence. This area of the Basin does not suffer the same rate of subsidence and exposure to sea level rise as its coastal wetlands and areas south of the project site. While sequestered sediments in interior swamps cause degradation and conversion, they are sorely needed at the coast.<sup>83</sup> This project area is one of the many examples in the Basin where prior alterations to the wetlands cause channelized, unnatural sediment deposition that degrades the receiving wetlands and deprives areas threatened by subsidence and sea level rise of these critical inputs. Further, the imbalance of sediment inputs into forested wetland swamps disrupts the Basin’s function as a spillway; subsidence occurs in and outside the levees and unless sediments are also diverted to combat subsidence outside the Basin’s levees, increasing elevations within the levees greatly reduce the flood protection they provide.

It is likewise important to describe the function, profile and/or class/subclass of wetlands the project is designed to enhance. TNC claims that the proposed activity will not only improve aquatic habitat (citing at least two reports sponsored by the organization), but that it also *may* improve tree growth.<sup>84</sup> But the project application and public notice do not make clear what wetland functions the project intends to support and how the activity will improve tree growth. The public notice discusses marsh creation whereas the application and plats discuss planting

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<sup>80</sup> *Id.*

<sup>81</sup> *See, e.g.*, Hupp et al. 2008.

<sup>82</sup> van Heerden Response to Comments, at 17, see Appendix A.

<sup>83</sup> FY 2017 Annual Plan, Atchafalaya Basin Program, at 5, available at [http://www.dnr.louisiana.gov/assets/OCM/ABP/2017\\_plan/2\\_4\\_16LOWRes2017\\_ABP\\_Plan.pd.](http://www.dnr.louisiana.gov/assets/OCM/ABP/2017_plan/2_4_16LOWRes2017_ABP_Plan.pd.); ABK et al. 2018 EGL Comments, at 3.

<sup>84</sup> 2019 TNC Annual Monitoring Report, at 9, citing McAlhaney, Alicia Louise. Baldcypress and Black Willow Growth Response to Contrasting Flood Regimes, Climate and Competition, in the Atchafalaya Basin, Louisiana. 2018 [Exhibits Group 3].

container-grown cypress trees in elevated dredge discharge areas, and the project's former consultant suggests sediments deliver nutrients supporting wetland soils and plants.<sup>85</sup> But these claims offer no helpful insight into what wetland ecological services are the focus of their efforts let alone what classes and/or subclasses of wetlands. Marshes provide different ecosystem services and functions than swamp wetlands, which are distinguishable from other forested wetlands such as bottomland hardwoods.<sup>86</sup> One is unable to meaningfully assess and comprehend the needs, purpose and impacts of the project without any qualitative description of the wetlands the project intends to support. These inconsistencies frustrate the public and Corps' ability to appreciate the purpose, need and impacts of the project contrary to the requirements of NEPA and the CWA.

If the intent is to protect and foster the health of the dominant cypress-tupelo wetlands in the area (see application section discussion above), the project's anticipated change to the hydrogeomorphic system through more introduced sediments may actually degrade forest health.<sup>87</sup> Of the two dominant species in the study area (black willow and bald cypress), black willows establish on newly deposited sediment whereas bald cypress are a slow-growing, long-lived species in floodplains.<sup>88</sup> The McAlhaney thesis explains that: "[a] concentrated period of establishment of black willow in the 1950s-1960s coincides with dates of the onset of rapid geomorphic change in the Atchafalaya Basin, and with the dates of channel manipulations in Bayou Sorrel that were the most likely apparent cause of disturbance at the study sites. The open stand conditions may persist both because of flooding that inhibits regeneration, but also rapid sediment deposition on these sites."<sup>89</sup> Unsustainable sediment accretion degrades cypress-tupelo swamps and it is unlikely that the species will regenerate. Neither increased flooding nor sediment accretion is favorable for cypress or black willow regeneration. Slow-growing bald cypress and water tupelo species that dominate the wetland swamps in the East Grand Lake area are the least likely to flourish under these conditions of decreased flooding depth from sedimentation and increased competition.<sup>90</sup>

We know that purported "temporary" impacts to cypress-tupelo forested wetlands are most often permanent. Even the prior project applicant – LDNR – recognized the fallacy in casting the loss of forested wetlands as temporary impacts in comments on the then-proposed Bayou Bridge and Enterprise Pipelines.<sup>91</sup> The agency commented that "[r]emoval of trees from forested wetlands, especially those that are hydrologically impaired and may not have the ability to naturally regenerate, cannot practically be considered as temporary impacts, because re-establishment of those forests may take hundreds of years if it happens at all. All impacts to

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<sup>85</sup> Sigma Response to Comments, at 7.

<sup>86</sup> For example, state regulations differentiate between forested wetlands and non-forested, or marsh, wetlands. 33:XI.1109.K.

<sup>87</sup> See Connor Decl., at 10-11.

<sup>88</sup> McAlhaney 2018, at 5.

<sup>89</sup> *Id.* at 20 (citing Hupp et al. 2008).

<sup>90</sup> McAlhaney 2018, at 20 ("Of all flooding and climate variables, flooding depth had the strongest, and positive effect on radial increment of both species across all sites.") and at 41 ("In this study, competition for growing space had a larger effect on growth efficiency than did hydrologic connectivity.").

<sup>91</sup> See LDNR Comments on Enterprise Pipeline [Exhibits Group 1].

forested wetlands are, practically speaking, permanent.”<sup>92</sup> Whether the loss results from direct felling of trees or as a result of unnatural sedimentation and accretion altering the hydrogeomorphic setting and ultimately converting cypress-tupelo swamp wetlands, these losses are not easily mitigated, and propagation and regeneration unlikely.

The “persistence and permanence” of the above identified effects warrant special consideration, particularly since similar projects have not only failed to meet their “enhancement” goals but have exacerbated wetland degradation in the Buffalo Cove and Beau Bayou areas.<sup>93</sup> In our previous comments we discussed the problematic Beau Bayou and Buffalo Cove water quality projects that proposed similar activities and goals as the 2022 (and 2018) EGL project.<sup>94</sup> St. Martin Parish applied for a Corps permit for the Beau Bayou water quality enhancement project, and after the project was noticed in 2016, fishermen concerned with the project’s potential to fill wetlands with sediments sent a letter to the then-parish president Guy Cormier urging him to stop the project, and sent comments to the Corps warning of the same.<sup>95</sup> Ultimately the Corps granted the permit on January 11, 2017, but requiring in special conditions reporting pre and post construction conditions of the area to the Corps, including sedimentation and accretion conditions and post-construction monitoring for years 1, 3 and 5 following project completion.<sup>96</sup> But when asked to produce the monitoring and reporting information, it is not complete and compliant with these permit conditions, and the end result has been as disastrous to the area as predicted by concerned fishermen. The failure to ensure permit compliance and appropriate monitoring and reporting of conditions impedes our ability to quantify the destructive impacts, but the resultant massive filling of wetlands in the area are visibly evident.

Since submitting EGL comments in 2018, the Commenters submitted comments on an additional proposed (and to our knowledge still pending) element for the Buffalo Cove project, raising many of these same concerns regarding river water inputs and sedimentation in interior swamps.<sup>97</sup> This element is part of a larger Buffalo Cove Management Unit joint project between the ABP and the Corps with similar goals to enhance water quality in the area by introducing river water. The original elements have been constructed and despite the Bayou Eugene project’s example for perhaps good intent gone wrong, causing massive accretion and loss of wetlands,

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<sup>92</sup> *Id.*

<sup>93</sup> 230.10(c).

<sup>94</sup> *See* ABK et al. 2018 EGL Comments, and comments on Buffalo Cove Element 10 [Exhibits Group 1].

<sup>95</sup> Beau Bayou public notice [Exhibits Group 2]; Letter to Guy Cormier and LCPA et al. Comments on Beau Bayou water quality enhancement project [Exhibits Group 1].

<sup>96</sup> Beau Bayou Permit Decision, at special conditions 3 and 14. [Exhibits Group 2].

<sup>97</sup> ABK et al. Comments on Buffalo Cove Element 10, July 18, 2018 [Exhibits Group 1]. Neither the element 10 project public notice nor for draft environmental assessment were included on the Corps’ online public notices page, and neither Basinkeeper nor LCPA-West received the public notice(s) through the regular mail. Commenters sent timely comments on the proposed Element 10 thanks to the kindness of a member who alerted Basinkeeper to the pending public notice. Basinkeeper has since asked to be included on the Corps’ public notice mailing list for project in the Basin, but has been told the NOD no longer uses the mailing list and notices can be accessed online. *See* Letter from Corps re EGL status, May 6, 2021.

these elements have led to much of the same result across Buffalo Cove with accretion over a matter of months measurable in feet in some sites.<sup>98</sup>

We also submitted additional Freedom of Information Act requests to the Corps seeking information regarding monitoring data, reports and project evaluations for all stages of the Beau Bayou and Buffalo Cove projects to understand the agency's perspective on project efficacy, adaptive management, and consistency with state and federal laws, policy and management guidance for the Basin floodway. The piecemealed information that has been produced paints a very grave portrait of the agency's inability to keep up with its monitoring requirements, and a willingness to disregard its own protocols. Despite the prior elements' failure to meet stated project goals, the Corps showed intent to move forward with Element 10, but after the Commenters sent supplemental comments with an expert declaration describing the anticipated detrimental impacts of the project, the project was ultimately decommissioned and ABP has since publicly withdrawn its support.<sup>99</sup>

These projects illustrate the permanence of missteps in a complex ecosystem like the Basin, and require the Corps to closely assess the function of the receiving wetlands to evaluate hydrogeomorphic impacts in light of prior failed experiences in Beau Bayou and Buffalo Cove. In responding to comments to the 2018 EGL project and public notice, Sigma Consulting did not claim these similar projects did not suffer adverse impacts from sedimentation, but instead claimed that the EGL project is different, mainly because "[t]he bottom elevation of the proposed elements is set high enough that they will not be flowing year-round" and that the water will come "from the upper part of the water column of the connecting channel[.]"<sup>100</sup> But Dr. van Heerden's observations show the weakness in their efforts to differentiate the ultimate outcome of these similar projects to EGL.<sup>101</sup> The project locations and connections to river inputs differ from the 2022 EGL proposal, but similar outcomes are likely – new introduced river water inputs channeling sediment into interior swamps. Even with less frequent river water connectivity, sediments will be introduced and deposited into the area during moderate river stages, with more sediments allowed to travel into interior swamps more quickly during high water and river flood events.

Clearly, the particular geomorphic setting of wetlands in the project area, and threats and alterations thereto, should be defensibly identified and thoroughly evaluated. The Basin is a complex system and reference sites with similar aquatic functions may provide helpful insight into managing considerations for state and federal agencies. Ultimately, however, they do not replace the need for thorough site-specific monitoring and evaluation or prevent degradation of wetlands from ill-conceived project such as the 2022 EGL proposal.

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<sup>98</sup> See ABK et al. Comments on Buffalo Cove Element 10.

<sup>99</sup> ABK et al. Supplemental Comments on Buffalo Cove Element 10, Feb. 22, 2012, with Declaration of Dr. Ivor van Heerden. [Exhibits Group 1].

<sup>100</sup> Sigma Response to Comments, at 1-2.

<sup>101</sup> See van Heerden Response to Comments.

## **b. The EGL Project Will Degrade Wildlife Habitat**

Accelerated and exacerbated accretion in the project area will degrade fisheries in the project's impact area. Areas experiencing accretion and increased elevation create habitat prime for the growth of invasive and shade intolerant species common in bottomland hardwood forests, impairing cypress-tupelo forest health and the flooding regime that supports fish and aquatic wildlife. Accelerated unnatural sediment deposition will eventually impede flow and reduce deep water areas providing fish refuge when water quality problems occur during low to moderate river stages in interior swamps. The project area is already suffering loss of deep-water habitat that is critical for fish survival; the EGL project will exacerbate and accelerate these losses. Temporarily increasing dissolved oxygen concentrations in the project area do not serve aquatic wildlife in the long-term if their habitat is substantially degraded and reduced, and eventually destroyed, as a result. Further, Dr. van Heerden explained that the Mississippi River water's concentration of fertilizers and certain nutrients can actually contribute to hypoxia and lower dissolved oxygen concentrations. Even without these proposed new inputs, a site visit to the project area shows that sedimentation deposition is already negatively impacting these ecosystems.

The project area includes swamp habitat and forested wetlands that not only furnish fisheries but also provide necessary habitat for domestic and neotropical migratory birds. In the area of Lake Zadrick located just south of the proposed Bayou Sorrel cuts (Elements 11 and 12), the migratory bird rookery is teeming with life as migrants travel through the Atchafalaya Basin to feed. This rookery provides the necessary temporary nesting and feeding grounds for these birds to survive. Migratory bird species that nest in the Lake Zadrick rookery include, but are not limited to, Roseate Spoonbill, White Ibis, Anhinga, Snowy Egret, Great Egret, Wood Stork and Cormorant.<sup>102</sup> In the local area of the EGL project there are also hundreds of Yellow and Black-crowned Night-Heron nests and important habitat for Little Blue Herons, neotropical migrants with ever shrinking habitat throughout their range. One of the greatest threats to birds is the loss and degradation of habitat from development or disturbance.<sup>103</sup> Bird habitat restoration and protection can mitigate against the accelerated decline in bird populations.<sup>104</sup> This can be accomplished through coordination and consultation with the U.S. Fish & Wildlife Service. The proposed project would have detrimental long-term impacts on the aquatic ecosystem caused by changes in water levels and flow and elevation in the East Grand Lake area that would contribute to degradation to the breeding and nesting areas and food sources for these birds.<sup>105</sup>

In addition to adversely impacting the physical and biological characteristics of the ecosystems in the project area, the proposed dredge and fill's impacts will negatively affect human uses in the area including but not limited to ecotourism and aesthetics, commercial and recreational fishing.<sup>106</sup>

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<sup>102</sup> See 50 C.F.R. 10.13 (list of protected species).

<sup>103</sup> See *Threats to Birds*, U.S. Fish & Wildlife Service, updated Mar. 12, 2018, available at <https://www.fws.gov/birds/bird-enthusiasts/threats-to-birds.php>.

<sup>104</sup> *Id.*

<sup>105</sup> 40 C.F.R. § 230.23(b), § 230.24(b); § 230.32(a), (b).

<sup>106</sup> *Id.* at § 230.51-53 (Subpart F).



**c. The EGL Project Will Reduce Flood Capacity and Impair the Basin's Resources Needed to Combat the Effects of Climate Change**

Accelerated degradation to the East Grand Lake area not only degrades the ecosystem services and wildlife habitat the area provides, but unnatural and expedited sediment deposition impairs the ability of the Basin to protect Louisianans from Mississippi River floods. The Basin was designed as a spillway to protect the ports of Baton Rouge and New Orleans, hundreds of industrial plants and refineries along the Mississippi River and millions of people from New Orleans, Baton Rouge, Morgan City and Lafayette from floods. The Corps has stated that “[t]he overriding factor in any analysis of the Atchafalaya Basin is the requirement of the Basin to function properly and adequately during major flood events.”<sup>107</sup> Flood capacity is crucial for flood protection. However, net accretion in the Basin diminishes its ability to contain and move floodwaters.<sup>108</sup>

In a published report in 2018, Jim Lewis, Director of the Corps' Mississippi River Science and Technology Office and experienced researcher of the impacts of sediments in the Basin, showed that over the next 50 years, sedimentation in the Atchafalaya River may boost water levels by 3 feet over those recorded in the 2011 flood event.<sup>109</sup> LSU professor and hydrology expert Yi-Jun Xu warns that growing levels of sediment are raising river water to dangerous levels and dramatically reducing the basin's ability to absorb floodwater.<sup>110</sup> The effects of the State and Corps' mismanagement of the Basin is already creating massive consequences for the people of Louisiana; the loss of flood capacity affects communities on the east and west side of the Atchafalaya Basin guide levees. In May 2021, the areas of Bayou Sorrel, Bayou Pigeon, Pierre Part, Belle River and Stevensville suffered a catastrophic, record flood; both Basinkeeper's Executive Director and Development Director's homes flooded along with hundreds of other homes. Every year, as the Basin loses more and more flood capacity, it takes less rain to create worse floods.

The threat of rapid sedimentation has been well documented in the Basin, affecting the carrying capacity of the floodway, fish and wildlife habitat, and regeneration of forests and other vegetation.<sup>111</sup> The impacts of the proposed activity must be considered with respect to the function of the Basin as a managed floodway and considering applicable law and policy, as well as populations most affected and at risk in the face of floodway failure.<sup>112</sup> Flooding is predicted to increase with climate change, increasing the likelihood that the Mississippi River levees will not be able to contain future floods and damaging the industrial, environmental justice

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<sup>107</sup>1982 ABFS EIS, “Summary of Commission Action” at 8.

<sup>108</sup> ABK et al. 2018 EGL Comments, at 21 (citing *Dr. van Heerden Report*, at 2, 23, exhibit O).

<sup>109</sup> Rocky Kistner, Rescuing the Massive Swamp our Country Depends on But has Mostly Forgotten, April 30, 2022, Huff Post publication, available at [https://www.huffpost.com/entry/atchafalaya-basin-ticking-time-bomb\\_n\\_624c4afce4b007d3845b506f](https://www.huffpost.com/entry/atchafalaya-basin-ticking-time-bomb_n_624c4afce4b007d3845b506f).

<sup>110</sup> See Kistner article.

<sup>111</sup> *Id.* at 3 (State Master Plan, at 3-2).

<sup>112</sup> *Id.* at 21-22 (citing legal requirements relative to floodplain management); EO 12898.

communities along the Mississippi River. Maintaining the Basin's flood capacity is essential to avoid this looming environmental and humanitarian catastrophe.

Ultimately, based on the information provided for the project, the Corps cannot specify that the proposed EGL project complies with the requirements of the guidelines and CWA regulations because it fails to meet every restriction on discharge, it is not in the public interest and does not account for unavoidable impacts that will result from the dredge and fill activity that will introduce river water and large amounts of sediment into the back swamps of the project area. The Corps' factual determinations per §230.11 should reflect that the project will result in unacceptable adverse effects on the aquatic ecosystem in the East Grand Lake area of the Atchafalaya Basin.

Because the proposed activities in East Grand Lake fail to satisfy both § 404(b)(1) guidelines and Corps regulations for evaluating § 404 permit applications, the Corps must deny authorization of the proposed East Grand Lake "enhancement" project under Section 404 of the Clean Water Act. Under both the CWA and NEPA, the Corps is required to examine how and to what extent the proposed project will affect the environment.<sup>113</sup> But the scope of the NEPA impacts analysis is more broad than under the CWA, including not only environmental effects to the physical, chemical and biological characteristics of the aquatic ecosystem but additionally the aesthetic, historic, cultural, economic and social effects of the proposed activity.<sup>114</sup> NEPA requires the Corps to not only consider all reasonably foreseeable direct and indirect effects of the activity to the aquatic ecosystem and the environment outside the aquatic ecosystem, but the cumulative effects of past, present and reasonably foreseeable future activities in the area as well.<sup>115</sup> The identification and evaluation of all reasonably foreseeable impacts, and cumulative impacts, bears on the avoidance, minimization and mitigation assessment for the project. Failure to identify and consider probable impacts invalidates the mitigation assessment.

## **VII. THE PROJECT FAILS TO DEMONSTRATE ADEQUATE AVOIDANCE, MINIMIZATION AND MITIGATION OF ADVERSE IMPACTS**

CPRA and TNC have not met the avoidance, minimization and mitigation requirements under NEPA and the CWA. Mitigation is required for resource losses that are identifiable, reasonably likely to occur, and important to the human or aquatic environment. Flaws in identifying direct, foreseeable secondary and cumulative impacts to aquatic resources leads to unmitigated losses. Considering all adverse impacts of the proposed activity,<sup>116</sup> the applicants must submit a statement explaining how impacts to jurisdictional waters are to be avoided first, and then minimized and finally compensated.<sup>117</sup>

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<sup>113</sup> *Ohio Valley Envir. Coal. v. U.S. Army Corps of Eng'rs*, 479 F.Supp.2d 607, fn 15 (S.D. W.Va. 2007) (citing 40 C.F.R. § 1501.1(d) and 40 C.F.R. § 230.1(c)).

<sup>114</sup> 40 C.F.R. §§ 230.10-11, 1508.8.

<sup>115</sup> 40 C.F.R. § 1508.8.

<sup>116</sup> 40 C.F.R. § 230.10(d); 40 C.F.R. § 1508.25; *see also O'Reilly v. U.S. Army Corps of Eng'rs*, 447 F.3d 225, 235 (5th Cir. 2007).

<sup>117</sup> 33 C.F.R. § 325.1(d)(7); Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army Concerning the Determination of Mitigation under the Clean Water Act

The applicants present the proposed activities as an “ecological swamp enhancement” project, with the goal of “hydrologic restoration” with “[a]dditional enhancement and restoration features” including using dredged material to “create marsh and provide nourishment for forested areas within the project site.”<sup>118</sup> But these terms have legal significance and cannot be used errantly without justification and support that the activity meets these definitions and applicable standards under the CWA. Based on the information provided, the project is not a restoration project, but solely a project pursued to enhance water flow in the area, focusing on the improvement of this one specific function to the exclusion of other.

Restoration involves manipulation of characteristics of a site “with the goal of returning natural/historic functions to a former or degraded aquatic resource.”<sup>119</sup> Restoration can be either re-establishment or rehabilitation. Because project area is still an aquatic site, and is represented as such by the applicants, this project would fall under the rehabilitation option proposing to manipulate the site to repair (rather than return) natural or historic functions. But this project proposes to restore one function – water flow. The applicants do not describe the natural/historic functions of the area including identification and description of the class/subclass of wetlands and dominant vegetation or other helpful modifiers, what led to the degraded state and how the proposed action will repair the historic functions and prevent continued or recurrent degradation. This is not a restoration project.

The project is also presented as an enhancement project. Enhancement involves manipulation of an aquatic resource “to heighten, intensify, or improve a specific aquatic resource function(s)” with the recognition that it “results in the gain of selected aquatic resource function(s), but may also lead to a decline in other aquatic resource function(s).”<sup>120</sup> Here, again the sole function the project seeks to improve is water flow, which will – without sediment control measures or otherwise considering alternative design, etc. – channel more sediments into the area and ultimately lead to a decline in all aquatic functions of the resource area over time. This happened in Buffalo Cove and Beau Bayou. These types of projects that fail to include actions to manage contemporaneous sediment inputs, focusing solely on one water flow to the exclusion of other aquatic functions, do not satisfy the goals of mitigation, are not in the public interest, and are ineligible for permitting under the CWA.<sup>121</sup> The proposed EGL project is neither a restoration nor enhancement project where the proposed activity to improve the one aquatic function will ultimately compromise the continued existence of the entire aquatic resource.

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Section 404(b)(1) Guidelines, Feb. 7, 1990 [1990 Mitigation MOA] [Exhibits Group 3]; 40 C.F.R. 1508.20; 40 C.F.R. § 230.10(d). *See also* ABK et al. 2018 EGL Comments, at 14-15, and 18 (discussing actions employed to minimize impacts).

<sup>118</sup> *See* 2022 EGL Public Notice.

<sup>119</sup> 33 C.F.R. § 332.2. (emphasis added).

<sup>120</sup> *Id.*

<sup>121</sup> Where temporary improvement of one aquatic function will result in the overall decline of the aquatic resource, coexisting impacts should, at a minimum, be identified and evaluated to determine whether the project proposes mitigation commensurate with the amount and type of impact associated with the permit and compensates for the aquatic resources that will be lost as a result. 33 C.F.R. § 332.3(a)(1).

Avoidance is mitigation achieved through analysis of appropriate and practicable alternatives, potential impacts, and selecting the least-damaging project type and footprint.<sup>122</sup> As discussed below, the least-damaging alternative to the proposed project may actually be the no action alternative unless and until the regulators and stakeholder groups can agree to an alternative approach that comprehensively addresses the coexistence of water inputs and sedimentation. Neither avoidance nor minimization requirements are met where practicable alternatives exist and the proposal fails to recognize, let alone incorporate, avoidance measures for sediment inputs.<sup>123</sup>

Modifications to the discharge locations and methods for dredged material and cypress trees planted to “create” and “nourish” wetlands were made with the intent to meet avoidance and minimization requirements. But the proposal lacks support to assess whether these modifications will establish or nourish wetlands. Establishment involves manipulating present characteristics of the site “to develop an aquatic resource that did not previously exist at an upland site” resulting in a gain in aquatic resource area and functions.<sup>124</sup> Piling dredged spoil in an elevated pipeline canal or channel does not create a new aquatic resource, but rather frustrates future improvements actually intended to return the suite of impaired aquatic functions to the area and instead creates additional uplands in an area already crippled with wetland forests converted to upland areas overgrown with tree species indicative of this conversion. It remains unclear what class of aquatic resource and functions they intend to establish. Planting cypress trees on elevated spoil piles is not conducive to creating bald cypress dominant swamp wetland, and even less so if adaptive management and performance standards require more frequent dredging and fill disposal on the sites to counteract sediment deposition in the area. A critical and unrepresented factor is the level of water inundation on these proposed established wetlands on elevated spoil deposits.

Moreover, the applicants – and the Corps’ public notice – fail to mention compensatory mitigation planned to offset unavoidable adverse impacts. Both the CWA and NEPA require compensatory mitigation for unavoidable impacts from Section 404 permitted activities.<sup>125</sup> Mitigation must be commensurate with the amount and type of impact associated with the permitted activity, and it is therefore important that all potential adverse impacts are identified and considered.<sup>126</sup> Compensatory mitigation offsets impacts by replacing or providing substitute aquatic resources for remaining, unavoidable impacts and can be achieved through avoidance or minimization.<sup>127</sup> The impacts of the 2022 EGL project are cumulatively significant when added

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<sup>122</sup> 40 C.F.R. § 230.10(a).

<sup>123</sup> 40 C.F.R. § 230.10(d) (An applicant must take “appropriate and practicable steps [to] minimize potential adverse impacts of the discharge on the aquatic ecosystem.”); 230.70, 230.73, 230.75-76; 1990 Mitigation MOA, at II.B.2.

<sup>124</sup> 33 C.F.R. § 332.2.

<sup>125</sup> 40 C.F.R. §§ 230.91, 230.93(a)(1); *see also* 33 C.F.R. §§ 320.4(r), 332.1 (mitigation is required to ensure compliance with the 404(b)(1) Guidelines); 1990 Mitigation MOA, at III.C-E (“Mitigation requirements shall be conditions of standard Section 404 permits.”).

<sup>126</sup> *Id.*

<sup>127</sup> 33 C.F.R. § 332.2.

to the actual effects of other permitted activities and alterations in the area.<sup>128</sup> The environmentally-impacting legacy of spoil banks and channelized water flow, coupled with the Corps' enforcement shortcomings in the Basin (discussed below), support denial of the permit and at a minimum show how this project may be cumulatively significant and require additional mitigation plans to replace aquatic losses.

The 2022 EGL project modifications characterizing the direct discharge impacts of the "enhancement" project as wetland establishment (creation) and rehabilitation (nourishment) may also have been made to support the applicants' position that the project is "self-mitigating."<sup>129</sup> Whether the applicant claims the project to be self-mitigating or not, before the Corps performs an environmental analysis for the project, the applicant must prepare – and the Corps must provide notice of – plans to mitigate unavoidable impacts caused by the proposed activity. The similar Beau Bayou water quality enhancement project required compensatory mitigation through the purchase of mitigation bank credits. Granted, the Commenters do not believe that the New Orleans District's use of LRAM to calculate mitigation in the district is legal,<sup>130</sup> or that the ecological function of mitigation banks used and preferred across the country to offset unavoidable impacts to jurisdictional waters has been proven or adequately enforced in the New Orleans District.<sup>131</sup> In any event, mitigation planning should be transparent and noticed for

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<sup>128</sup> See *O'Reilly*, 477 F.3d at 235-236 ("an assessment of cumulative effects asks whether a project with individually 'mitigated-to-insignificant' effects may yet result in significant environmental impacts when those effects are aggregated with the foreseeable effects of other environmentally impacting human activities and natural occurrence.").

<sup>129</sup> 11.21.19 Email Re ABP TAG Meeting Minutes (describing EGL where "[p]ermit is essentially issued, however we are being asked to purchase mitigation credits. We are now providing pre-monitoring data, studies, and a monitoring plan to state that the project is self-mitigating and is needed.") [Exhibits Group 4].

<sup>130</sup> See Louisiana Wetlands Rapid Assessment Method, available at [https://www.mvn.usace.army.mil/Missions/Regulatory/Mitigation/Assessment\\_Method/](https://www.mvn.usace.army.mil/Missions/Regulatory/Mitigation/Assessment_Method/). The Tulane Environmental Law Clinic (TELC) submitted comments in November 2015, and March 2017 on behalf of GRN (now Healthy Gulf), ABK, and Sierra Club Delta Chapter on the proposed LRAM, identifying, among other things, that LRAM was not promulgated in accordance with rulemaking procedures and does not account for a project's cumulative impacts as required by NEPA. After the close of both comment periods, the Corps did not issue any response to comments or a final decision and/or decision document. The Clinic has objected to the Corps' continued use of the LRAM without the response to comments and a final decision, particularly after a FOIA request from the Clinic to the Corps confirmed the absence of these documents. [Exhibits Group 1].

<sup>131</sup> There is no coordinated study or published review evaluating the ecological performance of mitigation projects since the 2008 Mitigation Rule like that prepared by the Corps and EPA reviewing implementation of the 2008 Mitigation Rule. See *The Mitigation Rule Retrospective: A Review of the 2008 Regulations Governing Compensatory Mitigation for Losses of Aquatic Resources*, Oct. 2015, available at <https://www.epa.gov/cwa-404/mitigation-rule-retrospective-review-2008-regulations-governing-compensatory-mitigation>. Reporting on mitigation in Louisiana for state coastal use permits has identified substantial staffing needs to monitor and investigate mitigation projects, the deficient number of mitigation banks for coastal resources and other impediments to meet goals and objectives. *Evaluation of Louisiana's Mitigation Program for Impacts to Coastal Habitats*, LDNR, Office of Coastal Management, Sept. 17, 2010 [Exhibits Group 3]. Moreover, the Bayou Fisher Mitigation Bank has been

comment with necessary information on natural aquatic functions, sources contributing to the current state of the resource and explanation for how proposed mitigation will offset losses to the aquatic resource. Further, there is a concerning deficit of mitigation bank credits, in-kind, for cypress-tupelo wetland losses in the Atchafalaya Basin.

Monitoring is an important component of mitigation, particularly for projects shrouded in scientific uncertainty.<sup>132</sup> Considering the divergent opinions on the anticipated outcomes of the East Grand Lake project, at a minimum, the Corps should require the production of all relevant pre-construction monitoring data (including but not limited to data used in any report, study or publications prepared to provide scientific support for this project), as well as long-term monitoring and identified remedial action and performance standards available to the public for review and comment. To the extent an adaptive management plan has or will be prepared for this project, that information should also be identified, publicly noticed and available for public comment prior to rendering a decision on the permit.

Raising elevation through the deposition of dredge materials will accelerate sedimentation of the Basin. According to 2019 LIDAR data from CPRA, the interior swamps in the project areas elevations of the interior swamp are approximately 8' - 9' in elevation. Even a modest increase in this elevation could convert these swamps into bottomland hardwood, thus harming the swamps that this project aims to 'enhance.' Any materials dredged during this project should be transported to areas where elevation will enhance the landscape, not result in conversion and loss of the wetland. Ultimately, the foreseeable accretionary impacts of this project resulting in aquatic losses are so significant that the discharge cannot be permitted regardless of the enhancement, wetland creation or other mitigation measures proposed.

### **VIII. PRACTICABLE ALTERNATIVES THAT ARE LESS HARMFUL TO AQUATIC ECOSYSTEMS EXIST**

The Guidelines make clear that “[e]xcept as provided under section 404(b)(2), no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences.”<sup>133</sup> CPRA must present information sufficient to overcome the presumption that alternatives that are both practicable and less harmful to the aquatic ecosystem exist.<sup>134</sup>

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used to mitigate unavoidable losses to cypress-tupelo resources in the Basin (e.g., for mitigating cypress-tupelo losses in the Basin from the Bayou Bridge pipeline). This mitigation bank site, former agriculture lands, still does not support cypress-tupelo forests commensurate with the losses incurred because of pipeline construction in the Basin. Relaxed enforcement of mitigation bank instruments, unproven efficacy of mitigation banks – particularly in south Louisiana – to replace lost aquatic functions and the continued and invalid use of LRAM leaves aquatic resources in Louisiana exceedingly vulnerable to permitted losses.

<sup>132</sup> 1990 Mitigation MOA, at III.D.

<sup>133</sup> 40 C.F.R. § 230.10(a); *see also* 33 C.F.R. § 320.4.

<sup>134</sup> 40 C.F.R. § 230.10(a)(3), and to allow the Corps to evaluate alternatives under CWA guidelines and NEPA.

For many years, the Coalition has been trying to work with the project proponents (LDNR and now CPRA) as well as the oversight bodies (Task Force, Mississippi River Commission, the Corps, Technical Advisory Group, and even TNC) to share our concerns regarding the proposed activity and discuss alternative actions less likely to cause long-term adverse impacts to the surrounding wetlands.<sup>135</sup> Coalition members have attended meetings, made presentations, submitted alternative proposals and earnestly engaged with the agencies and project proponents to discuss practicable alternatives that do not involve introducing more river water laden with heavy sand and silt sediment into backswamps of the Atchafalaya Basin. Unfortunately, even when it seemed these agencies were legitimately interested, our concerns and suggestions have been widely ignored and stymied.

For example, at the request of CPRA, in 2020 and 2021 the Coalition submitted proposed EGL project alternatives to CPRA aimed at restoring north-south flow and hydrology into the East Grand Lake area (the very purpose claimed for the proposed project) that would not introduce more sediment-laden river water into the area.<sup>136</sup> But, although these proposals were designed and submitted at the request of CPRA, the agency has not since followed up with the Coalition regarding these submissions. One practicable alternative includes removing the spoil bank along the Williams Canal, an east to west canal that blocks north-south flow to the entire project area. This removal would allow even flow into the area without unnaturally channeling sediments. Commenters discussed other practicable alternatives in our original comments to the 2018 EGL public notice which are incorporated herein.<sup>137</sup>

Perhaps the most obvious alternative is no action, at least until a project proposes reasonable measures to address both water quality and sediment management in the East Grand Lake area. Unless the applicants can show that the proposal will not irreparably impair the forested wetlands, the Corps cannot permit the activity in the wetlands. Moreover, the minimal, conclusory and contradictory information provided in the Public Notice is insufficient to inform the public as to how the proposed activity can accomplish the purported purpose, let alone allow them the opportunity to comment on practicable alternatives.

## **IX. THE CORPS CANNOT PERMIT THE PROJECT WHILE OTHER PERMITS, CERTIFICATIONS AND APPROVALS REMAIN OUTSTANDING**

The Corps cannot render a decision on the 404 permit application while other approvals remain outstanding. Some of the outstanding approvals are illustrated below.

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<sup>135</sup> See ABK et al. 2018 EGL Comments, at 7-10 (discussing efforts of the undersigned, and other initiatives, recognizing the problems, and calling for more collaborative and effective solutions); and see throughout these comments.

<sup>136</sup> ABK et al. Proposed Alternative to EGL (Phases 1 and 2) [Exhibits Group 1].

<sup>137</sup> ABK et al. 2018 EGL Comments, at 7-10.

First, CPRA must apply to the Louisiana Department of Environmental Quality for a new or modified Water Quality Certification for the project. The 2022 EGL project involves substantial changes to the proposed methods and locations for the discharge of dredged material impacting the discharge of pollutants into state waters and protected wetlands requiring reevaluation pursuant to Section 401 of the Clean Water Act.<sup>138</sup>

The 404(b)(1) Guidelines prohibit the discharge of dredged material if it causes or contributes to violations of state water quality standards.<sup>139</sup> The Corps regulations also require evaluation of the activity's compliance with water quality standards *during and after construction* of the activity.<sup>140</sup> Experts have opined that “[s]uspended sediment may be the most important water-quality concern in the United States.”<sup>141</sup> In our original comments, we discussed the myriad harms that modifications to sedimentation rates and distribution patterns can have on the functions these wetlands and the integrity of their waters in consideration of Louisiana's Surface Water Quality Standards.<sup>142</sup> These concerns are equally relevant to the 2022 EGL project's re-proposed dredged cuts to more easily introduce and funnel river water into the area, and alone necessitate reconsideration in light of changes to the wetlands in this area over the last 4 years (for example, installation of the Bayou Bridge pipeline south of the project area, distribution of sediments and water quality impacts from high elevations and significant flood events).

Modifications to the method and locations of disposal of dredged material, however, also must be evaluated for consistency with state water quality standards and, in particular, antidegradation regulations. CPRA must submit an application for Water Quality Certification to LDEQ for the 2022 EGL project pursuant to state regulations that includes, among other things, an estimated schedule for the dredge and fill activities, location of the discharge, nature of the receiving waters, description of the discharge materials, and a description of any conduit conveying the discharge.<sup>143</sup> At a minimum, CPRA must request modification of the WQC issued June 4, 2018 for the 2018 EGL project version, and in accordance with content required for applications.<sup>144</sup> The application or proposed modification must be publicly noticed allowing interested parties an opportunity to submit comments and request a hearing,<sup>145</sup>

Next, the proposal must be adequately assessed to ensure compliance with the National Historic Preservation Act. The Corps must ensure that another Cultural Survey is conducted in the proposed project area pursuant to the National Historic Preservation Act. A previous survey

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<sup>138</sup> U.S. 33 U.S.C. § 1341; *see also* ABK et al. 2018 EGL Comments, at 22-24 (discussing applicable state water quality regulations).

<sup>139</sup> 40 C.F.R. § 230.10(b)(1), (2); *see also* ABK et al. 2018 EGL Comments, at 10, 22-24.

<sup>140</sup> 33 C.F.R. § 320.4(d).

<sup>141</sup> Hupp. et al. 2008, at 138 (citing USEPA 1994) [Exhibits Group 3].

<sup>142</sup> ABK et al. 2018 EGL Comments, at 22-24; LAC 33:IX.Chapter 11 (Surface Water Quality Standards), Chapter 15 (Regulations for issuing Water Quality Certifications).

<sup>143</sup> LAC 33:IX.1507.A.1. (Application Requirements).

<sup>144</sup> *Id.* at § 1507.G.1. *See* 2018 EGL Water Quality Certification, June 4, 2018, issued to LDNR for 2018 EGL project [Exhibits Group 2].

<sup>145</sup> *Id.* at § 1507.D, E, and G.2.



was conducted in 2018 and a corresponding report shared in October 2018.<sup>146</sup> However, the 2022 EGL proposal's modifications to discharge sites for dredged material necessitates another survey to ensure cultural resources are not impacted by the project, which should be performed when the water level allows adequate access and survey of critical areas including the proposed activity areas as well as the estimated footprint of probable adverse impacts. In particular, the potential presence of a human burial site noted burial site near the Bayou Sorrel elements necessitates re-surveying when the water level allows for adequate access.

The Corps must also consider whether anticipated impacts of the proposed project necessitate review and approval pursuant to Section 408 of the Rivers and Harbors Act. Under this section, persons are prohibited from damaging or impairing a public work built by the U.S. to prevent floods, including levee systems.<sup>147</sup> However, the Corps "may grant permission for the alteration ... [when] such occupation or use will not be injurious to the public interest and will not impair the usefulness of such work."<sup>148</sup> For the many reasons discussed here, the proposed EGL project will injure the public interest and may impair the Basin's capacity to contain floodwaters. The Basin floodway is a Corps' project designed to contain floods and protect communities; the Corps must assess whether this project will injure works built by the Corps to meet this floodway function.

The Corps must also consult with the U.S. Fish and Wildlife Service prior to rendering a decision on the application to identify and discuss impacts to migratory bird habitat in the project area. The Migratory Bird Treaty Act (MTBA) is one of the oldest wildlife protection laws; the MTBA prohibits the "take" of a migratory bird including incidental takes.<sup>149</sup> Because the project area includes the bird rookery in Lake Zadrick supporting nesting and feeding habitat for many species of migratory birds, the Corps must consult with the U.S. Fish and Wildlife Service regarding the project's probable impacts on the rookery.

Finally, the Corps must ensure that applicable notice and approvals of the Atchafalaya Basin Levee District (La. R.S. 38:291) have been given prior to rendering a decision.

## **X. THE CORPS CANNOT PERMIT THE PROJECT BECAUSE IT IS NOT IN THE PUBLIC INTEREST**

Wetlands are considered productive and valuable public resources; "the unnecessary alteration or destruction of which should be discouraged as contrary to the public interest."<sup>150</sup> The Corps has the authority to deny section 404 permits for failure to comply with the

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<sup>146</sup> Cultural Survey, EGL Oct. 2018 (noting that survey was conducted when the water levels in the area were very high) [Exhibits Group 2].

<sup>147</sup> 33 U.S.C. § 408.

<sup>148</sup> *Bd. of Commrs of SE LA Flood Protection v. Tenn. Gas Pipeline*, 88 F.Supp.3d 615, 632-633, n. 160 (E.D. La. 2015).

<sup>149</sup> 16 U.S.C. § 703; 50 C.F.R. § 10.12; 86 Fed. Reg. 54, 642 (Oct. 4, 2021).

<sup>150</sup> 33 C.F.R. § 336.1 (requiring the DE to follow the Guidelines and EO 11990 (May 24, 1977) when evaluating Corps operations and maintenance activities in wetlands). *See also* 33 C.F.R. § 208 (Corps Flood Control Regulations).

Guidelines; but even if activity would comply with the Guidelines, the Corps may deny a permit if it would be contrary to the public interest.<sup>151</sup> For the myriad reasons articulated above, in accordance with the Guidelines and consideration of relevant factors such as conservation, economics, aesthetics, general environmental concerns, wetlands, fish and wildlife values, flood hazards, floodplain values, navigation, accretion, recreation, water quality and safety, the Corps should deny this permit for the 2022 EGL project as contrary to the public interest.<sup>152</sup>

The Atchafalaya Basin Floodway is a Corps project, and it is ultimately the Corps' responsibility to manage the ecological and anthropogenic services provided by the Basin Floodway symbiotically, in accordance with federal and state law, policy, economic, ecological, public health and safety interests for present and future generations. But responsibilities also lie with the state agencies that propose project without identifying all relevant issues impacting the area, cooperating with certain stakeholders to the exclusion of others. Since the earliest discussions of the East Grand Lake project, stakeholders have cautioned that introducing new inputs of river water could cause long-term adverse impacts to the project area that may ultimately destroy the interior wetland swamps.<sup>153</sup> The direct, indirect, secondary and cumulative impacts of the proposed activity will negatively affect the ecological and human uses of the wetlands and ultimately the public interest in the long-term. These outcomes are inconsistent with applicable regulations and policies, including the duties of state and federal agencies under the public trust doctrine to protect resources for the benefit of all people, not just a handful of special interest groups.

Federal and state public trust doctrines obligate these agencies to protect natural resources for the welfare of the people. All state agencies in Louisiana – including CPRA and LDEQ – must satisfy their constitutional mandate as a public trustee pursuant to Article IX, Section I of the Louisiana Constitution, which provides that “the natural resources of the state, including air and water, and the healthful, scenic, historic, and esthetic quality of the environment shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people.”<sup>154</sup> Federal agencies – including the Corps – must also act consistent with their duties as public trustees. However, our experience engaging with the agencies does not reflect equal application of these duties to all interests.

## **XI. REGULATORY CAPTURE THREATENS THE LONG-TERM HEALTH OF OUR NATURAL RESOURCES AND HUMAN ENVIRONMENT**

Regulatory capture occurs when an agency created to act in the public interest, instead advances the commercial or political concerns of special interest groups that dominate the

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<sup>151</sup> 33 C.F.R. 323.6(a). *See also id.* at § 323.6(b) (authorizing the EPA regional administrator pursuant to 40 C.F.R. 231.3(a)(1) to deny, restrict, or withdraw use of a defined area as a disposal site in accordance with section 404(c) of the CWA).

<sup>152</sup> 33 C.F.R. 320.4(b)(4); *id.* at § 320.4(a)(1).

<sup>153</sup> ABK et al. 2018 EGL Comments at 5, 26-27, discussing opposition to the proposal and similar projects (including two public meetings in the Basin in 2016 [audio file Exhibits Group 1] as well as efforts to be included in cooperating with agencies and stakeholders to develop agreeable solutions.

<sup>154</sup> *See also, Save Ourselves v. La. Env'tl. Control Comm'n*, 452 So. 2d 1152, 1157 (La. 1984).

industry or sector it is charged with regulating. Special interest groups, industry or corporations that use their influence over agencies to push projects or policies that benefit them to the detriment of the environment and surrounding communities threaten the foundation of our legal system and efficacy of regulatory oversight.

CPRA's continued pursuit of this project despite recognized impacts resulting from increased sediment introduced into the project area shows a blatant disregard for the agency's mission and duties as public trustee over natural resources for the welfare of the people. The anticipated impacts to irreplaceable wetlands, public and industry safety, wildlife habitat, cultural interests and flood capacity in the Basin raise concerns as to the agency's willingness and ability to perform its necessary duties for the welfare of the people. The Atchafalaya Basin Program (ABP) made its intentions clear at the 2016 public hearing in Henderson when then director Don Haydel confirmed that despite 100% opposition to the project at that time, the ABP had every intent to move forward with the project.<sup>155</sup>

Since then, Governor Edwards established the Atchafalaya Basin Restoration and Enhancement (ARBRE) Task Force naming CPRA as the lead agency charged with organizing the Task Force. Despite complaints from the Atchafalaya Basin Coalition and assurances of Basinkeeper's inclusion, the only group CPRA included to represent the environmental community was TNC. CPRA's failure to include any other non-governmental organization in the Task Force, excluding Basinkeeper or other groups in the Atchafalaya Basin Coalition, speaks volumes. As discussed in our prior comments, TNC has been the impetus for the renaissance of this project in purchasing key land holdings and preparing materials, studies and reports in support. Our concerns over this partnership between the Atchafalaya Basin Program, formalized in memorandum of agreements with first LDNR and now CPRA, were heightened with the recent publication of an expose prepared by environmental and justice groups and scientists that describes their findings and negative experiences with TNC across the country.<sup>156</sup> One commenter describes TNC's "carefully controlled, membership-only collaboratives" including only those who agree with their interests and excluding those who don't.<sup>157</sup> Similarly, Basinkeeper and partners have been repeatedly refused access to similar collaboratives in Louisiana, and denied access to information about this project that should be publicly accessible, transparent and open.<sup>158</sup> The Commenters are disturbed by the disclosed entities funding TNC's pursuit of this project and its studies, reports and papers prepared to support their view of the

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<sup>155</sup> See Exhibits Group 1, audio recordings from public hearings in Bayou Sorrel and Henderson in 2016, noting specifically to listen at 2:14, 2:30, 3:18, and 4:18:50 for the above-mentioned statement by Don Haydel.

<sup>156</sup> The Nature Conspiracy, March 2022 [Exhibits Group 3].

<sup>157</sup> *Id.* at 23 (quoting Dominick DellaSala Ph.D., chief scientist at Wild Heritage), and 9 (describing how "community organizations and scientists keep finding themselves excluded" from working groups and decision-making discussions).

<sup>158</sup> ABK et al. 2018 EGL Comments at 26 (LDNR refused Basinkeeper's request to be included in collaboration and the Memorandum of Understanding between TNC and LDNR) and Exhibits E and F.

need, purpose and anticipated impacts.<sup>159</sup> Independent, defensible science must be evaluated alongside the materials prepared by project proponents and affiliates to push the project.

The ARBRE Task Force recommends restoring and conserving deep-water habitats within the Atchafalaya Basin.<sup>160</sup> ABK has submitted opposition comments to CPRA, including a report warning of imminent bank failure at Coon Trap that would create a new river water diversion into the EGL area and degrade the wetlands, Grand Lake and Keelboat Pass.<sup>161</sup> CPRA's verbal response assured that they were working with the Corps to "do something" to avoid bank failure, but the Corps represented that they were not contacted by CPRA about Coon Trap. In response, Basinkeeper sent a letter to the Corps requesting immediate action to prevent irreparable harm, but both CPRA and the Corps refused to act until Governor Edwards ordered CPRA to permanently close the crevasse and avoid the breach.<sup>162</sup> But the order came too late – water levels rose and breached the crevasse, forming a new bayou and fostering the harm Basinkeeper tried so hard to prevent. Although Basinkeeper had found a contractor willing to build the levee for \$50,000, now closure of the newly formed bayou will be exponentially more expensive and difficult, and damage already experienced cannot be reversed. Despite promises from CPRA leadership that Coon Trap would be closed as soon as water levels recede, no action has been taken. When the Atchafalaya Basin Coalition sent a complaint letter to CPRA for its mishandling of Coon Trap, requesting closure of Coon Trap and the newly formed river diversion created by the Bayou Bridge Pipeline canal, CPRA did not respond.<sup>163</sup>

On November 4, 2020, at the request of CPRA, the Atchafalaya Basin Coalition submitted a draft proposal for an alternative project plan in East Grand Lake that would distribute water flows and restore deep-water habitat without diverting additional sediments in the project area, but after CPRA failed to respond the Coalition the Coalition sent the alternative proposal again.<sup>164</sup> To date, CPRA has failed to respond. The coalition's alternative proposal to EGL was submitted after members of the Coalition submitted comments to CPRA on the 2021 ABP Annual Plan, and a subsequent letter pleading that CPRA drop the EGL project.<sup>165</sup> The letter describes CPRA's failure to respond to the Coalition's prior comments and legitimate concerns regarding the ABP and management of the Basin and Louisiana's coasts, the EGL project's far-reaching adverse impacts and its growing concern with deceptive practices and agency-backed problematic and unethical projects that have and will destroy irreplaceable wetlands.

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<sup>159</sup> For example, companies such as Shell, Enterprise Products Operations, LLC, and Caterpillar Foundation have contributed to the project and/or Atchafalaya River Basin Initiative.

<sup>160</sup> ARBRE Recommendations to CPRA, Nov. 17, 2021 [Exhibits Group 3].

<sup>161</sup> ARBRE Meeting Comments, Mar. 4, 2022 [Exhibits Group 1]; 1.5.21 Coon Trap, Imminent Failure Notice to CPRA [Exhibits Group 5, "Coon Trap Failure"].

<sup>162</sup> 1.26.21 Coon Trap, Request for Emergency Action [Exhibits Group 5, "Coon Trap Failure"].

<sup>163</sup> 10.25.21 Proposal for Permanent Closure of Coon Trap [Exhibits Group 5, "Coon Trap Failure"].

<sup>164</sup> ABK et al. Proposed Alternative to EGL Phase 1 (Oct. 2020); Phase 2 (Nov. 4, 2020); Phases 1 & 2 (Oct. 25, 2021) [Exhibits Group 1].

<sup>165</sup> ABK et al. Comments on ABP Draft Annual Plan FY 2021, Feb. 15, 2020 [Exhibits Group 1]; ABK et al. Comments on ABP Draft Annual Plan FY 2022, Mar. 27, 2021 [Exhibits Group 1].

To the chagrin of the Commenters and to the detriment of the Basin's communities, the Atchafalaya Basin Program has a history of proposing modifications to projects that defeat the purpose and need for restoration and benefit certain stakeholder interests to the great detriment of the public at large; for example, projects at Bayou Postillion, Bayou Fouché, Little Bayou Pigeon, Grand Lake, Brown Bayou and now East Grand Lake. With the program now under CPRA, the Commenters were hopeful that the program would be open to working with environmental and community stakeholder groups and approach these projects with more consideration of the interrelated nature of the Basin's wetland ecosystems and coastal ecosystems and functions. But the continued pursuit of problematic projects, including the EGL project, shows the agency's intent to carry on with business as usual, to the detriment of the Basin, public health and safety and the long-term wellbeing of our state.

## **XII. THE CORPS CANNOT ISSUE PERMITS IT WILL NOT ENFORCE**

The Department of the Army and the Environmental Protection Agency entered into a Memorandum of Agreement "to strengthen the Section 404 enforcement program by using the expertise, resources and initiative of both agencies in a manner which is effective and efficient in achieving the goals of the CWA."<sup>166</sup> Under the terms of the MOA, the Corps is to act as the lead enforcement agency for all violations of Corps-issued permits. Unfortunately, the NOD has not met this duty, disregarding the goals of this Enforcement MOA, its role as public trustee and regulatory mandates.

For years, the Coalition organizations have monitored the Basin and coastal wetlands by land, water and air to identify and rectify actions harming public resources, wetlands, forests and waterways. We have observed, reported and challenged illegal development of wetlands, problematic permit authorizations and permit noncompliance. For illegal and noncompliant actions in wetlands under the jurisdiction of the NOD, we identify the activity or failure and provide information to the Corps to facilitate enforcement and encourage compliance. Unfortunately, and more recently, these efforts fail to bear fruit. Examples where NOD has issued after the fact permits to violators and [refused to enforce permit conditions and easements] are too numerous to count, but a few particularly egregious examples stand out from the pack.

### **a. Development on Protected Property**

The NOD granted a permit (No. DACW-29-9-11) to land claimant Kenneth Bernhard authorizing the construction of a camp, in what was at the time designated critical habitat for the Louisiana black bear, and in contravention of the terms of the Corp's on environmental easement on the property. Bernhard constructed a mansion, stables, a second residential structure and two large ponds on the property. The Corps also authorized Bernhard to bore under the Atchafalaya River to bring electricity to the illegal development under nationwide permit 12.<sup>167</sup>

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<sup>166</sup> Corps-EPA Enforcement MOA. [Exhibits Group 5].

<sup>167</sup> See Exhibits Group 5, "Development on Corps Easement" documents.

## **b. Grand Lake**

Grand Lake has been recognized to possess some of the last remaining deep-water habitat in the Atchafalaya Basin. Unfortunately, in 2011 a dam designed to stop river water from passing through an existing pipeline (owned by Enterprise) breached, allowing sediment-laden river water to funnel into Grand Lake. The effects have been detrimental; the breach has led to rapid filling of this deep-water habitat and the formation of a large sandbar and shoaling area that presents a significant hazard to navigation in Grand Lake. Enterprise was the responsible party but has not been held to account.

In 2016, LDNR originally proposed to dredge the areas shoaling and filling with sediment and transport the dredged fill to the Atchafalaya River (original GLP), with the intent to “remove sediment accretion in Grand Lake”, “enhance/restore water quality and depth to Grand Lake for marine life refuge during times of low and/or hypoxic water conditions” and to allow for the beneficial use of spoil generated from sediment removal “to augment natural delta-building processes on the Louisiana coast.”<sup>168</sup> The project’s application and public notice emphasized the benefits of returning sediments to the river system in order to enhance downstream coastal areas suffering land loss. But the Corps rejected the original proposal to discharge the sand back into the Atchafalaya River where it came from, and ultimately the project was modified to use the dredged sediment to cover the Enterprise pipeline to the benefit of Enterprise and unfortunate detriment of the environment (modified GLP). In 2019, the Corps granted the permit for the modified Grand Lake project proposal despite failing to provide public notice and comment in light of these substantial modifications.

In 2020, Basinkeeper, LCPA-West and Healthy Gulf subsequently sued the Corps for failing to comply with applicable law in granting a permit for the substantially modified Grand Lake project.<sup>169</sup> As a result of this suit, the Corps voluntarily remanded the permit and proclaimed it would reconsider the project, reopen public notice and comment regarding the authorized dredge and fill and related obstructions under the 2017 permit, and to consider the need for corrective measures. The Corps issued public notice and on November 19, 2020, we submitted comments on the modified permit proposal – identical to the permitted project – and have yet to receive any response to our comments.<sup>170</sup>

## **c. Enterprise Pipeline**

In the summer of 2017, during construction of its pipeline across the Basin, Enterprise Products Operating, LLC dammed waterways blocking navigation adjacent to the pipeline right-of-way on the west side of the Basin. In July 2017, Basinkeeper and local fishermen identified the blockages and notified the NOD.<sup>171</sup> When NOD failed to follow up, Basinkeeper, Healthy

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<sup>168</sup> Grand Lake Restoration project public notice, Feb. 8, 2016 [Exhibits Group 2].

<sup>169</sup> *Atchafalaya Basinkeeper, et al. v. U.S. Army Corps of Engrs*, Case No. 2:20-cv-01106-LMA-KWR (E.D. La. 2020).

<sup>170</sup> ABK et al. Comments on Grand Lake Restoration, Nov. 19, 2020 [Exhibits Group 1].

<sup>171</sup> 7.31.17 Emails between ABK and Corps [Exhibits Group 5, “Enterprise Pipeline”].

Gulf (then GRN) and LCPA-West sent Enterprise (copying the NOD) a Notice of Intent to File Suit against the company for CWA and RHA violations.<sup>172</sup> In 2018, Basinkeeper requested all public records related to the Corps' enforcement with regard to both the Enterprise and Bayou Bridge Pipeline projects constructed in the Basin in 2017 and 2018-19 respectively. In response, the Corps represented that it possessed no records regarding enforcement for the subject Enterprise pipeline. At a minimum, the emails sent in 2017 identifying and alerting the Corps to the blockages along the Enterprise pipeline right-of-way should have been produced, but were not.

#### **d. Bayou Bridge Pipeline**

On November 2, 2016, the Coalition submitted comments on the then-proposed Bayou Bridge Pipeline, a 162.5 mile major crude oil pipeline to cross 11 parishes and the entire width of the Atchafalaya Basin.<sup>173</sup> Part of the pipeline crossing the east side of the Basin was co-located with the existing Florida Gas pipeline owned in part by the same company proposing the Bayou Bridge pipeline (Energy Transfer Partners). The Florida Gas pipeline right-of-way is a prime example of unmitigated noncompliance that has contributed to immeasurable adverse impacts on the east side of the Basin; the elevated spoil piles left behind from pipeline installation (despite permit conditions prohibiting blocked navigation) form dredge sites for Elements 4-10 of the proposed East Grand Lake project.<sup>174</sup> Permit conditions for the Florida Gas pipeline reinforce the Corps' authority over the project including authority to require removal.<sup>175</sup> Despite the pipeline installation and creation of spoil piles along the north and south banks of the canal that have blocked navigation and water flow and channelized water inputs causing unnatural sediment disposition in interior swamps for more than years, the Corps has not required the company to bring the site into compliance. To make matters worse, the Corps granted a permit to Energy Transfer Partners over our objections authorizing construction of the Bayou Bridge Pipeline across the Basin and in the noncompliant Florida Gas pipeline right-of-way.

During the pendency of our lawsuit challenging the Corps' 404 permit for Bayou Bridge, Basinkeeper monitored pipeline construction in the Basin and identified many instances of perceived permit noncompliance. From the time pipeline construction began in the Basin until post-construction clean-up was performed, Basinkeeper and partners sent several notice letters and emails to the NOD identifying locations and activities perceived to be violative of specific permit conditions and requirements. In October 2019, after construction was complete, we sent a follow-up letter and email to the Corps identifying significant environmental degradation in the Basin as a result of the pipeline's construction and noncompliance with permit conditions designed to mitigate and prevent this degree of unprecedented harm observed from one permitted project in the Basin. Eventually the company returned and performed some post-construction clean up, but because intervention was not taken during construction – particularly during high

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<sup>172</sup> See Exhibits Group 5, "Enterprise Pipeline" records, including notice letters and responses.

<sup>173</sup> ABK et al. Comments on Bayou Bridge Pipeline, Nov. 2, 2016 [Exhibits Group 1].

<sup>174</sup> Florida Gas pipeline permit, at special conditions (b) – (f).

<sup>175</sup> *Id.*

water events contributing to excessive sediments canalized into interior wetland forested swamps – many of the impacts are irreparable.

We have been extremely frustrated and disheartened to confirm that little action was taken in response to our noncompliance notice letter sent to the Corps through the pipeline’s construction in the Basin, and in fact no action was taken at all (investigatory or otherwise) until after construction was complete. In 2018, after having sent several notice letters to the Corps identifying permit noncompliance, we sent a request to the Corps for any records in the its possession regarding enforcement for the Bayou Bridge pipeline. The Corps issued an initial response in October 2019, but additional records were produced in April 2022, in response to discovery requests in the ongoing FOIA litigation between the commenters and the Corps. The NOD’s discovery and FOIA responses confirm that the NOD did not enforce permit conditions during construction of the pipeline and that no enforcement action was ever opened for violations related to construction of the Bayou Bridge pipeline, or the Enterprise products pipeline in 2017. The records produced reveal that the project manager performed 1 site inspection of the pipeline right-of-way in the Basin in October 2019 – nearly 2 years after construction began, 17 months after receiving the first notice letter, and after receiving 5 letters total on identified compliance issues with pipeline construction in the Basin – and ultimately determined there were no compliance issues at that time.<sup>176</sup> But by the time the site inspection was made in October 2019, post-construction clean-up was well underway and near completion; these representations neither confirm nor deny that permit noncompliance occurred, but rather than the Corps’ interest and/or capacity to ensure permit compliance in the Atchafalaya Basin – even when handed all the information necessary to do their job from a small, environmental nonprofit with minimal staff and resources – is compromised. To date, the pipeline right-of-way remains out of compliance with permit conditions.

#### **e. Pat’s Throat Bayou Dam**

In the fall of 2021, the lessee hunting club built an illegal, unpermitted dam across Pat’s Throat Bayou, an important access route from the Atchafalaya River into the Billy Little Lakes area of the Basin, east of the Atchafalaya River. A significant amount of river water flows through Pat’s Throat into the Billy Little Lakes area; the bayou is the main source of fresh water, providing historical access for Cajun fisherman and fish migration corridor to over 30,000 acres of wetlands forests. The dam not only blocks all access but also water flow, causing modification to the hydrology, sedimentation patterns and flooding in the area. On October 17, 2021, Basinkeeper sent a report of the illegal dam at Pat’s Throat Bayou to the NOD, but the Corps did not act.<sup>177</sup> In a race against time to remove the dam before high water season exacerbated irreparable damage to the area, in late November 2021, Basinkeeper sent the lessee hunting club a Notice of Intent to File Suit under the Clean Water Act for construction of an illegal dam in jurisdictional waters without permit authorization. In December, LCPA-West sent a separate

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<sup>176</sup> Meanwhile, the “Regulatory Fact Sheet” we received in response to our FOIA request represents that the Corps made two additional site visits to the right-of-way in May and June of 2018, but this is refuted by the Corps’ response to discovery requests on this topic.

<sup>177</sup> See Records attached in Exhibits Group 5, “Pat’s Throat Bayou Dam”.



Notice of Intent to the landowners for the illegal dam. Having received no response from the lessees or land claimant responsible for the property, Tulane sent an email to the Colonel Murphy alerting him to the obstruction and sharing the Coalition's opposition to issuing an after-the-fact permit for the obstruction. Unfortunately, the Corps' response confirmed that an after-the-fact permit was granted for the dam under nationwide permit 14 (MVN 2021-01131-CF). Once again, the Corps thwarted our efforts to correct illegal action and prevent continued harm.

We raise these examples not to shame the agency, but out of genuine concern for the long-term health and sustainability of our public resources and the ability, willingness and/or intent of the NOD to meet its statutory mandate to oversee regulation and enforcement of Section 404 of the Clean Water Act. We cannot understand why we have experienced such an extreme unwillingness by the agency to work with interest groups such as those included in these comments to protect jurisdictional waters and wetlands. Instead, it seems both the Corps and CPRA as discussed above are intent on disrupting, rather than cooperating with, our continued efforts to serve the public interest for the health and safety of our communal environment.

The Coalition organizations have shown their dedication to protecting and restoring the Basin and coastal wetlands for the public good; it is time for the agencies to likewise show their commitment to these federal and state policies and laws for the protection of our human environment. If the agency is unable or unwilling to fulfill these duties, it is incumbent upon EPA and the Corps to address the situation and reach a solution that ensures compliance with federal law. Unless and until the NOD is prepared to enforce applicable laws and perform its mandatory duties to regulate and enforce, it cannot continue to issue Section 404 permit authorizations for activities that will cause or contribute to environmental degradation in the Atchafalaya Basin.

For the many reasons discussed, the organizations of the Atchafalaya Basin Coalition and Waterkeeper Alliance respectfully request that the Corps deny to permit the proposed activities in the East Grand Lake area. At least 623 individuals have now signed a petition to oppose the East Grand Lake project, to ask the Atchafalaya Basin Program to immediately stop moving forward with the project and to ask the Corps to deny the permit.<sup>178</sup> In accordance with applicable provisions under NEPA and the CWA, the Commenters request that the Corps reissue a public notice including all the information that is necessary to allow for meaningful public comment; that it prepare an environmental impact statement (EIS) and make any and all environmental information available to the public for inspection and comment before rendering a decision; and that it reasonably determine that, in accordance with applicable state and federal law and policy, congressional mandates, defensible science and the public interest, the application for a Section 404 permit for the proposed activities in East Grand Lake must be denied.

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<sup>178</sup> East Grand Lake Petition signatures [Exhibits Group 1].

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**LIST OF ATTACHMENTS**  
SUBMITTED BY DOD SAFE FILE DROP OFF SYSTEM PER INSTRUCTION OF  
PROJECT MANAGER NEIL GAUTHIER

**Exhibits Group 1** – Public Comments, Meeting Records, and Correspondence with Regulators, including:

1. Audio record of 2016 EGL public hearings in Henderson and Bayou Sorrel
2. ABK et al. 2018 EGL Comments, April 19, 2018, and attached exhibits A-P, including
  - Exhibit A: Expanding Geospatial Assessment Tools for the Atchafalaya Basin Program, 2009
  - Exhibit B: Paul Chadwick, Overview and Planning Process of the East Grand Lake Water Quality Improvement and Sediment Management Plan
  - Exhibit C: Characterization of temporal and stage-related changes in water quality in major inflows into the Greater East Grand Lake area of the Atchafalaya River Basin
  - Exhibit D: Memorandum of Understanding between the Louisiana Department of Natural Resources Atchafalaya Basin Program (ABP) and the Nature Conservancy of Louisiana (TNC), Dec. 2015
  - Exhibit E: Letter of Expression of Interest to be included in the MOU, Atchafalaya Basinkeeper to LDNR ABP, Jan. 13, 2016. Response Letter from LDNR ABP to Atchafalaya Basinkeeper, Mar. 23, 2016
  - Exhibit F: Letter from the Law Office of R. David Brown, on behalf of Atchafalaya Basinkeeper, to the Atchafalaya Basin Program regarding the ABP-TNC MOU and EGL project. June 7, 2016
  - Exhibit G: Letter from the Law Office of R. David Brown, on behalf of Atchafalaya Basinkeeper, to Governor Edwards regarding the EGL project, July 22, 2016
  - Exhibit H: Cooperative Endeavor Agreement (CEA) between the Department of Natural Resources (DNR) and the Nature Conservancy (TNC), Sept. 2016
  - Exhibit I: Letter from Senator Fred H. Mills, Jr. to Governor Edwards regarding the EGL project, Oct. 13, 2016. Response Letter from the Department of Natural Resources, Dec. 7, 2016
  - Exhibit J: Louisiana: TNC The Atchafalaya River Basin Initiative pamphlet
  - Exhibit K: Ivor van Heerden, Ph.D., Initial Comments on the Nature Conservancy Project in East Grand Lake, Atchafalaya Floodway, Aug. 2017 [also attached in Exhibits Group 3]
  - Exhibit L: 2017 EGL Annual Monitoring Report
  - Exhibit M: Dec. 21, 2017, Request for Public Records to TNC and LDNR; Jan. 4, 2018 Response Letter from TNC
  - Exhibit N: 2018 EGL DOA permit application [also included in Exhibits Group 2]
  - Exhibit O: Ivor van Heerden, Ph.D., Expert Report on the Proposed East Grand Lake Project (EGL), April 2018. [also included in Exhibits Group 3]

- Exhibit P: Public Hearing Transcript and Request for Public Comment, Water Quality Certification Application and DA Permit Application, Permit Number MVN-2015-02295-WII, Jan. 12, 2017
- 3. ABK et al. 2020 Supplemental EGL Comments, April 22, 2020 (1979 EPA Report, exhibit included in Exhibits Group 3)
- 4. 4.28.21 ABK Letter to Corps re EGL status
- 5. 5.6.21 Corps Response Letter to ABK re EGL status
- 6. ABK et al. Proposed Alternative to EGL Phase 1, Oct. 9, 2020
- 7. ABK et al. Proposed Alternative to EGL Phase 2, Nov. 4, 2020
- 8. ABK et al. Proposed Alternative to EGL Phase 1 & 2, Oct. 25, 2021
- 9. Sigma Consulting, Response to Public Comments, Aug. 28, 2018
- 10. Ivor van Heerden, Ph.D., Review of Comments of Others as Related to the EGL Project, Nov. 4, 2019
- 11. ABK et al. Comments on Buffalo Cove Element 10, July 18, 2018
- 12. ABK et al. Supplemental Comments on Buffalo Cove Element 10, Feb. 22, 2021, with Declaration of Dr. Ivor van Heerden, exhibits A-B
- 13. ABK et al. Comments on ABP Draft Annual Plan FY 2020, Mar. 9, 2019, and attachments A-E:
  - Exhibit A: Emails from landowners
  - Exhibit B: 2018 EGL Comments
  - Exhibit C: 2018 Buffalo Cove Comments
  - Exhibit D: Ivor van Heerden, Ph.D., Updated Expert Report on Proposed East Grand Lake Project (EGL), Mar. 4, 2019
  - Exhibit E: 2010 Proposed Memorandum of Understanding – Atchafalaya Basin Code of Ethics for Water Quality Projects Funded by Taxpayers
  - Exhibit F: 2016 EGL meetings in Henderson and Bayou Sorrel [attached separately]
- 14. ABK et al. Comments on ABP Draft Annual Plan FY 2021, Feb. 15, 2020,
- 15. ABK et al. Comments on ABP Draft Annual Plan FY 2022, Mar. 27, 2021
- 16. LCPA – ABK Comments on Beau Bayou water quality enhancement project, Oct. 18, 2016
- 17. Letter to Guy Cormier on Beau Bayou Project, Oct. 16, 2016
- 18. ABK et al. Comments on Bayou Bridge Pipeline, Nov. 2, 2016
- 19. ABK et al. Comments on Buffalo Cove Element 10 and Draft EA, July 18, 2018
- 20. ABK et al. Supplemental Comments on Buffalo Cove Element 10, Feb. 22, 2021
- 21. ABK et al. Comments on Grand Lake Restoration, Nov. 19, 2020
- 22. ABK et al. Comments on proposed LRAM, Nov. 30, 2015, with exhibits 1-3
- 23. LDNR Comments on Enterprise Pipeline
- 24. LDNR Comments on Bayou Bridge Pipeline
- 25. ARBRE Meeting Comments, Mar. 4, 2022
- 26. Signed Petitions Against the East Grand Lake Project

**Exhibits Group 2** – Public Notices, Application and Permit Documents, including:

1. 2018 EGL joint public notice, Mar. 19, 2018
2. 2022 EGL public notice, April 25, 2022

3. 2022 EGL CUP joint permit application, April 4, 2022
4. 2018 EGL Water Quality Certification, June 4, 2018
5. Cultural Survey, EGL Oct. 2018
6. Beau Bayou Project joint public notice, May 30, 2016
7. Beau Bayou Permit / Record of Decision, date
8. Buffalo Cove Element 10 public notice, June 2018
9. 7.9.18 Email M. Mitchell to S. Roberts re BCMU Element 10 public notice
10. Grand Lake Restoration public notice, Feb. 8, 2016
11. Grand Lake Restoration public notice, Nov. 23, 2020
12. Florida Gas Pipeline permit, Dec. 12, 1962

**Exhibits Group 3 – Studies, Reports and Publications**

1. Ivor van Heerden, Ph.D., Turbidity, Nitrogen, and Dissolved Oxygen Abnormalities in the Atchafalaya Basin 2016-2019 – A Working Paper
2. Ivor van Heerden, Ph.D., Review of TNC Monitoring Data Collection in the Atchafalaya Basin, 2016-2019, Dec. 14, 2020
3. EPA Report, Hydraulics of the Atchafalaya Basin Main Channel System: Considerations for a multiuse Management Standpoint, May 1979
4. 1982 EIS, Atchafalaya Basin Floodway System Vol. 1
5. Hupp. et al., Recent Sedimentation Patterns within the Central Atchafalaya Basin, Louisiana. 2008
6. Decl. of William Connor, Ph.D., Jan. 29, 2018
7. The Nature Conspiracy, March 2022 (highlighted)
8. ARBRE Recommendations to CPRA, Nov. 17, 2021
9. Cowardin et al., Classification of Wetlands and Deepwater Habitats of the United States, 1979
10. 2019 TNC Annual Monitoring Report
11. Brinson, M. M., A hydrogeomorphic classification for wetlands, 1993
12. McAlhaney, Alicia Louise. Baldcypress and Black Willow Growth Response to Contrasting Flood Regimes, Climate, and Competition, in the Atchafalaya Basin, Louisiana. 2018.
13. Kroes et al., Channel modification and evolution alter hydraulic connectivity in the Atchafalaya River basin increasing vulnerability to sea level rise, July 2019
14. LDNR Mitigation White Paper, Sept. 2010
15. 1990 Mitigation Memorandum of Agreement

**Exhibits Group 4 – Record Requests and Response Documents, including:**

1. 11.21.19 Email Re ABP TAG Meeting Minutes
2. 2.22.11 Recommendations for Monitoring East Grand Lake
3. 8.3.10 East Grand Lake Summary Report
4. 2010 Annual Plan TAG Recommendations
5. 6.2.20 ABK Public Records Request to Nicholls State University
6. 6.22.20 Nicholls Email Response to Records Request
7. 6.2.20 ABK Public Records Request to CPRA and TNC
8. 6.16.22 Response Letter from TNC attorneys re Record Request

9. Memorandum of Understanding between CPRA and TNC, May 20, 2020

**Exhibits Group 5** – Enforcement and Compliance Records, including:

1. MOA on Enforcement
2. Development on Corps Easement
  - ABFS Corps Easements Map
  - Bernhard, NWP 12 authorization
  - Bernhard, Structure 1
  - Bernhard, Structure 2
  - Bernhard, Easement
  - Bernhard, Bill of Sale
3. Bayou Bridge Pipeline
  - 2.20.18 Email D. Wilson to B. Guarisco, BBP violation
  - 3.5.18 Email S. Eustis to B. Guarisco, BBP violation
  - 5.9.18 Notice of Violations
  - 6.1.18 Supplemental Notice of Violations
  - 10.18.18 Email D. Wilson to B. Guarisco, BBP violations
  - 1.4.19 Third Notice of Violations
  - 8.23.19 Follow-up Letter Regarding Notices of Violations
  - 10.2.19 Post-Construction Notice of Violations
  - 10.7.19 Email D. Wilson to B. Guarisco, BBP violations
4. Enterprise Pipeline
  - 7.31.17 Email D. Wilson to B. Guarisco, Enterprise violations
  - 7.31.17 Email Reply B. Guarisco to D. Wilson, Enterprise violations
  - 9.29.17 Notice of Intent to File Suit, Enterprise
  - 11.27.17 Enterprise Response to NOIS
  - 1.9.18 Supplement to Notice of Intent to File Suit, Enterprise
  - 2.13.18 Enterprise Response to NOIS Supplement
  - Enterprise Plugs Emails to B. Guarisco, Jul. 18, 2017
5. Pat's Throat Bayou Dam
  - 10.17.21 Email and attached report, Illegal Dam at Pat's Throat Bayou
  - 11.24.21 Notice of Intent to File Suit, Pat's Throat Bayou Dam
  - 12.20.21 Schoeffler Notice to Land Claimants, Pat's Throat Bayou Dam
  - 1.18.22 Email D. Wilson to B. Guarisco, Pat's Throat Dam status inquiry
6. Coon Trap Failure
  - 1.5.21 Coon Trap, Imminent Failure Notice to CPRA
  - 1.26.21 Coon Trap, Request for Emergency Action
  - 10.25.21 Proposal for Permanent Closure of Coon Trap
  - Photos at Coon Trap, Jan. – March, 2021