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Re: Comments on Behalf of Atchafalaya Basinkeeper, Healthy Gulf, Louisiana Crawfish Producers Association-West and Sierra Club Delta Chapter regarding the "*Proposed* Grand Lake Restoration in Iberia Parish" (MVN 2015-02209-WPP, WQC 160204-02)

Dear Mr. Duplantis and Ms. Hill,

This comment letter is submitted on behalf of Atchafalaya Basinkeeper, Healthy Gulf, the Louisiana Crawfish Producers Association -West and Sierra Club Delta Chapter regarding the November 2, 2020 Joint Public Notice issued by the U.S. Army Corps of Engineers ("the Corps") and the Louisiana Department of Environmental Quality ("LDEQ") for the " Initially *Proposed* Grand Lake Restoration in Iberia Parish" (MVN 2015-02209-WPP).

As discussed in substantially more detail herein, the unusual posture of this publicly noticed project, that has already been substantially complete but seeking reevaluation and potential modification, warrants robust discussion and consideration of the history of restoration proposals and activity in Grand Lake. Moreover, damaging impacts observable in the project area necessitate substantial evaluation of the purpose of the project, the remanded permit and its accompanying decision documents, the project's results and impacts, and the ultimate need for substantial modification and restoration of the project area.

Upon thorough evaluation of these comments and the permitted activity, the Corps should modify the remanded permit (and the accompanying Water Quality Certification should likewise be modified and conditioned to meet applicable water quality standards) to adequately address the damaging impacts caused by the permitted activity, and require the permittee (the Louisiana

Department of Natural Resources' ("the Applicant" or "DNR")) to restore the project area and surrounding wetlands impacted by the permitted activity.

Atchafalaya Basinkeeper is a non-profit organization comprised of over 1,500 members dedicated to protecting and restoring the ecosystems within the Atchafalaya Basin for future generations. **Healthy Gulf** is a diverse coalition of individual citizens and local, regional, and national organizations committed to uniting and empowering people to protect and restore the natural resources of the Gulf of Mexico. **Sierra Club Delta Chapter** 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. Atchafalaya Basinkeeper works to protect what remains of our Basin. Basinkeeper, the Louisiana Crawfish Producers Association-West, Healthy Gulf and Sierra Club Delta Chapter have been working tirelessly to protect and restore the Atchafalaya Basin since before 2004.

Atchafalaya Basinkeeper, Healthy Gulf, the Louisiana Crawfish Producers Association–West and Sierra Club Delta Chapter reserve the right to rely on all comments to this Public Notice submitted by any party.

I. SUMMARY

The Atchafalaya Basin is "a national treasure, a part of Louisiana's culture, and an educational, economic and recreational asset for the public." *See* Atchafalaya Basin Floodway System, Louisiana Project, State Master Plan, April 1998, at 6-1, *available at* http://www.dnr.louisiana.gov/assets/docs/Atchafalaya_Basin/StateMasterPlan.pdf (hereinafter, "State Master Plan"). The swamps of the Atchafalaya Basin are critical to protect coastal Louisiana from Mississippi River floods. The Basin's wetlands provide some of the most important habitat for neotropical migratory birds in the Western Hemisphere and for a vast array of fishes, mammals, amphibians and other wildlife. The Basin's productive wetlands provide fishing grounds for commercial and recreational fishermen, as well as serve important cultural significance to the surrounding communities.

Threats to the sustainability, longevity and health of the Basin and its ecosystems include hydrologic impairments, largely as a result of developer non-compliance and failures by our agencies to enforce laws and permit conditions in the Basin. However, the greatest threat is excessive sedimentation and the uneven distribution of sediments in the Basin causing rapid filling of irreplaceable swamps, lakes and bayous. In 2001, the USGS estimated that since 1932, there has been a net accretion of nearly *2.5 billion cubic meters* of sediment in the Basin, which has resulted in the conversion of open water and cypress-tupelo swamps into bottomland forests. *The Atchafalaya Basin – River of Trees,* USGS 2001, *available at*

http://www.dnr.louisiana.gov/assets/OCM/ABP/River_of_Trees_USGS_2001.pdf. (hereinafter "USGS 2001") (emphasis added). More than 70% of the Basin's swamps, lakes and bayous have already been lost as a result of human intervention and development. According to the State Master Plan, "[o]ne of the major problems facing the Corps is the rapid sedimentation – the Atchafalaya Basin Floodway System carries more than 57,000,000 cubic yards of sediment annually. Sediment deposits in the basin affect the carrying capacity of the floodway, fish and wildlife habitat, and regeneration of forests and other vegetation." *State Master Plan,* at 3-2.

The sediment threats in the Basin also impact the state of our coast, which is deprived of sediments. According to DNR, "[a]pproximately 21 percent of the total suspended load and 50 percent of sands in the Atchafalaya River are sequestered within the Atchafalaya Basin and do not reach the coast where they are needed. Ongoing rapid and detrimental sedimentation in the Atchafalaya River Basin (ARB) fills swamps and waterways, impairs water quality, and degrades habitats. Conversely, areas of the Louisiana coast outside the Atchafalaya Basin protection levees are experiencing erosion and subsidence and are in need of sediment sources for restoration projects."" *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.

The Atchafalaya Basin Program

In 1996, Governor Foster named the Department of Natural Resources, along with the Corps, to serve as the lead state agency in the development and protection of the Atchafalaya Basin. In 1998, the Louisiana Legislature created the Atchafalaya Basin Program and its advisory Research and Promotion Board, and unanimously approved the State Master Plan. The Atchafalaya Basin Program ("ABP") acts on behalf of the State to implement and manage the State Master Plan for the Basin. From 1999 to 2004, the focus of DNR's ABP was to improve recreational facilities in the Basin, but in 2005 the program began to focus more on water management, quality and access issues across the Basin. In 2008, to advance the transition of the Program to water resource management and access, the Legislature adopted HB 1135 (Act 606) creating the ABP annual plan process and the Technical Advisory Group ("TAG") to approve water management projects proposed by the ABP. With DNR serving as the lead agency for the development of the Annual Basin Plan, the ABP Research and Promotion Board, along with the TAG, work to identify and approve projects for the plan.

The mission of the State Master Plan is to "conserve, restore, and enhance (where possible) the natural habitat and give all people the opportunity to enjoy the Atchafalaya Experience." *State Master Plan*, at 1-1, 2-2. It was created to promote effective management of the Atchafalaya Basin with a vision for the future, one that reorients anthropocentric institutions "toward a stewardship approach" to the region. *Id.* at i. The State Master Plan envisioned an interagency relationship based on coordination and communication between DNR and the Corps "to an extent not previously experienced" as the primary agencies overseeing the management of the Basin. *Id.* at ii. The primary objectives outlined in the State Master Plan include public access, environmental concerns, water management and recreation; it acknowledged that "[t]o save the Basin, problems with water quality and sedimentation must be solved by working with the Corps of Engineers, Department of Wildlife and Fisheries, Louisiana State University, and others to monitor the results of water management features planned by the Corps with assistance from the State and

implemented by the Corps." *Id.* at 1-2.

The State Master Plan recognizes the limitations of development in the Basin, particularly in light of concerns regarding varying water levels, navigation, public access and sedimentation. *State Master Plan*, at 3-7, 3-8. Recognizing that the floodway system in the Basin must be capable of carrying 1,500,000 cubic feet per minute of diverted flow through the MR&T project, the State Master Plan emphasizes that developments "must be limited to facilities which do not affect the carrying capacity." *Id.* at 3-7. Likewise, it acknowledges that the "long-term use or enjoyment in many areas may be limited by build-up of sediments which may eliminate water access, and which changes the character of trees and vegetation." *Id.* at 3-8.

The Grand Lake Restoration Project – Parts I and II

Grand Lake contains some of the last remaining deep-water habitat in the Atchafalaya Basin. However, these deep-water habits began to disappear when a channel training breach at the Atchafalaya River in 2011 caused rapid sediment fill and the formation of a large sand bar and shoaling area in Grand Lake. In addition to filling in and degrading the deep-water habitat in Grand Lake, this sediment deposition presents a major navigational hazard to boaters as it extends across much of the lake's width.

Originally, DNR proposed to dredged the disposed sediment and shoaling areas filling Grand Lake, and to transport the dredged fill to be deposited in the Atchafalaya River. (Grand Lake Project Part I, "GLP I"). The original purpose of the project was described as intending to "to remove sediment accretion in Grand Lake" to "enhance/restore water quality and depth to Grand Lake for marine life refuge during times of low and/or hypoxic water conditions" and allow for the beneficial use of spoil generated from sediment removal "to augment natural delta-building processes on the Louisiana coast." *See* February 8, 2016 Public Notice. Initial application documents as well as the Corps' initial public notice emphasized the benefits of returning sediments to the river system in order to enhance the downstream coastal area that is suffering land loss.

However, after the Corps' Operations Divisions allegedly expressed concern regarding the disposal of dredged material into a federally maintained channel, in 2017 DNR proposed an alternative project in Grand Lake (Grand Lake Project Part II, "GLP II"), proposing a new deposit site for dredged fill from Grand Lake into an adjacent private pipeline canal. Despite the Corps failing to publish a subsequent public notice for the substantially modified Grand Lake Restoration proposal, LDEQ issued a water quality certification for a modified Grand Lake Project on June 10, 2016, and subsequently the Corps issued a DA permit (hereinafter, "the 2017 Permit") for the modified Grand Lake restoration project (GLP II) on September 29, 2017.

Unfortunately for all involved, the modified GLP II project and 2017 Permit has been neither successful nor beneficial. GLP II's failures and resulting harm soon came to be realized by persons including members and officers of the signatory organizations to these comments, resulting in subsequent legal action. The permitted activity has not only failed to restore depths at Grand Lake but has resulted in additional harms.

On April 3, 2020 Atchafalaya Basinkeeper, Louisiana Crawfish Association-West and Healthy Gulf filed suit against the Corps for failure to comply with the Clean Water Act, the Rivers and Harbors Act, and the National Environmental Policy Act with respect to the substantially modified, yet permitted, activity in Grand Lake. *Atchafalaya Basinkeeper, et al. v. USACE,* No. 2:20-cv-1106 (E.D. La. 2020). As a result of the litigation commenced by the undersigned organizations, which identified significant shortcomings in GLP II and the permitting process, the Corps agreed to a voluntary remand of the Grand Lake Permit and committed itself to a "reconsideration process [that will] include providing public notice and seeking comment regarding the dredging and filling authorized [[under the 2017 Permit]], the related obstructions authorized [[under the 2017 Permit]], and the need (if any) for corrective measures." *Atchafalaya Basinkeeper, et al. v. USACE*, No. 2:20-cv-1106 (E.D. La. 2020), citing *Memorandum in Support of Agreed Motion For Voluntary Remand of the Permit At Issue in This Case*, Dkt. No. 27-1 (Sept. 30, 2020), at 2. The Corps has thus voluntarily committed to seeking public comment that should have informed its original permitting decision, and that it will "use those comments to inform its reevaluation of the Permit under 33 C.F.R. § 325.7." *Id.* at 9. We propose that substantial corrective measures and modifications are now needed to restore the project area, and to rectify the harm that has ensued as a result of permitted activity.

The November 2, 2020 Public Notice provides that the purpose of the project "is to restore the lake to its previous bottom elevations by dredging the newly formed sand bar and shoaling areas in Grand Lake" and to use the spoil generated "beneficially to fill an adjacent private pipeline canal." (hereinafter, we reference the "*proposed* project" as described in the 2020 Public Notice, however we do note with emphasis that the "*proposed* project" is essentially synonymous with GLP II and activities permitted by the 2017 Permit). However, there is nothing in the notice to explain how or why the Corps' concluded that such placement of dredged fill into a previously open waterway is "beneficial." The total dredging volume will be approximately 200,000 cubic yards, and DNR proposed to transfer the dredged spoil to fill an adjacent private pipeline canal. An existing authorized rock berm and plug is located on the western end of the canal at the Atchafalaya River, and a newly constructed sediment trap and containment berms were proposed to be installed on the eastern end of the canal. Fill operations were proposed to be located and deposited in a manner that would avoid any disruption to the natural course and flow of Schwing Chute, a nearby wetland area, at its intersection with the pipeline canal, as can be viewed in the attached drawings. According to the Corps' Authorized – Modified Project Description, "Any excess sediment that exceeds the volume of the canal will remain in Grand Lake. The Technical Advisory Group and Research and Promotion Board of the Atchafalaya Basin Program (ABP) approved this dredging project for the Fiscal Year 2016 ABP Annual Plan and have identified it as a number one priority for the program. All approved dredging is within Grand Lake, avoiding impacts to vegetated wetlands, and creating approximately 6 acres of wetlands from beneficial placement of the dredge material into the adjacent pipeline canal." The Corps asserts that the permitted activity now subject to post-permit public notice provides for a "less environmentally damaging practicable alternative" in placing the dredged fill into a nearby private pipeline canal. However, these assertions are highly inaccurate, erroneous and ultimately damaging.

Under GLP I, the deposited sediment was originally proposed to be diverted from the Atchafalaya River via the canal breach, and therefore would not cause environmental damage to the same river it came from. However, under the permitted GLP II has allowed DNR to leave a significant section

of the shoal area in Grand Lake, while destroying a significant number of waterways and wetlands. Redepositing the dredge material into Section 10 navigable waters has decreased the Basin's flood carrying capacity and closed the door to future hydrologic restoration of the area as the pipeline canal cannot be backfilled with the spoil banks in the future to restore hydrology to pre-pipeline conditions. Depositing the dredge material into the pipeline canal has caused catastrophic damage to the hydrology of the area by permanently blocking several sloughs, Schwing Chute and Millie Chute. It has also affected navigation and public access, including access available to commercial and sport fishermen. Since the dredge material was deposited into the pipeline canal, it has leached into Schwing Chute, Millie Chute and the adjacent wetlands, destroying highly valuable aquatic areas. Placing the dredge material into the canal has destroyed the fisheries north and south of the canal. Yet again, it is glaringly unclear as to how deposit of the dredged fill into the pipeline canal is beneficial, with the exception of the benefit to Enterprise Pipeline, the owner of the pipeline buried in the adjacent pipeline canal selected for the deposit site and which whose pipeline was previously exposed and damaged.

It is a strange posture upon which we comment today because the Corps has posted this "new public notice [to] re-evaluate the final authorized modified project plans" yet the notice fails to acknowledge all present conditions in the project area. While the notice acknowledges that the work proposal in the public notice has already been performed (presumably pursuant to the 2017 Permit for which we were denied the opportunity to comment), it does not explain that this work has already caused significant damage to the area while not fulfilling the stated goal of removing the navigational and ecological hazard in Grand Lake. The notice fails to acknowledge that although the shoal was dredged, the poor project design has allowed for sediment to continue to enter the Lake and redevelop the shoal; that the sediment dredged from Grand Lake and deposited into the pipeline canal did not remain within the canal but moved into and clogged adjacent natural waterways; and it fails to include any discussion of mitigation or remediation of the ensuing impacts despite the irrefutable impacts to jurisdictional waters and wetlands.

So today, the 2017 Permit is remanded, and the Corps is required to conduct new review of the permitted activity and assessment of the project area. In so doing, the Corps must consider all of the factors and guidelines required under the law, as discussed herein, and it must also monitor and study the impacts that the permitted activity has already caused. Ultimately, it is incumbent upon the Corps and DNR to modify the permit to prevent sediment deposited back into the pipeline canal to continue to flow into Grand Lake, and into adjacent waterways and wetlands (particularly during periods of high water), and to reestablish deep-water habitat in Grand Lake.

We request that the Corps provide meaningful response to our comments, and substantial administrative reconsideration of the Grand Lake project, providing documentation of adequate analysis and evaluation of the permitted activity, its impacts, and alternatives/modifications to rectify the harm that has ensued and to fulfill the purpose of the Grand Lake Project.

I. DISCUSSION

In consideration of the project's purpose and permitted activity in Grand Lake and the resulting impacts, the Corps must now conduct a thorough environmental review and reevaluation of the Grand Lake Restoration Project. This review should result in a determination that the 2017 Permit

should be substantially modified to meet project goals and that restoration is necessary. 33 C.F.R. 325.7. The depth of the Corps' environmental review is considerable, particularly with respect to the role the Corps plays in sediment management, as indicated by the State Master Plan, and its responsibilities under the Clean Water Act. In addition to the Clean Water Act §§ 404 and 401 considerations, the Corps' environmental review must include evaluations made pursuant to navigation and Section 10 of the Rivers and Harbors Act. Likewise, in light of the robust role the State of Louisiana has undertaken in regard to the restoration, preservation and management of the Atchafalaya Basin and the coast, the Corps must also conduct its review with considerations made to the State Master Plan, the Coastal Protection and Restoration Authority's Master Plan for a Sustainable Coast, coastal management consistency review and statewide efforts to protect wetlands and the coast.

a. CLEAN WATER ACT COMPLIANCE

Congress enacted the Clean Water Act in 1972 with aims to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). In pursuit of this aim, the CWA prohibits the discharge of any pollutant, including dredged or other fill material, into the waters of the United States unless specifically authorized by a permit. *Id.* at § 1311(a). The Corps requires all discharges of dredged or fill material into waters of the U.S. to be authorized under a Section 404 permit, issued by the Corps, unless otherwise exempt by statute. *Id.* §§ 1344(a)-(e). The Corps issues individual section 404 permits after conducting an analysis and review of the proposed action, its impacts and public interest analysis, providing public notice and opportunity for hearing, and ultimately making a formal determination. 33 C.F.R. § 322.3; see also 33 C.F.R. §§ 323, 325.

When issuing permits pursuant to § 404 of the CWA, the Corps must comply with the § 404(b)(1) Guidelines of the Clean Water Act at 40 C.F.R. Part 230. These legally binding guidelines establish requirements that must be met prior to issuing a permit authorizing the discharge of dredge and fill material into waters of the U.S. Additionally, the Corps has its own regulations it must follow to avoid unnecessary destruction or alteration of waters of the U.S., including wetlands. *See* 33 C.F.R. § 320.4. Between the 404(b)(1) Guidelines and the Corps' regulations for evaluating permit applications, the Corps must conduct a thorough environmental review of the proposed activity prior to making a determination on the permit. As discussed herein, the Corps cannot authorize the activities proposed pursuant to the Grand Lake project because it fails to meet the § 404(b)(1) Guidelines' requirements as well as the Corps' regulations for evaluating permits. *See* 40 C.F.R. § 230.10; 33 C.F.R. § 320.4.

i. The *proposed* Grand Lake Project [GLP II and 2017 Permit] fails to satisfy the requirements of the Clean Water Act Section 404(b)(1) Guidelines.

The stated purpose of the Guidelines mirrors that of the Clean Water Act, "to restore and maintain the chemical, physical and biological integrity of waters of the United States through the control of discharges of dredged or fill material." 40 C.F.R. § 230.1(a). The Guidelines prohibit the discharge of dredged or fill material absent a showing that the discharge "will not have an unacceptable adverse impact either individually or in combination with known and/or probable impacts of other activities affecting the ecosystems of concern." *Id.* at (c). In viewing the

degradation or destruction of special aquatic sites to be among the most severe environmental impacts, the guiding principle behind these sections of the CWA is that "degradation and destruction of special sites may represent an irreversible loss of valuable aquatic resources." *Id.* at (d). Special aquatic sites include wetlands and are defined as "geographic areas . . . possessing special ecological characteristics of productivity, habitat, wildlife protection, or other important and easily disrupted ecological values." *Id.* at §§ 230.4(q-1); 230.41. This *proposed* project has ultimately resulted in the discharge of tons of fill material into navigable waters of the U.S., destroyed hydrologic connections, and filled waterways and some of the most productive swamps in the world, an irreversible loss of the special characteristics of productivity, habitat, wildlife protection and other important and easily disrupted ecological values of those wetlands.

Section 230.10 of the § 404(b)(1) Guidelines lists four requirements the Corps must find to issue a § 404 permit under the CWA. These requirements include (1) no practicable alternative, (2) no violation of other laws, (3) no significant degradation and (4) minimization of adverse impacts. 40 C.F.R. § 230.10. In conducting its environmental review of damage created by the modified Grand Lake project, the Corps must compare its factual determinations with the four discharge requirements listed above to make and document its Findings of Compliance before making a permit decision. 40 C.F.R. §§ 230.5(l); 230.10; 230.11; 230.12. The Grand Lake project permitted by the Corps, without an opportunity for public comments, meets none of these requirements. This after-the-fact public notice does not resolve any of these issues.

1. **The Corps should modify the 2017 Permit because there are practicable alternatives to the proposed discharge.**

In accordance with the Guidelines, in order to grant a permit, the Corps must determine that there is no "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 consequence." 40 C.F.R. § 230.10(a); *see also* 33 C.F.R. § 320.4. Under this requirement, "practicable alternatives" include, but are not limited to, activities that do not involve a discharge of dredged or fill material into U.S. waters or a discharge at other locations. *Id.* at (a)(1).

The Guidelines create a presumption that alternatives that are both practicable and less harmful to aquatic ecosystems and special aquatic sites exist. 40 C.F.R. § 230.10(a)(3). DNR's original proposal (GLP I) met this criterion. Depositing the dredged material into the Atchafalaya River, where it would be carried by the river to the coast, is practical, would beneficially remove sediment from the Basin system, and did not involve a discharge into a special aquatic site. GLP I was fully supported by the environmental community and the local communities. DNR itself noted in its original permit application that returning the sediment to the River has downstream benefits as well, allowing the sediment to serve where it is actually needed to restore coastal land loss. However, the 2017 permit transformed a beneficial project into a harmful one, and decidedly more reasonable alternatives exist.

As discussed in the Report on Senate Resolution 154, spoil banks have been acknowledged as one of the three main threats to water quality in the Basin. *See* Final Report, Senate Resolution No. 154 of the 2017 Regular Session, Jan. 2018, *available at*

http://www.dnr.louisiana.gov/assets/OCM/ABP/SR154.Study.Final.pdf (hereinafter "SCR 154 Report") (discussing Dr. Kelso's opinions regarding the three sources of water quality issues in the Basin, spoil banks, invasive species and flood pulse timing and management); *see also EGL application*, at 2, para. 19 ("Existing flow is restricted by spoil banks."). Addressing spoil banks and their contribution should be of the highest priority. In fact, Dan Kroes commented at the 2017 public hearing before LDEQ and the Corps in regard to the then-proposed, now permitted, Bayou Bridge pipeline expressing his concern with the spoil banks associated with the pipeline. Mr. Kroes specifically stated that, "[f]rom studies we've done, and remote sensing, we've noticed that this pipeline is an obstruction [to] flow against the flood plain on the east side of the river and the Buffalo Cove Water Management Unit and the Beaux Bayou Water Management System" …. Evidently, the existing spoil presents a significant obstacle to water quality and north-south flow, presenting a reasonable alternative to addressing water quality and sediment deposition issues in the area. Unfortunately, despite knowing the problem with spoil banks, the permitted activity has exacerbated the problem in the pipeline canal deposit site.

The 2017 permit simply authorized DNR to dredge up sediment from one place in Grand Lake and move it to an adjacent location still within the Basin – locking the sediment in the Basin and impacting even more waterways. The 2020 Public Notice ignores entirely the fact that the work was performed but the purposes of the permit failed – Grand Lake is refilling, and now other areas are as well. The pipeline canal has had thousands of yards of fill dumped into it, and this has already led to sediment flowing north and south of the canal to invade wetlands during high water periods, and filling into Schwing Chute and Millie Chute. This sediment came directly from the River; the reasonable and practicable alternative is to remove it from the Basin and return it to the River (where the sediment originated), rather than trying to move it around within the Basin. DNR thought this to be a reasonable solution, as this was the proposal set forth in the original (and publicly noticed) proposal for GLP I. Additionally, there may be other areas in the Basin that could safely accept the sediment dredged from Grand Lake. There is absolutely no consideration of any location other than the Enterprise pipeline canal, which we now know for certain is not a "beneficial" disposal site.

The 2020 public notice and supporting documents do not explain how, if DNR was to dredge the shoal, the shoal remains partially intact within Grand Lake. A reasonable alternative to the dredging portion of the permit should include consideration of removing all of the shoal in order to actually resolve the navigation hazard and fulfill the project purpose of restoring deep-water habitat in Grand Lake.

2. **The Corps should modify the 2017 permit because the project destroyed and degraded wildlife habitat.**

In accordance with the Guidelines, the Corps cannot permit a project if the project (1) "causes or contributes, after consideration of disposal site dilution and dispersion, to violations of any applicable state water quality standard," (2) "violates any applicable toxic effluent standard or prohibition," or (3) "jeopardizes the continued existence of species listed as endangered or threatened under the Endangered Species Act." 40 C.F.R. § 230.10(b)(1)-(3). The project's impacts to state water quality standards and effluent limitations are clear and undeniable.

Again, the Corps' 2020 public notice ignores the failure of this project to perform as intended. DNR (via the CPRA) has partially dredged the sandbar/shoal and filled the pipeline canal, to the extreme detriment of the wetlands to the north and south. Sediment has already moved from the canal into these wetlands, further damaging this delicate habitat. Sediment is also already moving into the Schwing Chute. We already know, through this firsthand experience, that placing sediment into the pipeline canal simply moves the sediment from Grand Lake into the adjacent wetlands.

3. **The Corps should modify the 2017 permit because the project as permitted has caused significant degradation.**

In accordance with the Guidelines, the Corps cannot permit a project that will "cause or contribute to significant degradation of the waters of the United States" based upon "appropriate factual determinations, evaluations, and tests." 40 C.F.R. §§ 230.10(c); 230.11. Contributors to degradation considered individually or collectively, pursuant to these Guidelines, include: adverse effects on wildlife and special aquatic sites; adverse effects on aquatic ecosystem diversity, productivity and stability, including loss of fish and wildlife habitat; or adverse effects on recreational, aesthetic and economic values. *Id.* at § 230.10(c)(1)-(4).

The impacts of GLP II and the 2017 Permit have been detrimental to the long-term health of the surrounding wetlands. The ultimate result has been the filling in of these areas directly south and north of the canal, filling in the interior swamps and waterways, blocking navigation and leaving a significant part of the shoal in Grand Lake. These developments have had catastrophic effects on the surrounding fisheries and wetlands. The Corps must modify the 2017 permit to allow for repair or remediation of the damage already caused.

4. **The Corps must take additional steps now to consider and minimize all adverse impacts caused by the permitted activity.**

Finally, in accordance with the Guidelines, the Corps must require "appropriate and practicable steps to minimize adverse impacts of the discharge on the aquatic ecosystem." 40 C.F.R. § 230.10(d). In order to evaluate whether DNR has taken "appropriate and practicable steps" to reduce adverse impacts to the Grand Lake area, the Corps should have fully considered all of the impacts of the project. This includes the short and long-term impacts as well as the direct, indirect and cumulative impacts.

The 404(b)(1) Guidelines provide examples of actions that can be employed to minimize adverse effects of discharges of dredged and fill material. 40 C.F.R. § 230.70-77. These actions may include managing the method of dispersion, using technology to employ appropriate maintenance on site, avoiding sites with unique habitat or other value, using planning and construction practices to restore and develop habitat or perform regular maintenance in areas that support fish and wildlife recreation and human use. *Id.* at § 230.73-76. Other water management projects have included projections of the need for regularly scheduled maintenance and monitoring, anticipating annual inspections, period maintenance of sediment traps, clearing of debris from cuts and maintaining elevations based upon the post-construction results of the project. At a minimum, long-term maintenance must be provided.

However, DNR did not have the capacity, funding or intent to install sediment control measures or undertake long-term maintenance. Ultimately, the permitted activity resulted in a significant ecological modification to the aquatic environment that should have been anticipated by this project ("the permitting authority should consider the ecosystem that will be lost as well as the environmental benefits of the new system." 40 C.F.R § 230.77(d)). Because the ultimate result will continue to degrade the area's irreplaceable wetlands beyond repair, the Corps should never have permitted this project. However, these agencies must now take responsibility to ameliorate (to the extent possible) the harm that has ensued, and to fulfill the purpose of the project to restore Grand Lake.

A good example of the effects of lack of maintenance for this project is what is happening with the Atchafalaya River, which has carved a new channel next to and south of the dam, causing river water to continue to flow from the Atchafalaya River through the canal, carrying more river sand, in addition to the sand that was deposited into the canal, all the way back into Grand Lake. The shoal area is growing again making the project a failure. Yet, it seems that DNR and the Corps are now ignoring the proof already in the lake that this project did not work as proposed. This is the precise information that should have been considered when the permit was first approved, but because of the failure to issue public notice, there was no opportunity to do so. Nonetheless, given the evidence at hand from the redevelopment of the shoal area following DNR's attempts to address the problem, the Corps now has access to the information that it now obligated to review. Despite the ongoing harms, the Corps must reconsider the entire project in light of these impacts and modify the permit to authorize best practices for remediating and restoring the effected areas.

a. **Although the Corps failed to consider all impacts of the project prior to the 2017 permit, it must now conduct a thorough evaluation of all impacts of the *proposed* project.**

The Guidelines require the Corps to determine the potential short and long-term effects of the proposed activity to make a finding of compliance or non-compliance with the articulated "restrictions on discharge." 40 C.F.R. § 230.11. The National Environmental Policy Act also requires consideration of cumulative, secondary and indirect impacts in considering mitigation options. 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).

Based on the information (and lack thereof) provided in the 2020 public notice, it does not appear that the Corps, LDEQ or DNR have fully weighed the costs and benefits relevant to the Grand Lake project as it seems the *proposed* project is identical to the 2017 permit and GLP II, without adequate and necessary consideration of impacts and restorative needs. Direct, indirect, secondary, and cumulative impacts of the proposed wetland dredge and fill project were completely overlooked. Nonetheless, the Corps now has some evidence of the direct, indirect, secondary and cumulative impacts of the 2017 permit and GLP II dredge and fill activities, but it should endeavor to continue to monitor the area and gather evidence of impacts, to assess foreseeable impacts, and ultimately modify the 2017 permit to ensure minimal impacts, to mitigate existing and anticipated wetland modifications, and to remediate the harms that have already ensued. r

1. **Direct Impacts**

The 2017 permit and GLP II project construction directly impacted all the sloughs that crossed the Enterprise pipeline canal. DNR used logs to go over the sloughs with their machinery and they completely and permanently closed those sloughs with the sand. The sand from the shoal filled navigable waters of the U.S. adjacent to the pipeline canal, decreasing the Basin's flood capacity and flood water flows. All direct impacts must now be considered and addressed under a modified permit.

2. **Indirect Impacts**

The Guidelines also require the Corps to consider the secondary effects associated with the proposed activity prior to issuing a permit decision. 40 C.F.R. § 230.11(h)(1). Secondary effects include "effects on an aquatic ecosystem that are associated with a discharge of dredged or fill materials, but do not result from the actual placement of the dredged or fill material." *Id.* The Code of Federal Regulations recognizes the significance of secondary impacts from wetland destruction by emphasizing that "minor loss of wetland acreage may result in major losses through secondary impacts." 40 C.F.R. §230.41.

Since no sediment control measures were implemented in GLP II permitted activities, the sand being pumped from the shoal infiltrated all of the sloughs, Millie Chute and Schwing Chute, filling the surrounding wetlands as well as both Chutes, resulting in major, irreversible losses throughout the area. The filled pipeline canal itself failed to maintain integrity despite DNR's efforts, and water from the Atchafalaya River continues to enter the canal and flow into Grand Lake, rebuilding the shoal area in the Lake. All indirect impacts must now be considered and addressed under a modified permit.

3. **Cumulative Impacts**

The Guidelines also require the Corps to "predict[] to the extent reasonable and practical," collect and solicit information, and consider during the decision-making process the cumulative effects attributable to the discharge activity. 40 C.F.R. § 230.11(g)(2).[1] The Corps must analyze and address the cumulative impacts of this project. 40 C.F.R. § 1508.25(c)(3). This includes addressing impacts of past, present and reasonably foreseeable future actions, also such impacts that may be the result of minor but "collectively significant actions taking place over a period of time." 40 C.F.R. § 1508.7.

DNR has acknowledged and accepted that the changes in hydrology in the Basin are significant and warrant consideration in determining how best to manage, preserve and restore the Basin's ecosystems. The long-term effect of the 2017 permit and GLP permitted activities have resulted in exacerbated sedimentation in the project area and more filling in of the interior swamps. DNR never developed or implemented a monitoring and maintenance plan. This lack of monitoring and maintenance has resulted in river water creating a new channel around the southern end of the dam, back into the pipeline canal, moving both new river sand and the dredged sand from the pipeline back into the lake. The shoal is rapidly growing, and Schwing Chute, Millie Chute and

[1] Cumulative impacts are defined as "the changes in an aquatic ecosystem that are attributable to the collective effect of a number of individual discharges of dredged or fill material." 40 C.F.R. § 230.11(g)(1).

adjacent wetlands are filling even more as this goes on.

Part of this cumulative and secondary impacts analysis must include an assessment of the unpermitted fill and conversion of wetlands resulting from existing pipeline infrastructure in the area. These impacts are ongoing, are not restricted to the past, and any meaningful preservation of this area must consider and adequately address these sources of harm to the area. The detrimental effects of spoil banks in the Basin are well documented and current sediment deposition trends should have been assessed and addressed before the Corps permitted this project. Not only those impacts were not addressed but the 2017 permit created a huge spoil bank/dam blocking all north to south water flows and closing the door on true hydrological restoration, as the spoil banks cannot be used to backfill the canal. All cumulative impacts must now be considered and addressed under a modified permit.

ii. **The *proposed* Grand Lake Project [GLP II and 2017 Permit] fails to comply with Corps regulations.**

The Corps' regulations also provide general policies the Corps must apply in its review of all permit applications. 33 C.F.R. § 320. These regulations include mitigating for unavoidable harms and weighing public interest factors prior to authorizing the activity. If the Corps had previously adequately considered these factors in accordance with its regulations prior to issuing the 2017 permit, it could not have authorized the dredge and fill activities proposed in GLP II, especially if the Corps had requested public comments as required by law.

1. **The lack of proposed mitigation for the *proposed* project fails to account for existing and anticipated wetlands losses.**

The Guidelines require minimization of potential adverse impacts, but not mitigation explicitly. *See* 40 C.F.R. §230.10(d). The Corps regulations require the agency to include "appropriate and practicable" compensatory mitigation conditions in Section 404 permits for unavoidable impacts as a result of the permitted activity. *See* 40 C.F.R. § 230.91; *see also* 33 C.F.R. §§ 320.4(r), 332.1 (mitigation is required to ensure compliance with the 404(b)(1) Guidelines).

The *proposed* projects includes no compensatory mitigation proposals despite the significant direct, indirect and cumulative adverse impacts of this project to irreplaceable swamps and waterways. As we have identified, the 2017 permit and GLP II permitted activity have already caused substantial modifications to adjacent jurisdictional waterways and wetlands, these existing adverse changes, and any foreseeable modifications, must be mitigated.

Compensatory mitigation is defined as "the restoration (re-establishment or rehabilitation), establishment (creation), enhancement, and/or in certain circumstances preservation of aquatic resources for the purposes of offsetting unavoidable adverse impacts which remain after all appropriate and practicable avoidance and minimization has been achieved." 33 C.F.R. § 332.2. Compensatory mitigation is intended to compensate for the aquatic resources that will be lost due to the permitted activity. *Id.* at § 332.3(a)(1). Although the permit applicant is responsible for proposing appropriate compensatory mitigation for the proposed activity, the mitigation requirements must be commensurate with the amount and type of impact associated with the

permit. *Id.* Generally, the method of restoration should be considered first due to the "potential gains in terms of aquatic resource functions" when compared to enhancement and preservation. *Id.* at 332.3(a)(2). With these parameters in mind, the Corps should have considered the anticipated conversion of wetlands in the Grand Lake area to require restoration mitigation measures before issuing the 2017 permit. Given the known impacts that this project has had on the area, the permit should be modified to include required compensatory mitigation. We invite the agencies to work with stakeholders, including the undersigned organizations, to explore unique, innovative and beneficial on-site and/or in-Basin mitigation plans with respect to this modified permit.

The Corps must review the proposed project for compliance with the § 404(b)(1) Guidelines to determine whether it can issue a permit considering the lack of appropriate and practicable compensatory mitigation. Considering the totality of impacts that have already and may continue to result from the Grand Lake project (even with beneficial modification), the failure to require any mitigation to compensate for the anticipated environmental harms of the project is justification alone to deny the permit under NEPA and the CWA. The Corps must, at a minimum, require some degree of compensatory mitigation to offset the unavoidable conversion of wetlands that have and will result. In consideration of the project's impacts and the lack of compensatory mitigation proposed, the Corps must modify or deny the permit.

2. **The public interest is best served by modifying the 2017 permit under the CWA § 404.**

Pursuant its own regulations, and in compliance with § 404(b)(1) Guidelines and § 10 of the Rivers and Harbors Act, the Corps must conduct a public interest review weighing the adverse impacts against the potential benefits of the proposed project. 33 C.F.R. 320.4(a). This review considers the specific facts of the potential permit and the individual and cumulative impacts of the proposed action. *Id*. If this balancing indicates that the project is not in the public interest the Corps cannot issue the permit. *Id.*; 33 C.F.R. § 320.4(b)(4). Additionally, the Corps' public interest review is informed by the evaluation of the proposed project under the aforementioned Section 404(b)(1) Guidelines. 33 C.F.R. § 320.4(a)(1) ("For activities involving 404 discharges, a permit will be denied if the discharge that would be authorized by such a permit would not comply with the Environmental Protection Agency's 404(b)(1) guidelines.").

Based on all the facts related to this permit DNR fails to overcome the burden created by the § 404(b)(1) Guidelines, which requires a clear showing that there are no practicable alternatives with less adverse impacts to wetlands. 33 C.F.R § 230.10. Additionally, the permitted project resulted in significant degradation of the surrounding wetlands and wildlife habitat. Because the permitted activity does not comply with the Guidelines' requirements it must likewise be modified under the Corps' public interest review. 33 C.F.R. § 320.4(a)(1); *see also* 33 C.F.R. § 320.4(b)(4) ("In evaluating whether a particular discharge activity should be permitted, the district engineer shall apply the Section 404(b)(1) guidelines (40 C.F.R. § 230.10(a)(1),(2),(3)).").

In addition to the 404(b)(1) Guidelines and other applicable criteria, the Corps must deny a permit if the district engineer determines that it would be contrary to the public interest. *Id.* The Corps must consider all factors which may be relevant to the proposed project, including the cumulative effects thereof. 33 C.F.R. § 320.4(a)(1). These factors include, but are not limited to, conservation,

economics, aesthetics, general environmental concerns, wetlands, fish and wildlife values, flood hazards, floodplain values, navigation, accretion, recreation, water quality and safety. *Id.*

For the reasons and facts outlined in these comments, and in addition to other applicable public interest factors, the 2017 permit and GLP II permitted activity is contrary to the public interest and the Corps should modify the current project proposal to promote restoration and remediation in the project area, in consideration and after thorough and complete administrative reevaluation of the project and its impacts.

a. **The *proposed* Grand Lake Project [GLP II and 2017 Permit] has and will continue to negatively impact valuable wetlands.**

The Corps' regulations describe the significant, productive and valuable public resource wetlands provide. 33 C.F.R. 320.4(b)(1). In addition to the critical biological and habitat functions wetlands provide, the regulations acknowledge the impact that alternations to wetlands can have on natural drainage and sedimentation patterns. *Id.* at (b)(2)(ii), (iii). The permitted activity in Grand Lake has had detrimental effects on the surrounding wetlands and sedimentation distribution patterns in particular. Not only are the wetlands of the Atchafalaya Basin unique, scarce and nationally renowned, they protect millions of people from river floods, provide habitat for a myriad of wildlife and aquatic birds, support commercial fishing of cultural importance to the unique Cajun fishing communities in the area and protect from severe weather events. *See id.* at (2)(i)-(viii). It is indisputable that the wetlands of the Atchafalaya Basin are of particular public interest, importance and significance. Alterations to this invaluable ecosystem, even in the name of "preservation," must be scrutinized thoroughly.

Congress, the Corps and EPA have clearly identified the detriments of dredge and fill projects like the project permitted here. By devoting an entire permitting program under the Clean Water Act to the disposition of dredge and fill material, Congress signaled its clear recognition that dredge and fill activities may be harmful to the environment and should be conducted with caution. *See* 33 U.S.C. § 1344. Moreover, including this permitting program in the Clean Water Act, the stated goal for which is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," shows that Congress considered the disposed dredge and fill material to be an impairment to our waters. 33 U.S.C. § 1251. This is especially important when the waters at issue include wetlands. As the Corps' 404 permitting regulations explain, "most wetlands constitute a productive and valuable public resource, the unnecessary alterations or destruction of which should be discouraged as *contrary to the public interest*." 33 C.F.R. §320.4(b)(1) (emphasis added). The Corps' regulations further state that wetlands provide important "biological functions" including general habitat for wildlife, as well as nesting and spawning grounds. *Id*. The applicability of these functions to the Atchafalaya Basin cannot be controverted. *See, e.g.,* 16 U.S.C. §§1451-53 (declaring a national policy to "to preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation's coastal zone for this and succeeding generations" and defining coastal zone to include coastal wetlands).

EPA regulations describe many values that could be lost as a result of the discharge of dredged or fill material in wetlands, including a likelihood "to damage or destroy habitat and adversely affect the biological productivity of wetland ecosystems." 40 C.F.R. § 230.41(b); *see also* 40 C.F.R. §

230.41(b) ("Discharges can also change the wetland habitat value for fish and wildlife."). But while Congress, the Corps and EPA have clearly identified the public interest in preserving wetlands and forbidding the destructive effect of discharged dredge and fill material, DNR has not clearly identified all potential benefits and detriments to the public interest in pursuing the *proposed* project, GLP II.

The Corps' regulations provide that, despite the relatively minor change that may result from a particular alteration of a wetland, the Corps must evaluate the cumulative effect numerous minor changes can have on a complete and interrelated wetland area. 33 C.F.R. § 320.4(b)(3). The Corps is authorized to consult with DNR, the appropriate state agency, to assess the cumulative impact of activities in the Grand Lake area. As previously noted, the cumulative impact that this project had on the surrounding wetlands is significant and irreversible. With respect to its adverse effect on the Basin's wetlands, the Grand Lake project modified (GLP II) as it was at the request of the Corps was clearly contrary to the public interest.

b. **The *proposed* Grand Lake Project [GLP II and 2017 Permit] has impaired the Basin's capacity to contain floodwaters.**

The value of floodplains in mitigating flood damage and protecting from storm surges requires close consideration of adverse impacts and a heightened scrutiny for permitting that could impact the functionality of the floodplain. 33 C.F.R. § 320.4(l). It is imperative that the Corps consider the cumulative effects this and other activities in the area will have on the values and functions of the floodplain, and the increased potential for harm to upstream and downstream activities. *Id.* at (l)(2).

Development in a floodplain must comply with Executive Order 11988, Floodplain Management. 33 C.F.R. § 320.4(l)(3). The EO requires agencies to consider alternatives "to avoid adverse effects and incompatible development in the floodplains." EO 11988, Sec. (2)(a)(2).

The Atchafalaya River is the largest distributary of the Mississippi River. Flood protection improvements, constructed primarily under the Mississippi River and Tributaries (MR&T) project, are critically important to the lower Mississippi River area. *State Master Plan*, at 3-4. The MR&T project distributes half of the 3,000,000 cubic feet per second of design project flood at Old River down the Mississippi River and the other half into the Atchafalaya Basin Floodway. *Id.* The levee system along the banks of the Mississippi River protect densely populated areas from New Orleans to less populated communities below the Morganza Floodway. *Id.* Meanwhile, the flood protection in the Basin, including levees, control structures, locks and floodwalls, protects surrounding communities, farms and industries that have developed in areas adjacent to the floodway. *Id.*

In 2016, nearly every Parish in the state was flooded by enormous rains from an overheated Gulf of Mexico. In the aftermath of the Gulf Flood of August of 2016, twenty parishes were declared disaster areas, thirteen people perished, and 122,000 people filed for assistance with FEMA. Julia O'Donoghue, *Louisiana Flood: 8 things you need to know about the aftermath,* NOLA.com, The Times Picayune, Aug. 25, 2016, *available at* http://www.nola.com/politics/index.ssf/2016/08/louisiana_flood_public_safety.html. Filling valuable wetlands impairs the capacity of the basin spillway to contain floodwaters and protect

surrounding communities. These wetlands and waters will only become more crucial for flood attenuation as climate change accelerates, and large rains become more frequent and intense. Van der Wiel, et al. *Rapid attribution of the August 2016 flood-inducing extreme precipitation in south Louisiana to climate change*, Hydrol. Earth Syst. Sci. Discuss., 2016, *available at* https://www.hydrol-earth-syst-sci.net/21/897/2017/hess-2016-448.pdf.

The Atchafalaya Basin is critically important for flood control. Between 1932 and 2001, there has been a net accretion of nearly 2.5 billion cubic meters of sediment in the Basin floodway, converting a substantial amount of open water and cypress swamps to bottomland hardwood forests. *See* USGS 2001. The ability of the Atchafalaya Basin to move flood waters is severely diminished due to this trend of accelerated accretion. During the 2016 flood, Grand River at Bayou Sorrel crested at 10.39' on August 17, 2016, while across the levee inside the floodway it crested at only 7.1' on August 14, 2016 (levels are fluctuating as the Mississippi River rises). The Atchafalaya Spillway is critical to protect countless cities and communities along the Mississippi River Delta, including the cities of Baton Rouge, New Orleans, Lafayette, Morgan City and the entire industrial corridor along the Mississippi River. As the Basin fills with sediments, it loses its capacity to protect these communities from Mississippi River floods.

Projects including the *proposed* project and permitted activity in Grand Lake with long-term impacts that accelerate the accretionary process have contributed significantly to the impairment of the Basin's spillway functionality. Likewise, the impact of GLP II on the Basin's capacity to manage floodwaters is contrary to EO 11988 and the public interest. In the interests of public safety and floodplain management, the Corps should modify the project to better manage sediment disposal in the Basin.

c. **The *proposed* Grand Lake Project [GLP II and 2017 Permit] impaired water quality.**

The Corps' regulations require evaluation of the proposed activity's compliance with applicable effluent limitations and water quality standards during and after construction of the proposed activity. 33 C.F.R. § 320.4(d). Similarly, the EPA Guidelines prohibit dredging or discharging fill material if that dredging or discharging should violate "any applicable State water quality standard." 40 C.F.R. § 230.10(b)(1).

Section 401 of the Clean Water Act requires DNR to obtain certification from the Louisiana Department of Environmental Quality for the proposed project which will result in a discharge of dredge and fill material into waters of the U.S. 33 U.S.C. § 1341.

Article IX, Section 1 of the Louisiana Constitution 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." When issuing permits, LDEQ must satisfy its constitutional mandate as a "public trustee" pursuant to Article IX, Section 1. *See Save Ourselves v. La. Envtl. Control Comm'n,* 452 So. 2d 1152, 1157 (La. 1984). Prior to issuing a final permit, state agencies must determine "that adverse environmental impacts have been minimized or avoided as much as possible consistently with the public welfare." *Id.* LDEQ must conduct an individualized

consideration of the proposed project, balancing environmental factors in good faith *before* reaching a permitting decision. LDEQ, CPRA and the Corps must review the application and all comments and determine how the 2017 permit can be modified so it will not violate State Water Quality Standards and a new water quality certification to DNR for the modified project should be issued with conditions to ensure its compliance. *See* LAC 33:IX.1507.F.3.

i. **The *proposed* Grand Lake Project [GLP II and 2017 Permit] does not meet Louisiana Water Quality Standards.**

The Surface Water Quality Standards are intended to serve the objectives of the CWA and to preserve and protect Louisiana's aquatic ecosystems. LAC 33:IX.1101.A. The Antidegradation Policy requires the maintenance of waters that support "an unusual abundance and diversity of fish and wildlife resources" to be maintained at their existing high quality. *Id.* at § 1109.A.1. It ensures that new discharges will not exceed specified standards and that designated uses will not be adversely impacted. *Id.* at 1119.C. Additionally, the waters of the state must be "protected for recreational uses and for the preservation and propagation of desirable species of aquatic biota and indigenous species of wildlife." *Id.* at § 1109.B.1. Wetlands are held to a particular degree of importance and are seen as a valuable resource to the state, including commercial, recreational and cultural uses. *Id.* at § 1109.J.1. Louisiana wetlands serve many important functions, including "biological and physiochemical functions that include . . . buffering against hurricanes and storms, holding excess floodwaters during high rainfall or high tides, . . . and improving water quality by filtering pollutants and taking up nutrients." *Id.* The general, numerical and biological criteria applicable to wetlands can be found at LAC 33:IX.1113.B, C.

Applicants seeking a state water quality certification are required to submit an application to LDEQ's Department of Environmental Quality. LAC 33:IX.1507.A. The information contained in the application must include, among other things, "the nature of the activity to be conducted by the applicant, including estimates of volume of excavation for dredge and fill activities;" "the location of the discharge"; "the nature of the receiving water, including type (creek, river, swamp, canal, lake or pond), nature (fresh, brackish or salt), and direction or flow;" "the type of discharge"; "and the location of discharges into receiving waters." *Id.* at (A)(1)(a)-(n). Upon completion of the review process by LDEQ, the Applicant shall publish the notice "in each parish in which the activity is to be conducted" and allow for a 10-day comment period. *Id.* at (D). The notice shall include, among other details, the activity proposed in the application along with the nature and location of the activity. *Id.* at (D)(1)(c). LDEQ cannot certify a project without first identifying applicable water quality standards and water use designations of the various streams and open waters and assessing how the project will impact those standards.

The project's impact on applicable criteria includes impacts on sedimentation rates and distribution patterns, which can affect the floating, suspended or settleable solids contained in the waters (1113.B.3), turbidity (1113.B.9) and the biological and aquatic community integrity of the waters (1113.B.12). The numerical criteria of concern in relation to the Grand Lake Project should include, but are not limited to, dissolved oxygen values (1113.C.3.). Most concerning is the project's impact to the area's designated uses, which include primary contact recreation, secondary contact recreation, fish and wildlife propagation and drinking water supply. LAC 33:IX.1123.D. With respect to the accretion that resulted from this project, these uses cannot possibly be

maintained or preserved. While LDEQ must ensure the affected waterbodies maintain their recreational uses and support the preservation and propagation of desirable species of aquatic biota and indigenous species of wildlife, the project's application and lack of public notice fail to address these functions or the impacts this project with have thereon. LAC 33:IX.1109.B

The pipeline covered by sand from the shoal is damaged and its integrity is compromised. Additionally, because of the failed dike along the River/canal border, the water from the Atchafalaya River flowed through the canal with a very strong current eroding the dirt covering the pipeline, causing the pipeline below to become exposed. As boats traveling through the pipeline damaged the pipeline with their propellers, Enterprise had to come out to replace the damaged sections of the pipeline. At that time, Enterprise tried to fix the dike using small rocks and sand. The new weak dike failed again, exposing the pipeline again. Boats traveling through the pipeline further damaged the pipeline and the damaged and compromised pipeline was buried by the sand dumped into the pipeline when DNR dredged the lake rather than undergo repair or replacement.[2] The damaged pipeline can leak at any time contaminating the sand, water and aquifer.

In addition, as the Basin's wetlands fill with sediments and become uplands, their ability to absorb river nutrients and pollutants is forever lost and, in the long term, impact the state's ability to manage the dead zone in the Gulf. Considering that the long-term effects of GLP II and activity authorized under the 2017 permit will transform the hydrology of the area through exacerbated and accelerated sedimentation, LDEQ cannot find that the *proposed* project and the 2017 Permit comply with applicable water quality standards and effluent limitations. The permitted GLP II was incompatible with sustainable water quality improvements and contrary to the interests of the commercial fishing communities that rely on the fisheries, and the public at large. In light of the significant opposition presented to the permitted modified project, the important economic and environmental issues involved, and the material matters at issue in the certification of this project, including but not limited to the cumulative impacts on water quality posed by the project and the damaged pipeline, we request that LDEQ revoke the water quality certification for the permitted Grand Lake Project.

d. **The *proposed* Grand Lake Project [GLP II and 2017 Permit] has impaired Fisheries and Wildlife Habitat.**

Part of the public interest analysis includes coordination with agencies responsible for fish and wildlife resources, with a focus on conservation by prevention of direct and indirect loss and damage to wildlife resources as a result of the proposed activity. 33 C.F.R. § 320.4(c); *see also id.* at § 320.3(e), the Fish and Wildlife Coordination Act. Similarly, the Clean Water Act Guidelines consider the impacts and potential loss of value in recreational and commercial fisheries due to the discharge of dredged and fill materials. 40 C.F.R. § 230.51.

The Corps disserved the interests of the public, the state and the entire nation by granting a permit without public comments that resulted in the filling in of irreplaceable wetlands. The public interest favors protection of these fisheries and invaluable wildlife habitat for generations to come. The

[2] Ronnie Dimm (225-210-8631) was the Enterprise pipeline person in charge when the dredging took place in 2018.

Corps should now modify the *proposed* project in Grand Lake to include restoration to the wetlands and waterways affected by the permit. In addition, the shoal in Grand Lake is a hazard to navigation and decreases the fishing habitat in the Lake. Given that the shoal has redeveloped after the first attempt to dredge it, there is no evidence that this impact on fisheries and wildlife can be mitigated barring modification of the 2017 permit to include restoration of impacted areas.

3. **The *proposed* Grand Lake Project [GLP II and 2017 Permit] has and will continue to result in harms that substantially outweighed its purported benefits.**

In addition to the aforementioned factors the Corps must consider in making a public interest determination regarding the Grand Lake Project, the regulations also provide general criteria that must be considered in every application evaluation. 33 C.F.R. § 320.4(a)(2)(i) – (iii). These general criteria include public and private need for the project, the practicability of using reasonable alternative methods or locations to accomplish the project's objective and the extent and permanence of the beneficial and/or detrimental impacts the project will have on the area. *Id.*

The project's application failed to meet the public interest balancing inquiry as required by 33 C.F.R. § 320.4(a)(1). There is no inclusion of the scientific basis used to support existing *proposed* project, GLP II and 2017 permit as written.

In accordance with the regulations, the Corps cannot permit conduct impacting valuable wetlands in the Atchafalaya Basin without expressly finding that benefits of the project will outweigh the damage to the wetlands resource. 33 C.F.R. § 320.4(b)(4). The purported benefits of short-term water quality improvement do not outweigh the significant detriments that resulted from the GLP II and 2017 permit, especially when the lack of a monitoring and maintenance plan resulted in a lateral breach of the dam that resulted in more sand from the river and the pipeline returning to Grand Lake and the shoal growing again, and so much damage to wetlands and waterways took place. The Corps should not have granted this permit under its own regulations, the 404(b)(1) Guidelines, the goals of the ABP, the Coastal Master Plan and the State Master Plan for the Atchafalaya Basin Floodway System. Now, the Corps should modify the 2017 permit in consideration of the public interest.

b. THE NATIONAL ENVIRONMENTAL POLICY ACT

The National Environmental Policy Act ("NEPA") provides "our basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). It assures that environmental protection is considered in every federal agency action. 42 U.S.C. § 4332(1). NEPA requires agencies to disclose all potentially adverse environmental impacts of its decisions prior to determining whether to proceed. 42 U.S.C. § 4332(C). NEPA also mandates that agencies utilize high quality, accurate scientific information and requires scientific integrity of the analysis. 40 C.F.R. §§ 1500.1(b), 1502.24. Here, the Corps must conduct an "independent evaluation" of the information submitted by DNR, to ensure its accuracy and reliability. 40 C.F.R. § 1506.5.

NEPA requires the Corps to consider the direct, indirect and cumulative effects of the proposed activity, in conjunction with the Guidelines which required consideration of the secondary effects

on waters of the U.S. 40 C.F.R. §§ 1502.16, 1508.7, 1508.8; 230.11(h). NEPA also requires the Corps to consider all reasonable alternatives to the proposed action. 40 C.F.R. § 1508.9. As discussed infra, the overlap of these requirements under NEPA and the CWA and the corresponding responsibility of the Corps in considering the effects of the proposed activity is important to the Corps' overall environmental review of the project.

i. The Corps should prepare an EIS to consider the totality of impacts and availability of alternatives to the *proposed* Grand Lake Project [GLP II and 2017 Permit].

If, after careful evaluation and assessment of the impacts of the project, the Corps determines that the adverse effects will be significant, it *must* prepare a full environmental impact statement ("EIS") to analyze the effects. 40 C.F.R. § 1501.4 (emphasis added). In determining whether the environmental impacts of an activity are significant, the Corps will consider both the context and intensity of the proposed action. 40 C.F.R. § 1508.27. In terms of context, the Corps must consider an array of contexts including the region affected by the conduct. *Id.* With regard to intensity, there are several factors the Corps must consider, including impact of the proposed activity on public health and safety, unique ecologically critical areas, unknown risks and cumulatively significant impacts. *Id.*

Here, because the direct, indirect and cumulative environmental effects were, and will continue to be, significant, the Corps must prepare a full EIS for the *proposed* Grand Lake Project. As noted, the long-term impacts of this project are staggering and crippling to the overall health and longevity of the area.

ii. The Corps and DNR must work to rectify the harms caused by its failure to solicit public comment, and provide sufficient information, prior to permitting the Grand Lake Project in 2017.

The procedures under NEPA require "that environmental information is available to public officials and citizens before decisions are made and before actions are taken." 40 C.F.R. § 1500.1(b). NEPA provides further that "(a)ccurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA." *Id.* Pursuant to NEPA's policy statement, NEPA requires federal agencies to encourage and facilitate public involvement in decisions affecting the human environment, identify and assess reasonable alternatives, and work to restore and enhance the quality of the human environment. *Id.* at § 1500.2.

Despite intense involvement to protect and restore the Atchafalaya Basin, DNR and the Corps failed to provide information regarding the project parameters, anticipated impacts, results of monitoring and study in the area and the future management of the project to allow for adequate public notice and comment. We want to be involved, to identify and assess reasonable alternatives and work with the regulatory agencies to restore the quality of the environment in this area, but without the supporting scientific bases for the project and an invitation for our voices to be truly heard and accounted for, we are ill-equipped to do so. Now, the Corps has provided public notice after the work has already been completed, despite the fact that this work is now an excellent demonstration of the impacts and problems with the project as designed. At a minimum, the Corps

and DNR must now work to ameliorate the harms its approval and conduct has caused, and to fulfill the original project purpose to restore Grand Lake.

In sum, the requirements under NEPA necessitate that the Corps take a hard look at the 2017 permit and GLP II, and conduct its own independent evaluation of the information offered in support of the project. Because of the significant impact this project has and will have on swamps, Grand Lake and waterways, the Corps should consider all damages, including the lateral breach around the dam. At a minimum, the Corps must prepare an EIS to adequately assess the totality of impacts and review all reasonable alternatives.

c. CONSISTENCY WITH STATE AND FEDERAL LAW AND POLICY

The Corps' regulations require the agency to ensure consistency with other applicable laws. 33 C.F.R. 320.3. According to the State Master Plan, "[t]he State's principal interest is to restore, where possible, and to preserve, where feasible, the natural habitat that has made the Atchafalaya Basin a national treasure." *State Master Plan*, at 6-1. Moreover, the Master Plan states that "the goal of the management units is to prolong the expected life of some habitats that may become scarce through time (primarily aquatic and cypress/tupelo habitats) by managing sediments, while at the same time achieving a healthy water circulation pattern that will maintain or restore water quality. Sediment laden water would be directed to areas naturally undergoing accretion (e.g. natural levees, overbank areas) or to maintained areas designed to trap sediments, thus prolonging the existence of swamp and aquatic habitats." *State Master Plan,* at 6-1. Ultimately, the State Master Plan envisioned the employment of "careful coordination" between the state and federal agencies "to achieve optimum results in the public interest." *Id.* It is evident from the stated purpose of the State Master Plan and the articulated interest in restoring the Atchafalaya Basin, that this mission must underscore the Corps' reevaluation and reconsideration of the 2017 permit, GLP II, the *proposed* Grand Lake Project with respect to its own regulations as well as other applicable laws.

The effects on the surrounding wetlands caused by the project and the continuous fill by the lateral breach around the dam will have impacts felt at the coast as the deposition of sediments in the Grand Lake area will deprive the coast of needed sediments. The Coastal Zone Management Act, whose goal is to preserve, protect, develop and restore the resources of our coastal zone, requires federal agencies whose activities will affect a state's coastal zone to comply with the state-approved coastal zone management program. 16 U.S.C. §§ 1456(c), 1451. DNR's Office of Coastal Management implements the Louisiana Coastal Resources Program (LCRP). La. R.S. 49:214.21 *et seq*. Federal permitting activities within or outside the coastal zone that have reasonably foreseeable effects on any coastal use (land or water) or natural resource of the coastal zone must be fully consistent with the state's coastal management program. 16 U.S.C. §1456(a)(1)(A). Prior to permitting, the original Grand Lake Project should have been subject to a consistency determination to ensure that the project was consistent with the state coastal plan. This includes the state approved program, the Coastal Restoration and Protection Authority's Master Plan for a Sustainable Coast, applicable Parish guidelines, and other applicable coastal protection authority. The GLP II evaded this determination when it was initially approved and at this point, in light of the well documented and undeniable impacts, this project cannot meet these required consistency standards.

The Corps must also ensure that the modified permit for Grand Lake Restoration is consistent with the Fish and Wildlife Act of 1956 (16 U.S.C. 742a, *et seq*.), the Migratory Marine Game-Fish Act (16 U.S.C. 760c-760g) and the Fish and Wildlife Coordination Act (16 U.S.C. 661-666c) which express Congressional intent "to protect the quality of the aquatic environment as it affects the conservation, improvement and enjoyment of fish and wildlife resources." 33 C.F.R. 320.3(e). As previously noted, this project had grave consequences on the sustainability and longevity of fish, bird and other wildlife habitat. Grand Lake and adjacent wetlands are important habitats for migratory birds. The Migratory Bird Treaty Act of 1918 protects migratory bird populations from takings. *See* 16 U.S.C. §§ 703-712. Migratory bird species protected under the Act that migrate annually through the Atchafalaya Basin, Grand Lake and adjacent wetlands include, but are not limited to: Roseate Spoonbill, White Ibis, Anhinga, Snowy Egret, Great Egret, Wood Stork, ducks and Cormorant. *See* 50 C.F.R. 10.13 (list of protected species). One of the greatest threats to birds is the loss and degradation of habitat from development or disturbance. *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. Bird habitat restoration and protection can mitigate against the accelerated decline in bird populations. *Id.* This can be accomplished through coordination and consultation with the U.S. Fish & Wildlife Service. Before authorizing a project that adversely impacts irreplaceable migratory bird habitat in the Grand Lake area, the Corps must consider these impacts and consult with the Service.

Following a necessarily comprehensive environmental review of the project, assessing its inconsistencies with applicable laws, the Corps must ultimately find that this project was not only inconsistent with state and federal law and policy, but also was detrimental to the restoration efforts underlying the ABP and the State Master Plan.

II. CONCLUSION

The *proposed* project to restore Grand Lake, which essentially keeps in place a failed project (GLP II) and 2017 permit, contradicts the goals of the Clean Water Act, the National Environmental Policy Act, and the State Master Plan. In addition to failing to meet the requirements of the CWA 404(b)(1) Guidelines, the *proposed* project does not satisfy the Corps' regulations for permitting dredge and fill activities. In consideration of the significant adverse impacts to wetlands, the Corps cannot reauthorize 2017 permit, the *proposed* project, GLP II, as written. Rather, in consideration of the nature of this notice, the work that has already been performed on site, and the impacts therefrom, pursuant to NEPA, the Corps must prepare an Environmental Impact Statement to adequately assess alternatives to mitigate the project's impacts and to restore Grand Lake. The Grand Lake Project as permitted was contrary to the public interests of protecting wetlands, floodplain functionality, water quality and wildlife and fishery habitat. It does, however, provide a useful and accurate demonstration of the inadequacies and dangers of this project and calls for the modification of the permit to require remediation of the resulting damage. Notably, had this project been subject to public notice and comment at the proper time, the public could have offered feedback to emphasize the problems this project design posed. Because notice has been issued "after the fact," the damage has been done and the Corps is limited to determining how to remedy this damage and to fulfill the original project purpose of restoring Grand Lake.

Additionally, the Corps should use this process as an opportunity to investigate the condition of the pipeline itself as well as Enterprise's negligent management of the pipeline and the dike wall, which has repeatedly failed due to Enterprise's ineffectual attempts at repair.[3]

There are many significant unanswered questions that remain, including

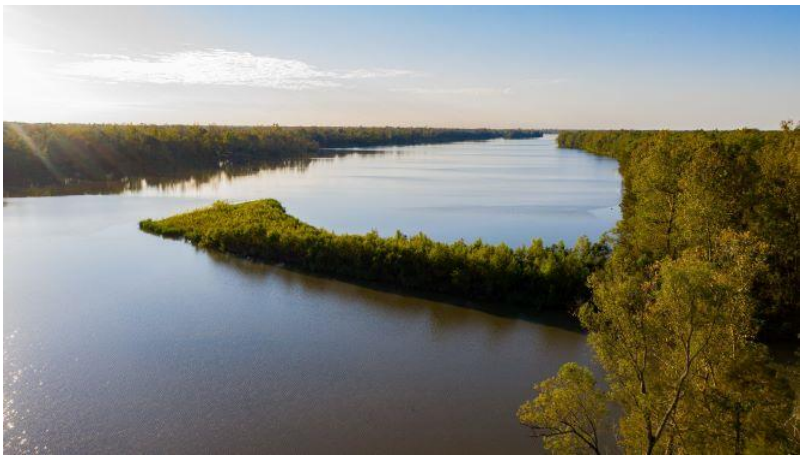
- Why did the Corps decline to approve the plan to redeposit the dredged sediment back into the Atchafalaya River?
- How is moving the sediment in Grand Lake into a previously open pipeline canal "beneficial"?
- Given that the shoal has not been completely removed from Grand Lake following the removal of sediment and continues to pose a navigation hazard to use of the Lake, how does the Corps justify maintaining the 2017 permit conditions which do not resolve that underlying problem?
- Given that the project has already been completed to the detriment of the Schwing Chute, Millie Chute and adjacent wetlands area, how does the Corps propose to remediate this damage?
- Can the remaining shoal be removed entirely from Grand Lake?
- How will the rock wall or dike at the River end of the pipeline canal be maintained to ensure the problem of erosion does not repeat itself?
- Is Enterprise responsible for the dam/plug. If the dam/plug was not Enterprise responsibility, why was Enterprise allowed to replace the plug without a permit?
- Why Enterprise did not apply for a permit to dig and replace the damaged pipeline?

For the many reasons discussed herein, in the interest of the public and in accordance with applicable federal and state law, Atchafalaya Basinkeeper, Healthy Gulf, Sierra Club Delta Chapter and the Louisiana Crawfish Producers Association-West respectfully request that the Corps and LDEQ deny the permit as proposed, modify the permit and conduct (or require DNR to conduct) a complete and adequate analysis and environmental review, including the consideration of practicable alternatives, and all impacts, both existing and foreseeable. This is a rare opportunity for the Corps, as it already has the evidence of how this project has failed, and will continue fail to perform as desired unless the 2017 permit is substantially modified to meet project goals and to

[3] Before the 2011 flood, Mr. Thomas Ashley called Enterprise at 888-883-6308 to inform them of the possible failure of the dike. The dike was damaged and was about to fail. Enterprise sent two men from LaPlace to look at the site. After their inspection, they specifically stated that they expected the dike to fail but were relying on the Corps to fix the issue. Of course, this was not a Corps responsibility. During flood of 2011, the dike did indeed failed as predicted. Because of the failed dike, water from the Atchafalaya River flowed through the canal with a very strong current eroding the dirt covering the pipeline, causing the pipeline below to become exposed. Boats traveling through the pipeline were hitting the damaged the exposed pipeline with their propellers, and Enterprise had to come out to replace the damaged sections of the pipeline. At that time Enterprise tried to fix the dike using small rocks and sand. This new weak dike failed again, exposing the pipeline again. Boats traveling through the pipeline, again damaged the pipeline. The damaged and compromised the pipeline was buried by the sand dumped into the pipeline when DNR dredged the lake. Ronnie Dimm (225-210-8631) was the Enterprise pipeline person in charge when the dredging took place in 2018. The damaged pipeline, buried without inspection or repair, could leak at any time, polluting the sand, water and the aquifer.

restore and remediate areas already impacted by this poorly-designed and implemented project.

This picture of the shoal was taken October 16th, 2020



Attached to these comments is Mr. Thomas Ashley declaration.

Thank you for your time and consideration of our comments.

Respectfully submitted by,

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