

April 28, 2021

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*Sent by Fax and Email*

**Re: Request for Confirmation and Notice, East Grand Lake Project**

Dear Mr. Gauthier and Office of Counsel,

On behalf of Atchafalaya Basinkeeper (“Basinkeeper”), I respectfully submit this letter of confirmation and request regarding the Atchafalaya Basin Program’s East Grand Lake Project (prior permit application number MVN 2016-01163-CM) in the Atchafalaya Basin. This letter is prompted by information recently brought to Basinkeeper’s attention regarding the East Grand Lake Project (“EGL project”).

Last month, Basinkeeper’s Dean Wilson contacted Neil Gauthier, project manager, seeking clarification of the status of the East Grand Lake project. Mr. Gauthier responded that the permit application had been withdrawn. However, soon thereafter, the Coastal Restoration and Protection Authority (“CPRA”) made verbal representations to the Governor’s Advisory Commission and the Governor’s Task Force that project will commence soon. CPRA again confirmed to Basinkeeper that it intended to resubmit the project for permitting and to move forward with the project very soon.

Since the project was publicly noticed over three years past in March 2018, Basinkeeper has worked with experts to study the area and produce expert data and reports; and has met and worked with the agencies to discuss alternative efforts to restore and protect the East Grand Lake area. Since early 2018, there have been significant changes to the East Grand Lake Project area.

Today, Basinkeeper requests confirmation of the status of the EGL project application before the Corps. Additionally, Basinkeeper respectfully requests timely notification of resubmitted permit application(s), reissued or newly issued public notice(s), and individual agency action(s) with respect to the East Grand Lake Project.

### **Background**

On February 20, 2018, the Corps received an application from the Louisiana Department of Natural Resources (“LDNR”) Atchafalaya Basin Program for Corps’ permit authorizations (Clean Water Act Section 404 (33 U.S.C. § 1344), and Rivers and Harbors Act of 1899 Section

10 (33 U.S.C. § 403)) for proposed activities in the East Grand Lake area of the Atchafalaya Basin.

On March 19, 2018, the Corps published a Public Notice for the permit application and proposed activities in East Grand Lake (MVN 2016-01163-CM, WQC 180312-01).

On April 19, 2018, Atchafalaya Basinkeeper, Gulf Restoration Network (now Healthy Gulf), the Louisiana Crawfish Producers Association-West, and Sierra Club Delta Chapter submitted a timely comment letter and accompanying exhibits to the Corps regarding the proposed EGL project.

On March 31, 2021, after identifying the removal of the proposed EGL project from the Corps' individual permits page on the agency's website, Basinkeeper's Executive Director Dean Wilson contacted the Corps by email seeking clarification of the status of the proposed EGL Project. On April 1, 2021, the Corps responded by email confirming that the East Grand Lake "permit application has been withdrawn." [Email attached hereto].

It has since come to Basinkeeper's attention that the Atchafalaya Basin Program now under CPRA (the EGL project applicant) intends to resubmit the project to the Corps for permit approval, and that construction of the project will commence very soon. On April 13, 2021, at the CPRA Governor's Advisory Commission Zoom meeting, attended by Basinkeeper's Development Director, Bren Haase reported to the Commission that the East Grand Lake Project will be started soon. This information was then confirmed by a representative of CPRA during the Governor's Task Force meeting on April 15, 2021, at which Basinkeeper was in attendance.

Regulations governing the processing of Department of the Army ("DA") Permits (33 CFR Part 325) prescribe the contents of applications for individual DA permits<sup>1</sup>, as well as the processing of permit applications. In processing permit applications, "[t]he district engineer should not delay the processing of the application unless the applicant requests a reasonable delay . . . to provide additional information or comments." 33 CFR § 325.2(a)(3).<sup>2</sup> However, for reasons unknown, the Corps has delayed the processing of the previously proposed EGL project.

The regulations require the Corps to publish a public notice to advise all interested parties of the proposed activity for which a permit is sought, including "information necessary to evaluate the probable impact on the public interest" so that interested parties are provided "sufficient

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<sup>1</sup> See 33 CFR § 325.1(d), (e), requiring applications to include plans sufficient for public notice, descriptions of the type and quantity of material to be dredged, plans for mitigation, as well as additional information deemed essential "to make a public interest determination including, where applicable, a determination of compliance with the section 404(b)(1) guidelines" which "may include environmental data and information on alternate methods and sites as may be necessary for the preparation of the required environmental documentation."

<sup>2</sup> The regulations set deadlines for district engineer to process permit applications to ensure information supplied is up-to-date, timely and accurate. See, e.g., 33 CFR § 325.2(d)(3)(v), (vi) ("District engineers will decide on all applications not later than 60 days after receipt of a complete application unless . . . (v) The processing is suspended at the request of the applicant, or (vi) Information needed by the district engineer for a decision on the application cannot reasonably be obtained within the 60-day period."). Otherwise, outdated information relied upon to meet regulatory duties may impair the right of interested parties to accurately consider and comment on the potential impacts of the proposed activity on the public interest.

information to give a clear understanding of the nature and magnitude of the activity to generate meaningful comment.” 33 CFR § 325.3(a). Specifically, the notice should include “[a] plan and elevation drawing showing the general and specific site location and character of all proposed activities, including the size relationships of the [proposed activity] to the size of the impacted waterway and depth of the water in the area;” and “[a]ny 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.” *Id.* at § 325.3(a)(6), (13).

Since March 2018, significant changes have occurred in the East Grand Lake Project area. 2019, 2020 and 2021 have been significant flood years, causing substantial alterations to the hydrology of the East Grand Lake Management Unit area in the Atchafalaya Basin. The closure of Coon Trap by the Corps in November 2020 has resulted in the complete collapse of the Atchafalaya river bank next to the Coon Trap closure, allowing the Atchafalaya River to move huge amounts of water laden with sand and silt into the East Grand Lake Management Unit area, a serious source of hydrologic harm and alteration that still continues today. The East Grand Lake Management Unit area, its hydrology and circumstance, is significantly altered from that which was present three years ago when the Corps first published notice and opened comments for this project. In consideration of these changes, if the application is resubmitted for permit processing, the Corps must issue a new public notice with adequate updated information to reflect these changes and offer sufficient updated information to allow interested parties meaningful opportunity to evaluate the probable impact of the project on the public interest, and to bring new information to the Corps’ attention.

Since submitting our comment letter to the Corps in 2018, Dr. Ivor Van Heerden has conducted extensive research on hydrology in the Basin, including in the East Grand Lake Management Unit area specifically using data collected in the East Grand Lake Project area. Dr. van Heerden has produced several scientific reports, including a Turbidity Report, two scientific reviews of the Kong, et al. research thesis<sup>3</sup>, an assessment of data collected by The Nature Conservancy for LDNR and the EGL project, a review of comments to the EGL project<sup>4</sup>, and a report on the Buffalo Cove Project (a similar “water quality improvement” project in the Buffalo Cove Unit). Additionally, Basinkeeper and partners have met repeatedly with CPRA and the Atchafalaya Basin Program to discuss this project and project area. Upon request from the agencies, Basinkeeper and partners have also sent an alternative project proposal to the Atchafalaya Basin Program. Basinkeeper and members of the Atchafalaya Basin Coalition (Louisiana Crawfish Producers Association-West, Healthy Gulf, Sierra Club and Basinkeeper) also submitted comments on the ABP Annual Plan to the Atchafalaya Basin Program in 2019, 2020 and 2021, and analysis of the science produced by The Nature Conservancy to justify the EGL project. Basinkeeper also requested, by Freedom of Information Act Request in December 2020, the disclosure of public documents in the custody of the Corps which includes data related to other river diversion “water quality” projects, the Beau Bayou and Buffalo Cove Projects. As these projects are similar to the activities proposed in East Grand Lake, the data requested is relevant

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<sup>3</sup> 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.

<sup>4</sup> Dr. Ivor van Heerden, REVIEW OF THE COMMENTS OF OTHERS AS RELATED TO THE EGL PROJECT PROPOSED BY THE LOUISIANA DEPARTMENT OF NATURAL RESOURCES.

to assessing potential impacts of these activities and the introduction of river water into these areas, including in EGL, to the surrounding wetlands, lakes, bayous, and sloughs. The National Environmental Policy Act's ("NEPA") governing regulations require the Corps to "[m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures" and shall "[p]rovide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents so as to inform those persons and agencies who may be interested or affected" and "[e]xplain in its procedures where interested persons can get information or status reports on environmental impact statements and other elements of the NEPA process." 40 CFR § 1506.6(a), (b), (e). The law requires "[i]n all cases the agency shall mail notice to those who have requested it on an individual action." 40 CFR § 1506.6(b)(1). On behalf of its members, supporters, and partners, Basinkeeper has continuously expressed its interest in the East Grand Lake project to LDNR, the Corps and now CPRA. In accordance with applicable regulations, the Corps must endeavor to involve Basinkeeper, a known interested party, in its NEPA procedures, to provide notice of the availability of environmental documents, and to mail notice of an individual action relating to the East Grand Lake Project.

The law requires the District Engineer to "consider all comments received in response to the public notice in his subsequent actions on the permit application." 33 CFR § 325.2(a)(3). As noted above, the public notice for the EGL was originally published in March of 2018, more than three years ago. If the ABP, or any other EGL project applicant, submits another application for similar activities proposed in the East Grand Lake project area, in consideration of the time passed since the initial application and changes to the attendant circumstances (including, as noted *infra*, status on the ground, elevation, water flow in this area, new water and sediments input from the breach of the Atchafalaya river bank at Coon Trap, additional science and expert reports now available, and new proposed alternatives to the project), it should be processed as a new application and comply with the regular procedures of § 325.2, including issuance of a new public notice to allow for the consideration of these changes, as well as new data and scientific reports available today.

### **Basinkeeper's Request for Confirmation and Notice**

On behalf of Basinkeeper, I submit this letter requesting confirmation of the withdrawn East Grand Lake project permit application as well as the effect of withdrawal: that the withdrawal means the permit application is closed, and any subsequent related application would qualify as a new submission, requiring compliance with regular procedures prescribed by federal regulations (33 CFR Part 325), including public notice and comment. We hope that the Corps would agree that to approve the East Grand Lake project soon – after the application was withdrawn, and without publishing another public notice and providing an opportunity for comment – would be unacceptable and illegal. We likewise hope that the Corps would agree that, should the project applicant commence construction after having withdrawn its permit application, and without having submitted a new application for processing, that conduct would also be illegal and subject to Corps enforcement.

In consideration of the regulatory requirements governing the processing of DA permits, and public involvement in the preparation and implementation of the agency's NEPA procedures,

Basinkeeper requests timely notification of any subsequent permit application(s), public notice(s), and individual agency actions with respect to the East Grand Lake project.

In the event the Corps acts without publishing a subsequent notice or providing opportunity for comment, Basinkeeper hereby submits this written request, in accordance with 33 C.F.R § 325.2(a)(8) for a copy of the permit and all relevant environmental documents and statement of findings/record of decision for this permitted activity contemporaneous with the final agency decision.<sup>5</sup> If the Corps denies our request for notification of a final permitting decision directly to Basinkeeper by electronic mail, Basinkeeper alternatively requests to be included in the list of interested parties in this public notice (East Grand Lake project), published monthly and including permits issued in the previous month. 33 CFR § 325.2(a)(8). Basinkeeper requests that the Corps add Atchafalaya Basinkeeper, c/o Dean Wilson, to the New Orleans District's distribution list to receive public notices, and especially, any reinstated public notice for the East Grand Lake Project.<sup>6</sup>

Thank you for your time. We look forward to hearing more from your offices soon to better understand the status and effect of the East Grand Lake project's permit withdrawal.

Sincerely,



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Misha L. Mitchell  
La. Bar. No. 37506

On behalf of Atchafalaya Basinkeeper  
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Plaquemines, LA 70765  
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Cc: Dean Wilson, Atchafalaya Basinkeeper

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<sup>5</sup> Including the following: the statement of findings or record of decision, environmental assessment or environmental impact statement, including "the district engineer's views on the probable effect of the proposed work on the public interest including conformity with the guidelines published for the discharge of dredged or fill material into waters of the United States (40 CFR part 230)." 33 CFR §325.2(a)(6).

<sup>6</sup> 33 CFR 325.3(d)(1) requires public notices be sent to "concerned business and conservation organizations."

**From:** Neil.T.Gauthier@usace.army.mil,  
**To:** enapay3@aol.com,  
**Cc:** Steve.W.Roberts@usace.army.mil,  
**Subject:** RE: [Non-DoD Source] East Grand Lake Project  
**Date:** Thu, Apr 1, 2021 8:06 am

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Mr. Wilson,

That permit application has been withdrawn.

Thank you,

Neil T. Gauthier  
Environmental Resources Specialist  
Regulatory Branch  
CEMVN-ODR-C  
(504) 862-1301

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**From:** Basinkeeper <enapay3@aol.com>  
**Sent:** Wednesday, March 31, 2021 9:20 PM  
**To:** Gauthier, Neil T CIV USARMY CEMVN (USA) <Neil.T.Gauthier@usace.army.mil>;  
basinkeeperlegal@gmail.com; basinkeeper@gmail.com; jmeche44@hotmail.com; scott@healthygulf.org;  
hrmartin2sc@gmail.com; davidmstets@gmail.com  
**Cc:** Roberts, Steve W CIV USARMY CEMVN (USA) <Steve.W.Roberts@usace.army.mil>  
**Subject:** [Non-DoD Source] East Grand Lake Project

Dear Mr. Gauthier,

Could you please let us know what is the status of the East Grand Lake Project, MVN 2016-01163-CM?

Thank you,

Dean

Dean A. Wilson

Executive Director, Atchafalaya Basinkeeper

Phone: 225-692-4114

*What evil needs the most to succeed is for good men and women to do nothing.*

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