



Tulane Environmental Law Clinic

November 30, 2015

By Email to: Stephen.d.pfeffer@usace.army.mil
Stephen Pfeffer
U.S. Army Corps of Engineers
New Orleans District

Re: Comments on proposed Louisiana Wetland Rapid Assessment Method (LRAM) For Assessing Wetland Compensatory Mitigation Requirements

The Louisiana Audubon Council, the Atchafalaya Basinkeeper, the Sierra Club Delta Chapter, and the Gulf Restoration Network (collectively Citizen Groups), represented by the Tulane Environmental Law Clinic, offer these comments on the U.S. Army Corps of Engineers, New Orleans District's ("Corps") proposed Louisiana Wetland Rapid Assessment Method (LRAM) for Assessing Wetland Compensatory Mitigation Requirements, noticed on October 12, 2015. We thank you for allowing an extension in observance of the holiday weekend (see Exhibit 1). The notice provided was insufficient to make meaningful comment. The LRAM meets the definition of a rule, and the Corps should follow rulemaking procedures in issuing it. Further, because the LRAM has the potential to significantly impact the environment in the New Orleans District, the Corps should complete an Environmental Impact Statement on it. At a minimum, the National Environmental Policy Act (NEPA) requires that the Corps do an Environmental Assessment on the LRAM.

Additionally, the LRAM does not include a direct method for evaluating cumulative, secondary, and indirect impacts, as was previously provided for in the Modified Charleston Method. Under both the Clean Water Act 404(b)(1) Guidelines ("Guidelines") and NEPA, the Corps must consider cumulative, secondary, and indirect impacts of proposed projects. If the Corps does not clearly and expressly require mitigation to compensate for these impacts, the Corps will not be able to support issuing a Finding of No Significant Impact (FONSI) based on mitigation reducing these types of impacts to insignificance. Many more projects will, therefore, require that the Corps conduct a full Environmental Impact Statement rather than an Environmental Assessment. There are additional potential issues with the LRAM, which are difficult to comment on, due to the lack of information provided in the notice.

The goal of compensatory mitigation is to have "no overall net loss of the Nation's remaining wetlands base, as defined by acreage and function, and a long-term goal to increase the quality and quantity of the Nation's wetlands, as defined by acreage and function." 33 U.S.C. § 2317(a)(1). "[C]ompensatory mitigation is a critical tool in helping the federal government to meet the longstanding national goal of "no net loss" of wetland acreage and function."

Tulane Environmental Law Clinic

Compensatory Mitigation for Losses of Aquatic Resources, 73 Fed. Reg. 19,594 (April 10, 2008). Any system used to evaluate mitigation requirements must enforce this policy. Citizen Groups asks that the Corps re-notice the LRAM and follow the rulemaking procedures. The Corps must, at a minimum, include any missing information, as highlighted below, and rework the rule to ensure direct and accurate consideration of cumulative, secondary, and indirect impacts in calculating mitigation.

Citizen Groups reserve the right to rely on any and all comments made by the public or organizations on this rulemaking, and request that the Corps send a written response and notice of decision to the undersigned counsel, rather than simply publishing the decision and associated documents at some later date. We greatly appreciate your review of our comments and anticipate your responses.

I. The Corps Provided Insufficient Notice to Allow Meaningful Comment.

The Corps' LRAM is a proposed rule, and it must therefore follow the rulemaking procedures under the Administrative Procedure Act. The Corps has not labeled the LRAM proposal as a "guidance document," as it has previous documents explaining the mitigation process. Even if it had, when a "guidance document" legislates by creating new standards, it is a rule. *Nat. Res. Def. Council v. E.P.A.*, 643 F.3d 311, 321 (D.C. Cir. 2011) (EPA created new standards to review alternatives in permitting). Here, the Corps has created new standards by which it will consider whether mitigation is achieved, making this document a rule.

Further, though the Corps has noticed and allowed comment on the LRAM, it has not provided sufficient notice for meaningful comment. As a matter of federal law, the Corps must provide the public with notice that provides "sufficient information to give a clear understanding of the nature and magnitude of the activity to generate meaningful comment." 33 C.F.R. § 325.3(a)(5); *Ohio Valley Envtl. Coal. v. U.S. Army Corps of Engineers*, 674 F. Supp. 2d 783, 802 (S.D.W. Va. 2009) (reversing where "the Corps unreasonably found the applications were complete and issued public notices that plainly did not contain sufficient information to allow for meaningful public comment."). In the context of rulemaking under the Administrative Procedure Act (APA), the D.C. Circuit has recognized that notice which "fails to provide an accurate picture of the reasoning that has led the agency to the proposed rule" deprives the public of an opportunity to comment meaningfully. *Connecticut Light & Power Co. v. Nuclear Regulatory Comm'n*, 673 F.2d 525, 530 (D.C. Cir. 1982); *see also Air Transp. Ass'n of Am. v. FAA*, 169 F.3d 1, 7 (D.C. Cir. 1999) ("[T]he most critical factual material that is used to support the agency's position on review must have been made public in the proceeding and exposed to refutation."); *Chamber of Commerce v. SEC*, 443 F.3d 890, 900 (D.C. Cir. 2006) ("By requiring the 'most critical factual material' used by the agency be subjected to informed comment, the APA provides a procedural device to ensure that agency regulations are tested through exposure to public comment, to afford affected parties an opportunity to present comment and evidence to support their positions, and thereby to enhance the quality of judicial review.").

The Corps has failed to provide sufficient information in numerous areas of the notice. For example, there is insufficient information regarding the reasoning behind the decision to (1) remove cumulative impacts as a primary factor, (2) declassify Bottomland Hardwood as rare and

imperiled, and (3) allow buffer and upland inclusions to add value to the mitigation process. Nor is there sufficient explanation of exactly how the mitigation method will work.

Additionally, while the LRAM is being proposed by the New Orleans District, there was no public meeting held in New Orleans. The closest meeting was held approximately 35 miles away in Mandeville, Louisiana. This denied the New Orleans public access to a meaningful opportunity to understand the LRAM and have questions answered.

II. The Corps Must Complete An Environmental Impact Statement on the LRAM.

The LRAM will have a significant impact on the environment, through its effects on mitigation processes, and therefore requires an Environmental Impact Statement (EIS). NEPA requires that all “major Federal actions significantly affecting the quality of the human environment” include “a detailed statement by the responsible official on... the environmental impact of the proposed action,” including unavoidable impacts, alternatives, short and long term impacts, and irreversible commitments of resources. 42 U.S.C.A. § 4332. The LRAM, by defining how mitigation is achieved, will have a large impact on the wetlands in a large portion of the state (those under the New Orleans District’s jurisdiction). Mitigation is required for every Section 404 permit the Corps grants allowing the destruction of wetlands, so clearly this is a significant impact.

Further, as part of this EIS, or even as part of an Environmental Assessment under NEPA, the Corps needs to do an inventory of the effectiveness and current condition of the various types of mitigation it has historically required, including specific reviews on each mitigation type (re-establishment, rehabilitation, enhancement, and preservation). The Corps must analyze and disclose to the public whether the mitigation it has approved in the past has succeeded. This database should also include a listing of permits approved and their related credits, and any EA, FONSI, or EIS done in relation to the permit. Citizen Groups are aware of numerous examples of mitigation the Corps has required which has failed. For example, the Atchafalaya Basinkeeper is aware that mitigation required for the Bayou Postillion permit, where the vast majority of the trees planted for mitigation did not survive. Citizen Groups are aware of other examples where wetlands set aside for mitigation were ultimately destroyed for other projects. These are all impacts of the Corps’ proposed action which it must analyze and disclose.

Relatedly, the Corps should inventory all of the wetland destruction it has permitted within its jurisdiction and compare this to the mitigation implemented for this same destruction (including consideration of its current condition) to determine whether “no net loss” has been achieved.

Without knowing how previous systems have worked, and what the current status of mitigation is, the Corps cannot adequately address alternatives under NEPA, nor can it meet the “no net loss” requirement. The EIS should also include a consideration of the cumulative impacts of mitigation.

An EIS is essential. However, the Corps should not continue under the Interim Method while completing the EIS. The Interim Method was not properly publicly noticed or promulgated, and was hastily crafted and is unsupportable. Because the Corps should not use the

Interim Method and cannot use the Modified Charleston Method, it should not issue any wetlands destruction permits until it has completed an EIS on the LRAM.

III. The Required Consideration of Cumulative, Secondary, and Indirect Impacts is Missing.

The Corps does not directly address cumulative, secondary, and indirect impacts anywhere in the LRAM, although they are required to be considered in the mitigation process. 40 C.F.R. § 1508.25. There is no explanation as to why this factor, which was present in the Modified Charleston Methods (MCM)¹, has been removed. The CEQ's regulations implementing NEPA define cumulative impacts as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." 40 C.F.R. § 1508.7. Indirect effects are defined as those "which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems." 40 C.F.R. § 1508.8. These regulations also require that NEPA review include "[c]umulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement." 40 C.F.R. § 1508.25.

When considering the environmental impacts of a wetlands destruction application, the Corps must complete an Environmental Assessment (EA), which can lead to an Environmental Impact Statement (EIS), or a Finding of No Significant Impact (FONSI). 40 C.F.R. §§1501.4, 1501.13. It has been recognized that mitigation can lessen impacts below the level requiring an EIS, and make a FONSI suitable. See *Spiller v. White*, 352 F.3d 235, 241 (5th Cir. 2003) (Holding that a FONSI is acceptable when "predicated on [the applicant] agreeing to certain mitigation measures."). A FONSI justified due to otherwise significant impacts being reduced to insignificance through the application of mitigation is often referred to as a "Mitigated FONSI."

The Corps must assess cumulative impacts when evaluating permit applications. Therefore, these impacts must either be addressed in the Environmental Assessment or the agency must complete an EIS which addresses cumulative impacts. However, the Fifth Circuit has held that the Corps must also assess cumulative impacts when determining, via a FONSI, that the mitigation reduces the project's impacts to insignificance. See *O'Reilly v. U.S. Army Corps of Engineers*, 477 F.3d 225, 235 (5th Cir. 2007). Because the LRAM does not include a cumulative impact assessment, it could not be used to justify a Mitigated FONSI. In effect, either a separate cumulative impact review would have to be done for each mitigation project approved under the LRAM, or a complete EIS would need to be done for each permit relying on mitigation to reduce the impacts to insignificance. Cumulative and indirect effects must be included in any mitigation evaluation as a separate and mandatory factor.

¹ Considered in the 2013 and 2015 MCMs as factor (f), "This factor considers the potential cumulative and indirect impacts of the proposed project." at 13.

IV. Additional Concerns About the LRAM Exist.

a. The LRAM's Downgrade of Bottomland Hardwood from RID to Secure is Unsupported.

The LRAM downgrades bottomland hardwood from rare, imperiled, and difficult to replace (RID) to secure. LRAM Draft Notice at 13. In all previous MCMs bottomland hardwood was classified as RID. The LRAM cites *The Natural Communities of Louisiana* (LNHP, 2009) for its information on rarity – but this document merely describes wetland areas. It does not describe rarity, or discuss whether bottomland hardwood is or is not rare and imperiled, nor that only areas above 500 acres are difficult to replace. The Corps' decision to delist bottomland hardwood as RID, without explanation, is arbitrary and capricious. The LRAM does include bottomland hardwood areas over 500 acres as difficult to replace, and therefore within the RID category – but again, there is no explanation for this distinction. There is no indication as to how the Corps determined that only bottomland hardwood areas over 500 acres are difficult to replace, and no explanation why those of under 500 acres are not entitled to be valued the same. The LNHP, in its 2005 Conservation Habitat Assessment, in reference to Bottomland Hardwood said: "Old-growth examples of this habitat type are very rare." There is no evidence that old-growth bottomland hard is any less rare today.

b. Buffer and Upland Inclusions Are Not Adequately Explained.

The Corps does not sufficient explain the buffer and upland inclusions, and why they add value to other re-establishment, rehabilitation, enhancement or preservation acres. In fact, it is not clear what type of value they add, or how that value affects the mitigation decision. While the brief, insufficient explanation states that 820 feet of buffer provides maximum effectiveness, the Corps has set 500 feet as the maximum. How was this number reached? Without further explanation, this decision appears arbitrary and capricious.

c. Additions are Needed for Public Notices of Permits Involving Mitigation.

When an applicant is proposing to compensate for unavoidable impacts by purchasing mitigation credits the public notice should specify the name and location of the bank. This, paired with the database described above, will provide the public with appropriate notice and records.

Additionally, public notices citing acreage impacted as "forested wetlands" should specify cypress tupelo or bottomland hardwoods habitat, or if mixed habitat, approximate percentage of each. If cypress tupelo habitat must be "unavoidably" impacted, compensation should be in a mitigation bank within the same watershed basin as the proposed development and contain sufficient cypress tupelo habitat (credits) to offset destruction at the applicant's site. Cypress tupelo habitat should not be interchangeable with other habitats. See LRAM Draft Notice, at 10. If sufficient credits are not available to offset impacts from development in the cypress-tupelo mitigation bank within the same watershed basin as the applicant's site, then the permit must be denied. This is justified because so much cypress tupelo habitat is non-renewable in nature (particularly the Pontchartrain-Maurepas watershed, Atchafalaya Basin and most of coastal

Louisiana); additionally the draft LWRAM defines all cypress habitat as “rare, imperiled or difficult to replace”.

V. Conclusion

Citizen Groups request that the Corps re-notice the LRAM with the above-requested information, rewrite the LRAM to include cumulative and indirect impacts, and complete an EIS on the LRAM with information about the success of past required mitigation.

Please also see the Sierra Club’s attached policy on mitigation (Exhibit 2), and Gulf Restoration Network’s additional comments (Exhibit 3).

Sincerely,

/s/ Lisa W. Jordan

Lisa W. Jordan, Supervising Attorney

/s/ Alison M. Dunbar

Alison M. Dunbar, Student Attorney
Tulane Environmental Law Clinic
6329 Freret Street, Suite 130
New Orleans, LA 70118
Counsel for Citizen Groups

Enclosures

RE: request for extension of time on LRAM (UNCLASSIFIED)

Jordan, Lisa W

Wed 11/18/2015 2:02 PM

To: Pfeffer, Stephen D MVN <Stephen.D.Pfeffer@usace.army.mil>;

Cc: Dunbar, Alison M <adunbar3@tulane.edu>;

Thank you. We appreciate it.
Lisa

-----Original Message-----

From: Pfeffer, Stephen D MVN [<mailto:Stephen.D.Pfeffer@usace.army.mil>]

Sent: Wednesday, November 18, 2015 1:52 PM

To: Jordan, Lisa W

Subject: RE: request for extension of time on LRAM (UNCLASSIFIED)

CLASSIFICATION: UNCLASSIFIED

We have received your letter dated November 16, 2015 requesting an extension to the 45 day comment period on the Louisiana Wetland Rapid Assessment Method (LRAM). At this time, we will not be providing a 20 day extension to the comment period. Understanding that next Thursday is a holiday and often times people take Friday off as well, we will certainly accept comments received a few working days following Thanksgiving Day. I would recommend getting those in by November 30.

Stephen Pfeffer
LA DOTD / FHWA Transportation Liaison
US Army Corps of Engineers, New Orleans District Regulatory Branch Office Phone: 504-862-2099
Cell Phone: 504-430-9789
Stephen.d.pfeffer@usace.army.mil

-----Original Message-----

From: Jordan, Lisa W [<mailto:lwjordan@tulane.edu>]

Sent: Monday, November 16, 2015 9:25 AM

To: Pfeffer, Stephen D MVN

Subject: [EXTERNAL] request for extension of time on LRAM

Please receive the attached request for an extension of time to comment. Thank you.

Lisa Jordan

Deputy Director

11/30/2015

RE: request for extension of time on LRAM (UNCLASSIFIED) - Dunbar, Alison M

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CLASSIFICATION: UNCLASSIFIED

Sierra Club National Mitigation Policy

These guidelines were developed by the Club's Coastal Committee to help interpret and implement the policy.

At this time, not all of the goals and objectives of the Sierra Club's agenda for wetlands protection have statutory or regulatory force. In the event that a permitting agency does not impose the strict limitations outlined in Item 4 above, the Sierra Club believes that the following conditions should be sought by its members in order to prevent an undesirable situation from becoming worse:

In order to fulfill the purpose of these prohibitions, development projects must be designed and executed to avoid long-term disruption of wetland functions and values (e.g., directional drilling or the use of hovercraft must be given preference over the dredging of access canals). Every permit for development involving temporary alteration of wetlands must be accompanied by conditions, enforceable by contract and performance bonds, to guarantee full restoration of functional values (e.g., removal of temporary structures or fill, replacement of natural sediment and vegetation). Public and private projects must be subject to the same standards and requirements even if this increases construction costs.

Development activities that involve significant alteration or destruction of wetlands must have extensive public review to demonstrate that no practicable alternative exists that would have less environmentally damaging impact, and should be restricted to use for water-dependent public facilities. No development project in a wetland area should result in a net loss of either wetland acreage or wetland values; therefore, all permits must be contingent upon adequate mitigation plans, with full opportunity for the public to review and comment on alternative mitigation plants. Compensatory mitigation is not an acceptable alternative to eliminating or minimizing avoidable damage.

The objective of a mitigation plan should be the long-term and incremental gain in a comprehensive range of wetland values, through at least a 2:1 replacement of acreage of the disturbed wetland. The following conditions should be met:

1. The cost of the entire mitigation process must be borne by the applicant, and long-term responsibilities and evaluation criteria for the success of the mitigation project should be specified in

the permit conditions. These conditions must be enforced by contract and performance bonds to ensure the implementation and completion of the mitigation project.

2. No mitigation plan should be considered unless the authorizing agency has committed the requisite staff, expertise, and resources for long-term monitoring and enforcement. These responsibilities may be delegated to a third party under contract and accountable to the authorizing agency, but funded entirely by the applicant. Similarly, the agency should contract for planning and implementation with funding provided by the applicant.
3. Mitigation should address all temporary and long-term negative impacts of the development project -- direct, indirect, cumulative, and synergistic.
4. Mitigation activities generally should be confined to restoration of degraded wetlands or previously functioning wetlands, provided that sites are available within the authorizing agency's jurisdiction and that they meet the needs of a comprehensive restoration plan. Preference should be given to restoration of the same wetland type within the same hydrologic system (drainage basin or waterway) as that to be altered, and should take into consideration the most critical and endangered wetland types in the local regional setting.
5. Under no circumstances should an applicant be allowed to destroy part of a wetland area in return for "improving" another part of the same area, or to gain mitigation "credits" for restoring a wetland he/she has degraded. Creation of wetlands in upland areas is generally undesirable, particularly at the current level of scientific and technical understanding. Wetland mitigation should not result in the loss of their biologically valuable habitats; the destruction of adjacent habitats and communities should be avoided.
6. Based on detailed hydrological and biological assessment of the wetland and its surrounding watershed, an adequate buffer should be provided to assure the future protection of the restored or created wetland. At least 300-500 feet should usually be recommended. Access to and uses of the restored wetland should be restricted as a "temporal buffer" until regeneration is assured. If the wetland is located adjacent to water, a buffer area should extend at least as far in the adjacent shallow water.
7. Preferably, the mitigation should have been completed and shown to be at least 75% successful before work may begin in the development project. At a minimum, the mitigation project must have been implemented to a point where reasonable

assurance of success has been established before the development project may be commenced. Two growing seasons should be the minimum time to determine the success of the mitigation project.

8. The restored or created wetland must be protected by legal mechanisms, such as a special zoning designation, deed restrictions, or covenants, to ensure their continued existence and protection. Created wetlands should be subject to all of the legal protections of jurisdictional wetlands.
9. Mitigation must result in a net gain in wetland acreage and in the full panoply of wetland functions (e.g., trading of flood control at one site for habitat improvements at another cannot be counted as a net gain in wetland functions).
10. Complete, consistent, and accurate documentation of the development and the mitigation projects must be collected and retained by the authorizing agency as part of the permanent public record. This is particularly important because of the experimental nature of wetland restoration and creation. This record should include details of the site evaluation before and after the development disturbance (inspection reports, maps, photographs, and analyses), all biological, hydrological, and engineering designs and plans, site monitoring data, and evaluations of the development and mitigation projects by other federal, state, and local agencies. In addition, names, addresses, telephone numbers, and affiliations of all personnel who have a working knowledge of the projects should be retained.
11. Donation or preservation of another wetland is not acceptable alone as mitigation for the loss of the project wetland, as this still constitutes a net loss in wetland acreage and values. The overall mitigation plan must provide for restoration and/or creation of wetlands.
12. Mitigation banks should be integrated into a comprehensive program for wetlands restoration under the authority of a "resource" agency. Provision must be made for public participation in all phases of the mitigation bank, including planning, operation, and education; conditions 1-11 should be applied.

**UNITED FOR A HEALTHY GULF**

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30 November, 2015

Stephen Pfeffer
United States Army Corps of Engineers
New Orleans District
ATTN: Regulatory Division
Post Office Box 60267
New Orleans, LA 70160-0267
Stephen.d.pfeffer@usace.army.mil

RE: MVN Special Comment and Evaluation Period for LRAM

Dear Mr. Pfeffer,

I am writing on behalf of the Gulf Restoration Network (GRN), a diverse coalition of individual citizens and local, regional, and national organizations committed to uniting and empowering people to protect and restore the resources of the Gulf of Mexico. We have serious concerns about the ongoing lack of mitigation in the New Orleans District.

What follows is a preliminary comment, since an extension to the comment period was not granted, we did not have sufficient time to evaluate and comment on the LRAM.

There is a general failure of various policies at the New Orleans District to align with the goals and strategies in the Louisiana State Master Plan and recent presidential orders on floodplain management, the values of ecosystem services, and climate change. Even while the federal government is spending billions of dollars to enhance and restore these ecological values; most lands remain private. The federal interests are threatened, since landowners and applicants can seemingly, at any time, impact wetland values enhanced by federal restoration, or alter these restoration projects.

Although we did not have time to complete the review, we are explicitly aware of hundreds of individual permits issued by New Orleans District each year since 2011, and there are thousands of acres associated with these permits, which the public is allowed to comment upon. We know there are generally about 1,500 permits issued per year, but about 4 of every 5 permits issued remain out of public scrutiny. We are routinely denied the ability to review and comment on impacts and mitigation for those impacts, even on projects that involve hundreds of acres of impacts to highly sensitive ecological areas.

Some of these individual permits are mitigation banks, and some restoration projects. If every mitigation bank were approved, and we ignore the requirements to mitigate in kind and in basin, the annual ratio of impacts to mitigation would be on the same order of magnitude, about 1 acre of impact to 1 acre of mitigation. The lift of ecological services proposed by the average mitigation bank proposal since 2011 is often less than the level



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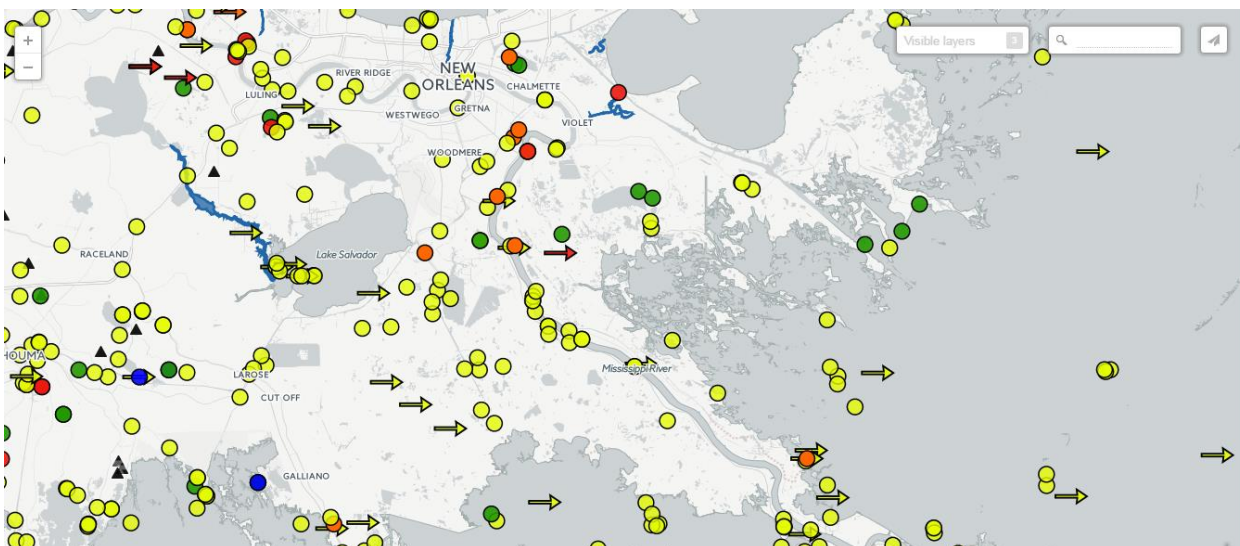
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of restoration than what is being employed by the State of Louisiana and the federal government in the restoration program.

Since some mitigation bank proposals are slowed down or denied, the ratio of impacts to mitigation acres seems significantly less than 1:1 on an annual basis; we are concerned that the findings of the Tyrna review still hold a decade after that initial, limited review of mitigation in the New Orleans District was conducted. That review found that there was a permitted loss of over 2,500 functional acres over many years in two small subbasins in the Florida parishes.

There is also the matter of geography. There are few to no coastal mitigation banks, in the areas of restoration focus, and so we remain concerned that the mitigation policies of the Corps are leading a retreat from the coast. The LRAM would accelerate this unofficial policy, since it seeks to widen the geographical service area available to applicants far beyond the hydrological basin of the impact.

Our impression from the amount of impacts that we are able to learn about, as well as the mitigation proposed, is that the New Orleans District is well below the amount of mitigation needed for no net loss, not to mention to meet the goals of the State Master Plan and the RESTORE Council. There is a dire need to have wetlands as flood protection for all of the major population centers in the State of Louisiana, and the need for mitigation policy to avoid leading the retreat away from the coast.

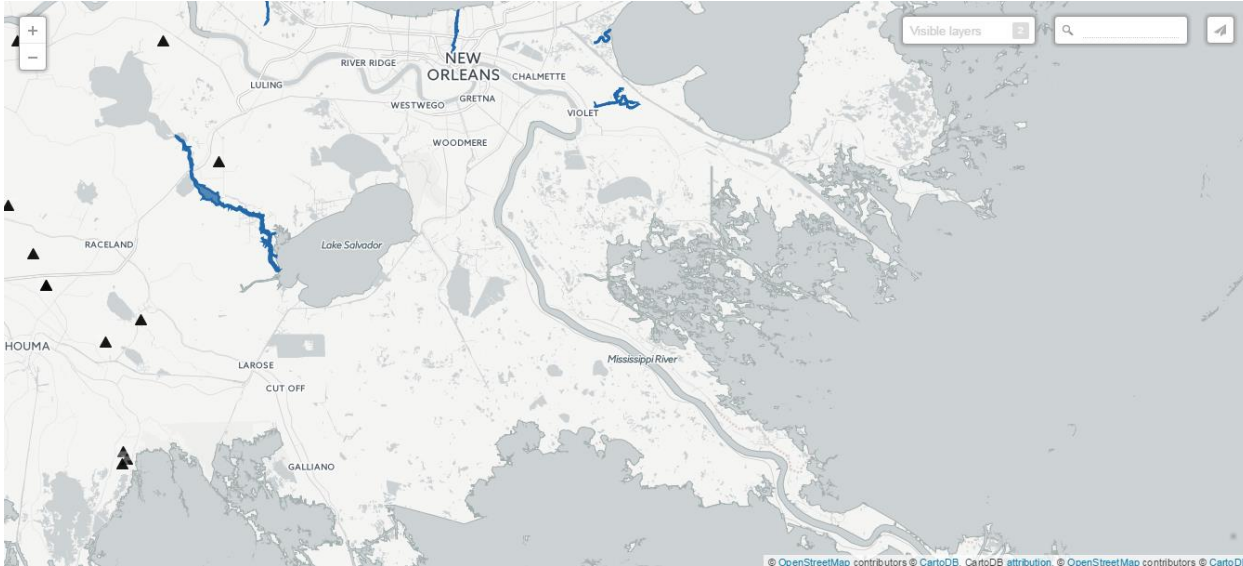


Map of permit impacts for the eastern upper Louisiana Coastal region, 2011-2014. Impacts over 50 acres are coded red. Restoration and mitigation proposals are coded blue and green.



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Mitigation Banks available for the eastern upper Louisiana Coastal region, 2011-2014. Note the lack of mitigation in Upper Plaquemines Parish, a region of particular focus of the State Master Plan, the LCA program, and the RESTORE Council.

1. Preservation

The GRN does not take an explicit position on preservation per se, since many of the wetlands and wetland forests in New Orleans District are privately held, and the Corps regulatory and other public agencies generally lack the resources to ensure that the Clean Water Act is upheld.

There are many 301 violations and after-the-fact permits issued each year without any penalty to the applicant. There are systematic problems and blind spots in enforcement, especially in the Atchafalaya Basin, especially in regards to indirect impacts. Because of the general lack of resources at the Corps New Orleans District to enforce the Clean Water Act, preservation can be a valuable method toward attaining no net loss.

The lack of a cap on preservation in the LRAM means that the details of the mitigation must be in the public notice, because the public must inform the Corps of threats to the mitigation, or conflicts of interest with the landowner. Our objection is not with preservation, but with the fact that the Corps withholds information on mitigation of protective wetlands from the public, and we are not allowed to comment on these mitigation plans.



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2. Indirect and Secondary Impacts

We are confounded by the fact that the new method omits indirect and secondary impacts, when some of the largest impacts in the New Orleans District are due to changing and restricting flow of water. Indirect impact is the largest category of impact in the New Orleans District, historically and currently; and yet LRAM omits them entirely.

Hydroperiod is a critical component of wetland ecosystems that is modelled for the entire coast by the State Master Plan. Changes in hydroperiod have effected enormous impacts to wetlands across the coast, and yet, these are omitted by the LRAM entirely.

Indirect mitigation impacts for the individual cross-basin sections of the Morganza to the Gulf levee, for example, are several times larger than the annual direct acreage permitted by the Corps New Orleans District each year.

The Corps found, correctly, that certain alignments of the West Shore Lake Pontchartrain project would have too many indirect impacts, and altered the levee project to a "Lines of Defense", or ring levee alignment that allowed the wetlands to remain and protect the proposed levee.

The RAM Terminal proposal was found to conflict with the Myrtle Grove / Mid-Barataria Sediment Diversion, and have indirect impacts on the restoration project that even the company admits would result in the loss of many acres of wetland per year (hundreds of acres over the life of the project). The Corps did not evaluate these hundreds of acres in its 404 review, and did not avoid these impacts in its permit.

River restoration and tidal restoration are the purpose of many projects funded by the State Master Plan, the RESTORE Council, and the federal restoration activities in CWPPRA and other programs. Restoration of the river is the core element of the State Master Plan.

Indirect and secondary impacts must be evaluated. And yet the Corps admitted at its hearing in Mandeville that they will not be evaluated under this method. This leaves evaluation of indirect impacts, which are the clear majority of the impacts in New Orleans District, to best professional judgement. It undermines the whole purpose of proposing a standardized mitigation method, if the majority of wetland impacts are not evaluated by that method.

The Corps must include a category in LRAM for indirect and cumulative impact.



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3. Mitigation In Basin

Expanding the service areas from HUC8 to HUC6 or greater is speeding the retreat of Louisiana and the United States from the Gulf of Mexico. Impacts to flood attenuation values are not being avoided nor mitigated. Withdrawing penalties for mitigating out of basin is against explicit provisions of the Clean Water Act. This decision is an arbitrary one, based not on science; this change is solely to hide the underperformance of the current shortcomings of the New Orleans District.

To our knowledge, this is a change unprecedented across the Corps Districts. Wetlands in the New Orleans District remain some of the most valuable to the United States, and they cannot be given a second class status in the United States.

The Corps must maintain the meager HUC8 standard as the standard for "in basin." The core purpose for the inclusion of the regulation of wetlands in the Clean Water Act is the fact that wetlands clean water. LDEQ evaluates water quality by sub basin, roughly equivalent to a HUC12 standard. LDNR evaluates coastal areas by Ecological Management Units which are roughly equivalent to a HUC10 standard. HUC8 is low by Louisiana standards, but it is the standard for the United States.

Wetlands only clean the water of the particular basin in which they are located. Removing the in-basin requirement by expanding geographic service areas undermines the intent and purpose of the Clean Water Act.

3. The Value of Forest Canopy

There is a lack of evaluation of wetland forest canopy as habitat with its own value. In its public discussion on its recent in-lieu agreement with Louisiana DNR, the Corps admitted that Louisiana DNR and the Corps 404 program is behind on mitigating wetland forest in the New Orleans District.

In many coastal basins, wetland forest canopy of cypress swamps is not being replaced naturally. This is due to two different kinds of indirect impact. Indirect impacts to flow of water cause infill in the Atchafalaya Basin, causing the inability of Cypress to recover from clearcutting and road construction. Subsidence and saltwater soils in the eastern basins of Terrebonne, Barataria, and especially Maurepas mean that the wetland forest canopy cannot regenerate.

These forests are the last large areas of the Mississippi Flyway. And yet, Forested wetlands are routinely fragmented and 'temporarily' replaced with marshes that last the life of a project. These impacts are never considered significant.



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Forest canopies have much higher wind and flood attenuation values than marshes, and we feel that the Corps must include canopy impacts as a separate category to ensure that the Corps is mitigating in kind for this irreplaceable habitat for both wildlife and people. In four years of close review, we have seen the loss of much Cypress Swamp, in particular, through the 404 program.

Cypress Swamp ecosystems are recognized as a Rare and Imperiled habitat by LRAM, but the costs to private bankers to properly restore a hydroperiod appropriate for Cypress Swamps are very high. Without a special category for wetland forest impact, the 404 program remains a mechanism for net loss of Cypress Swamps.

4. Incentivizing Consistency with Restoration Programs

We are baffled that the Louisiana deltaic ecosystem is so highly valuable and up until the very moment that a private interest would like to alter it through the 404 program. Wetlands are constantly evaluated by the array of restoration programs in the New Orleans District, but usually by methods much more rigorous than the LRAM.

The LRAM ignores the science-based efforts to enhance and preserve ecological functions in the Louisiana Coastal Zone. The LRAM could, instead, incentivize banks that replicate the successes of the restoration programs.

The Corps is willfully ignoring the importance of wetlands and coastal restoration to Louisiana's economic development by weakening mitigation standards. There are many enterprising mitigation banking efforts that would establish coastal banks, but these are generally disincentivized by the LRAM.

As part of the review for the LRAM, we request a summary report of mitigation banks that have been proposed over the last five years. We would like to know the kind of banks that the LRAM is enabling--what basin (HUC8), what kind of ecosystem, and what kind of hydroperiod restoration.

For example, we would like to see more credits for marshes and forests that protect levee systems ("fringe marshes," etc.) , or that follow the state restoration program's initiative to dredge replenishable sediment from the river.

Flood attenuation that these lines of defense provide is an essential ecological service. The costs to establish these banks are great, but restoring these systems provides a tremendous amount of ecological lift. Although the flood attenuation values of wetlands are generally known, they are non-linear. Fringe marshes and ridge projects along levees, however, are generally held by a wide array of wetland scientists, advocates, floodplain



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managers and public resource planners, to have flood attenuation value. Certain Landforms known as "Land Bridges" by the LCA program also have recognized flood attenuation value.

All wetlands have some flood attenuation value, but there is scientific and policy consensus that these wetlands have particular and measurable flood attenuation value. The LRAM could incentivize "fringe marsh" restoration along the flood side of levees and "land bridges" through its crediting system--thus giving the more enterprising mitigation banks the ability to compete with reclaimed sugar cane fields.

Similarly, the limited amount of sediment for restoration of ecological services is a near-constant refrain from scientific and government entities. Mitigation banks that seek to use the replenishable sediment, sourced from the river, should be given credit under the LRAM.

These companies and banks that are following the state and EPA's initiative bear considerable economic risk to engineer their projects for the ecological value of flood protection, but the LRAM disincentivizes such innovation from the private sector, as it willfully ignores indirect and cumulative impacts, as well as the flood attenuation value of canopy and of wetlands in general.

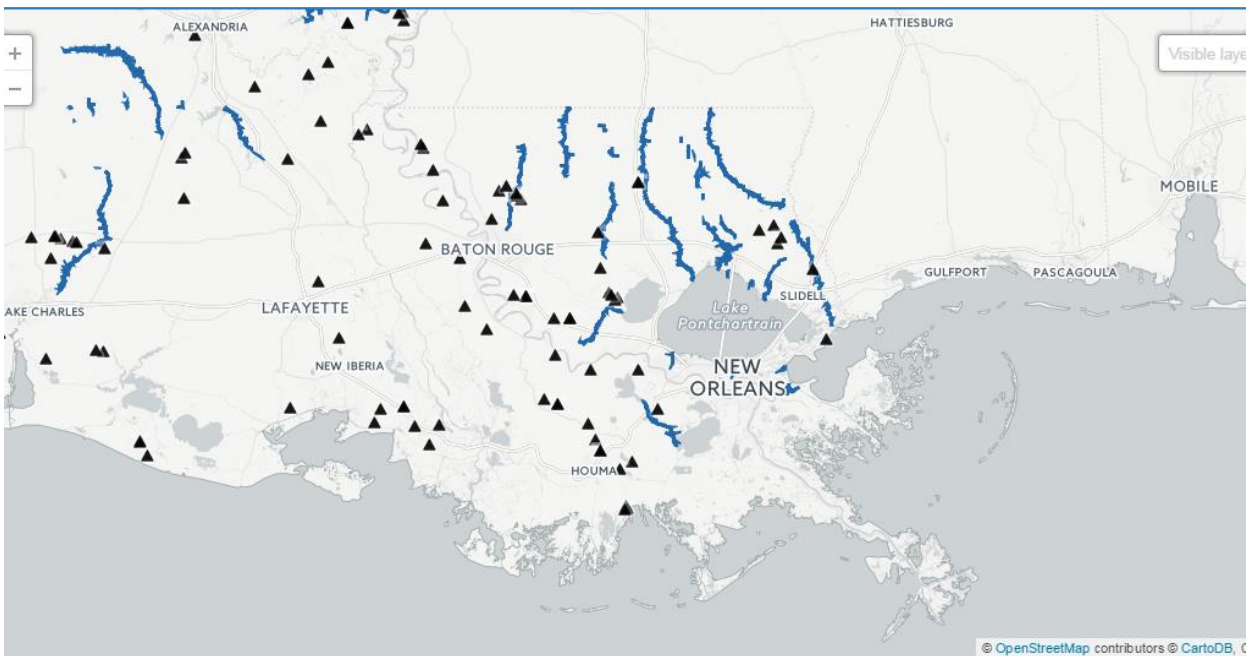
The fact that the New Orleans District sees little to no difference between a bank that brings in new sediment and nutrients to a project and degrades levees and spoil banks entirely, and a project that is a fallow sugar cane field with minimal gaps in its levees means that the Corps is establishing a situation where good ideas and beautiful restoration will be outcompeted on a market basis.

The LRAM ensures that the best companies, that are doing restoration work with the best science and most ecological techniques, in difficult terrain, will languish. Innovators that are taking Deltaic Restoration in Louisiana seriously will be outcompeted by companies with the lowest standards. It is a time of great innovation in wetland restoration in coastal Louisiana, but the Corps is actively working against contributions from the private sector by lowering the standards in the 404 program.

By lowering mitigation standards, the Corps is leading the retreat away from the coast, working against the State Master Plan, and damaging coastal resilience. There is almost no mitigation in Plaquemines Parish, for example. Impacts to Plaquemines are regularly mitigated where the wetlands have lesser flood attenuation value. Over time, this will affect the ability of the land to shelter the major population areas in the New Orleans District and the State Of Louisiana from coastal storms.

5. The lack of Streams in the New Orleans District, and the Florida Parishes in Particular

Stream ecosystems are particularly valuable across the coastal marshes and on the mainland, but particularly in the Florida parishes.



Map of Louisiana's Scenic Rivers in the Florida Parishes, compared to other regions and available mitigation banks.

In the Florida Parishes, Louisiana has established many Scenic Rivers and is attempting to develop an economy based on the cultivation of our natural resources. The Scenic Rivers Act of Louisiana protects the 'ecological regime' of many streams through a permitting process administered by Louisiana Wildlife and Fisheries.

Under LRAM, there are no impacts to streams the New Orleans District, and so the economic incentives to protect streams. There are many old sand and gravel mines in these parishes, but the economic opportunities to restore them are missing from this critical area of the state. The Corps' willful neglect of Louisiana's protected streams. The Corps in Mandeville had no answer to the question of stream mitigation for Louisiana.

At a minimum, the Corps should begin to evaluate impacts to streams in the Florida parishes, and communicate to existing mitigation banks, many of which regularly conduct stream mitigation projects in other states, that the 404 program will evaluate stream mitigation bank proposals for credits.



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GRN is investigating what economic developments are lost from the State of Louisiana due to the weakening of standards for the 404 program.

Wetland natural resources are ever more critical in the face of climate change and sea level rise, and are recognized as such by several executive orders. It is to the shame of the United States that the New Orleans District has perhaps the lowest standards for evaluating, avoiding, and mitigating wetlands under the 404 program.

In order to keep us and the public properly informed, we request notification of approvals/denials/changes to the LRAM.

We look forward to a written response.

For a healthy Gulf,
[sent via e-mail]

A handwritten signature in black ink, appearing to read "Scott Eustis", is positioned above the name of the sender.

Scott Eustis, Coastal Wetland Specialist

Cc: Matt Rota, Science and Policy Director
May Nguyen, Tulane Environmental Law Clinic
Raul Gutierrez, U.S. EPA, Region 6
James Hartwell, Coastal Wetland Analyst