



UNITED FOR A HEALTHY GULF

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19 December, 2018

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ATTENTION: REGULATORY BRANCH

RE: **MVN-2008-03207-CQ** - 6844 LLC, Ellis Estates (**WQC 181031-02**)

Dear Mr. Blanke, Ms. Hill,

I am writing on behalf of 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 natural resources of the Gulf of Mexico. We have serious concerns about the application for a Section 404 Permit (**MVN-2008-03207-CQ**) and Water Quality Certification (**WQC 181031-02**) submitted to the United States Army Corps of Engineers (“Corps”) and Louisiana Department of Environmental Quality (“LDEQ”), respectively, by 6844 LLC for the Ellis Estates subdivision (“Applicant”).

The Applicant requests Section 404 permitting and a Water Quality Certification (“WQC”) after the work has been partially completed (“after-the-fact”) for construction of a residential subdivision slab-on-grade development. This development including homesites, detention ponds, utility and drainage infrastructure (“Project”). The Project removes 15.51 acres of forested wetlands from an already heavily impacted watershed, Colyell Creek (0807020207). Colyell Creek is within the Amite River HUC-08 watershed (08070202) in Livingston Parish.

In 2016, the Amite watershed experienced historic flooding. By July 2017, the Federal Emergency Management Agency (FEMA) had spent at least \$1.5 Billion in the Amite for 2016 floods DR-4277-LA (August Floods) and DR-4263-LA (March Floods) combined¹. The Amite watershed hosted the vast majority of claims for individual residences to FEMA for DR-4277-LA²

¹ [FEMA Louisiana Watershed Resiliency Study, July 2017, Appendix A: Amite Watershed](#)

² [FEMA Louisiana Watershed Resiliency Study, July 2017](#). See p 29, Map 2.7.8 .

, totalling over \$500 Million. Additionally, the Project is located on the banks of West Colyell Creek, so the impact of development is immediate and more intense to this waterway than if the Project were located some distance away (Figure 1).



Figure 1. Map with composite satellite imagery highlighting current Project site, neighboring subdivisions and West Colywell Creek. Pink polygon shows approximate Project area.

We have serious concerns about all wetland loss in the Amite basin, as this would put more people and property at risk for future flooding and harm. It is not in the public's interest to subsidize more residential flooding by permitting this applicant to be allowed to continue a slab-on-grade development that was begun before it had been permitted. Such development, in addition to being a reckless disregard for the law, places more residents in harm's way, while removing much-needed flood mitigation in the form of riparian wetland forest.

The Corps and LDEQ must demand that the Applicant conduct an Area-Wide Environmental Impact Statement ("PEIS") for cumulative impacts to hydrology and wetlands from residential slab-on-grade construction within the Amite watershed to gain further insight into the economic impacts of this sort of wetland destruction in the region. This is beyond urgent, given the floods of 2016, the increasing likelihood of other such events, and the extreme amount of repetitive-loss slab properties in unincorporated Livingston Parish.

The Applicant is required to first avoid and minimize, and then as a last resort, mitigate for adverse impacts to wetlands³. Avoidance is impossible for after-the-fact development, and for the remaining wetlands the Applicant plans to clear, excavate fill or grade the entire site⁴. The Joint Public Notice states:

“The applicant has claimed that the project has been designed to avoid and minimize direct and secondary adverse wetland impacts to the maximum extent practicable. The applicant is proposing to utilize best management practices during and after the construction phase of the project. The applicant is proposing to compensate for the unavoidable impact by purchasing mitigation credits from an approved mitigation bank.”⁵

There is no indication of how the Applicant designed the Project to avoid and minimize adverse wetland impacts. Also, although the Applicant proposes to buy credits from a mitigation bank to offset any unavoidable losses to wetland functions caused by project implementation, no amount of compensatory mitigation is stated, and mitigation banks will not address floodplain impacts of this development, as all known mitigation banks are outside (and downstream of) the Amite watershed. We are concerned about the inevitable indirect and cumulative wetland effects that may result from a project of this scale, and the abysmal lack of local hydrological and floodplain mitigation.

GRN opposes the Applicant’s request for a Section 404 Permit and WQC, and we ask The Corps and LDEQ to deny this request based on the following concerns:

1. The Project is inconsistent with Louisiana’s Comprehensive Master Plan for a Sustainable Coast and the 2016 Executive Order.

The Louisiana Legislature approved the latest version of Louisiana’s Comprehensive Master Plan for a Sustainable Coast (Master Plan) during the 2017 Regular Session⁶. Positive public support for the Master Plan has been overwhelming with every iteration approved by the legislature, and informally through to the present.^{7,8} Implementation of the Master Plan was mandated on April 4th, 2016, with Executive Order No. JBE 2016-09 (“Executive Order”) issued by Louisiana Governor John Bel Edwards. The Governor’s mandate requires all state agencies, departments,

³ [Wetlands Compensatory Mitigation Rule Factsheet, US EPA and USACE](#). (accessed 27 November 2018)

⁴ [Joint Public Notice, MVN 2008-03207-CQ](#) (see Figure 2. Accessed 27 November 2018).

⁵ *Id*, p 2, “Character of Work” section

⁶ SCR 1, 2017 Leg., Reg. Sess. (La. 2017).

⁷ [“New Poll Shows 88 Percent of Louisianians Support the 2017 Coastal Master Plan”](#) (03 April 2017), Restore the Mississippi River Delta, Press release. Survey: [Louisiana Coastal Master Plan Public Opinion Survey, Southern Media & Opinion Research, Inc.](#) (both accessed 01 December 2018)

⁸ [“New Poll Shows Louisianians’ Overwhelming Bipartisan Support for Coastal Restoration”](#) (27 September 2018), Restore the Mississippi River Delta, Press release. (accessed 01 December 2018)

and offices to “administer their regulatory practices, programs, projects, contracts, grants, and all other functions vested in them in a manner consistent with the Coastal Master Plan and public interest to the maximum extent possible.”⁹ This requirement is intended to “effectively and efficiently pursue the State’s integrated coastal protection goals.”¹⁰

The “Master Plan” clearly states that valuable wetlands must be preserved. One of the key values stated in the 2017 Master Plan is that “Louisiana’s wetlands protect valuable infrastructure from storm surge and flooding.”¹¹ Beyond that, the mission behind the Master Plan is,

“to ensure that the Louisiana coast supports our communities, the nation’s critical energy infrastructure, and our bountiful natural resources for generations to come by securing funding, improving flood risk reduction, and creating and maintaining coastal wetlands and important fish and wildlife habitat.”¹²

Filling in wetlands removes both the ecosystem and flood-protection functions of these lands, in direct conflict with the state’s goals. Allowing the Applicant to remove over 15 acres of forested wetlands not only limits ecological function, but it also fails to minimize water-flow impediments or improve overall hydrology in the Amite.

The Public Notice does not thoroughly adhere to the executive order, and thus The Corps and LDEQ should deny the permit application. Furthermore, the destruction of these wetlands, in direct opposition to the Master Plan, would further weaken the state’s storm defenses.

LDEQ cannot both follow the Executive Order and issue a WQC to the Applicant. The destruction of water flow and loss of ecosystem services is contrary to the unequivocal language of the Master Plan. Louisiana cannot arbitrarily increase the cost of its own program, willfully subsidize this developer, and endanger Louisiana residents without cause.

2. Water Dependence of The Project has not been demonstrated by the Applicant.

The intent of Corps regulation is to avoid the unnecessary destruction or alteration of waters of the United States, including wetlands, and to compensate for the unavoidable loss of such waters. Corps regulations require that no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge that would have less

⁹ See Exec. Order No. JBE 2016-09, issued 4/4/16: <http://gov.louisiana.gov/assets/ExecutiveOrders/JBE16-09.pdf>

¹⁰ *Id.*

¹¹ [Louisiana’s Comprehensive Master Plan for a Sustainable Coast \(2017\)](#), p ES-13. Coastal Protection and Restoration Authority of Louisiana. (accessed 27 November 2018)

¹² *Id.*, p 31.

adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences.

Based on this provision, an evaluation is required in every case for use of non-aquatic areas and other aquatic sites that would result in less adverse impact to the aquatic ecosystem, irrespective of whether the discharge site is a special aquatic site or whether the activity associated with the discharge is water dependent. A permit cannot be issued, therefore, in circumstances where an environmentally preferable practicable alternative for the proposed discharge exists.

For proposed discharges into wetlands and other special aquatic sites, The Corps requires consideration of whether the activity associated with the proposed discharge is “water dependent.” Water dependency is defined in terms of an activity requiring access or proximity to or siting within a special aquatic site to fulfill its basic project purpose.

According to the public notice, the purpose of the Project is to clear, grade, excavate, place, and maintain fill for a 256-lot residential subdivision residential development.¹³ Housing and commercial space is not water dependent, and the Applicant has not demonstrated that the Project is an exception. The Applicant has also failed to demonstrate that practicable alternatives do not exist.

According to 40 CFR §230.10(a)(3):

“[W]here the activity associated with a discharge which is proposed for a special aquatic site (as defined in subpart E) does not require access or proximity to or sitting within the special aquatic site in question to fulfill its basic purpose (i.e. not water dependent), practicable alternatives that do not involve special aquatic sites are presumed to be available, unless clearly demonstrated otherwise. In addition, where discharge is proposed for a special aquatic site, all practicable alternatives to the proposed discharge which do not involve a discharge into a special aquatic site are presumed to have less adverse impact on the same aquatic ecosystem, unless clearly demonstrated otherwise.”¹⁴

Wetlands are considered “special aquatic sites.”¹⁵ There is no reason or explanation given by the Applicant concerning why this Project must be sited in wetlands to “fulfill its basic purpose.” Since the burden of proof rests with the Applicant, it must therefore be concluded that this proposal is not water dependent.

¹³ [Joint Public Notice, MVN 2008-03207-CQ](#) (Accessed 27 November 2018).

¹⁴ 40 C.F.R. §230.10(a)(3) (2009).

¹⁵ 40 C.F.R. §230.41.

In its present form, The Corps and LDEQ must deny the Applicant's requests for a Section 404 Permit and WQC.

3. Project Alternatives have not been addressed.

And according to the regulations, if the Project is not water dependent, non-wet practicable alternatives must then exist.¹⁶ In general, the regulations provide that no discharge of dredged or fill material shall be permitted: (1) if there is a practicable alternative to the proposed discharge; (2) if the discharge causes or contributes to violations of applicable state water quality standards; (3) if the discharge will cause or contribute to significant degradation of the environment; and (4) unless all appropriate steps have been taken to minimize potential adverse impacts.¹⁷ The Corps' regulations also require that destruction of wetlands is to be avoided to the extent practicable.¹⁸

The regulations further provide that "practicable alternatives" include "not discharging into the waters of the U.S. or discharging into an alternative aquatic site with potentially less damaging consequences."¹⁹ If a project is not "water dependent," as is the case with residential development including the Project, the guidelines contain a presumption that a less environmentally damaging practicable alternative exists while also requiring that the Applicant clearly demonstrates that practicable alternatives which would not involve discharge of fill material into special aquatic sites were not available.²⁰

It is widely known that elevated, pier construction is the historical, preferred, default construction method in flood-prone Louisiana²¹. The Applicant does not appear to be aware of the default construction methods routinely available to keep local residents free from future flood hazards.

There are public efforts in Livingston Parish and throughout the state, including LA-SAFE and the CRS program, to educate residents and developers on environmentally sensitive development, appropriate for high-risk flood hazard areas such as Colyell Creek. None of these

¹⁶ It should be further noted that 40 C.F.R. §230.20(a)(2) allows for the consideration of alternative sites *not owned* by the Applicant if they can be reasonably obtained and utilized for the basic purpose. Here, where the basic purpose is residential and commercial development, it can be easily assumed that numerous non-wetland properties could be reasonably obtained to fulfill the basic purpose, and it is clearly within the Applicant's burden to demonstrate otherwise.

¹⁷ 40 C.F.R. § 230.10.

¹⁸ 33 C.F.R. § 320.4(r).

¹⁹ 40 C.F.R. §§ 230.5(c), 230.10(a).

²⁰ 40 C.F.R. § 230.10(a)(3).

²¹ [The History of Building Elevation in New Orleans, 2013](#). Produced by URS for the Federal Emergency Management Agency.

features of environmentally sensitive development, such as bioswales, seem to have been considered by the Applicant at all.

The Applicant has provided no evidence of a proper alternatives analysis, to determine if non-wet potential project sites exist. An alternatives analysis must include direct, indirect, secondary, and cumulative impacts that take into account aspects of water quality, wildlife, and flood protection. Presently, the public has not received any information as to why the Project must be sited in the Applicant's preferred location.

Impacts to wetland areas could obviously be minimized if the development were relocated to non-wetland areas, or outside of floodplains. As noted above, a burden to show the non-existence of practicable alternatives rests with the Applicant, when the proposed project is located in a special aquatic habitat and is not water-dependent.

If no available alternate sites can be identified, documentation demonstrating such (letters of refusal from landowners to sell property or chronology and summary of attempts), MLS or other real estate searches resulting in no matches - include search parameters and full results; aerial photos showing no available undeveloped land, any other documentation showing an attempt to find less damaging properties) must be provided.

The Applicant has failed to demonstrate adequate consideration of alternatives, or an avoidance of impacts to the maximum extent practicable. Therefore, GRN respectfully submits that The Corps cannot issue the requested permit under Clean Water Act Section 404.

We request a Parishwide, adequate alternatives analysis in response to this letter. Such an alternatives analysis, for each property considered, must consider flood risk to residents in Amite watershed, surrounding land use, direct and cumulative impacts to wetlands by type, and secondary impacts like utilities necessary for residents and lessees. There must be a consideration of traditional and newer construction methods for mitigating flood risk and displacement of water.

4. Direct, indirect, secondary, and cumulative impacts must be fully considered.

Article IX, Section 1 of Louisiana's 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.”²²

In its ‘Save Ourselves’ decision, the Louisiana Supreme Court outlined how state agencies, as public trustees, can implement this constitutional guarantee. All agencies must determine whether a project avoids or minimizes adverse environmental impacts, balances environmental costs and benefits with economic and social factors, and consider whether alternate projects, sites, or mitigating measures would better protect the environment.²³

Given the information available in public documents, it does not appear that LDEQ or the Applicant have fully weighed the costs and benefits relevant to the Project. Direct, indirect, secondary, and cumulative impacts of the proposed wetland fill and clearing remain overlooked.

The Project’s direct impact to as many as 15 forested wetland acres in Amite is certainly significant. The Amite watershed was rapidly converted to highly developed according to the National Land Cover Database in the past 20 years.²⁴ A FEMA report following the 2016 floods shows that areas in the Amite watershed classified as High Intensity Development and Medium Intensity Development increased 51% and 34% respectively in 10 years from 2001-2011 in Amite. FEMA also found staggering monetary costs to repair damages from floods in high development areas including the type of development proposed by the Applicant. In the August 2016 flood, the Amite was the number one impacted HUC8 watershed according to cost (upwards of \$548 Million) and number of claims filed for individual homeowners.²⁵ The Applicant has not acknowledged the cost or impact of the Project in a future flood.

There would be considerable impacts to water quality and wildlife habitat, including potential threats to threatened species that either reside or feed in this area such as such as Bachman’s Sparrow, Bald Eagle, American Swallow-tailed Kite and Pine Woods Snake.

(see http://www.wlf.louisiana.gov/wildlife/species-parish-list?tid=263&type_1=All)

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.”²⁶ It is unacceptable that the Applicant offers no analysis of these

²² See Article IX of Louisiana Constitution:

<http://senate.la.gov/Documents/Constitution/Article9.htm#%C2%A71.%20Natural%20Resources%20and%20Environment;%20Public%20Policy>

²³ 452 So. 2d 1152 (La. 1984).

²⁴ [FEMA Louisiana Watershed Resiliency Study, July 2017, Appendix A: Amite Watershed](#), p. 52, Table 3.1.1.

²⁵ [FEMA Louisiana Watershed Resiliency Study, July 2017](#), p. 29 Map 2.7.8.

²⁶ 40 C.F.R. §230.41.

probable impacts. FEMA estimates that the Amite has lost almost 54% of it’s wetlands since pre-colonial times.²⁷

The impacts proposed by this Project are part of many connected actions within the Parish to fill wetlands. Within Livingston Parish and the Amite watershed, the majority of Corps actions that are not minimal impact, and thus under general permit, are for this connected purpose (see Table 1).

Proposed Wetland Impact		
Standard 404 Applications for Livingston Parish from Sep ‘13 to Nov ‘18		
Impact Type	Sum of Acres	Count of Applications
Residential Developments	180	78
Commercial Developments	452	21
Drainage Projects	638	11
Recreational Developments	1	10
Transportation Projects	30	6
Oil and Gas Facilities	8	2
Industrial Developments	18	2
Utility Projects	1	1

Table 1. Summary of standard proposed wetland impacts USACE public notices concerning the Amite. Note the majority of applications are concerning Residential impacts.

Since the Public Notice does not assess, or even recognize, the potential direct, indirect, and cumulative impacts that will result from the disruption of over 15 acres of forested wetlands, The Corps and LDEQ cannot approve this proposal as submitted. The Corps and LDEQ have permitted too many of this kind of project to alter hydrology, affect wetlands in this watershed, and place residents in harm's way.

5. The fill of these waters is against Federal and State Anti-degradation policy

²⁷ [FEMA Louisiana Watershed Resiliency Study, July 2017, Appendix A: Amite Watershed.](#) p. 28, Table 2.
4.3

The fill of such a large area is in violation of the federal and state anti-degradation policy. The Louisiana policy states that “administrative authority will not approve any wastewater discharge or certify any activity for federal permit that would impair water quality or use of state waters.”²⁸

Federal anti-degradation policy for floodplain management and wetland protection has not been adhered to. As per executive orders 11988 and 11990, in order to prevent impacts to wetlands, certain aspects need to be analyzed. Title 18 of the Code of Federal Regulations states:

“It is the policy of the Council to provide leadership in floodplain management and the protection of wetlands. Further, the Council shall integrate the goals of the Orders to the greatest possible degree into its procedures for implementing the National Environmental Policy Act. The Council shall take action to: Avoid long- and short-term adverse impacts associated with the occupancy and modification of floodplains and the destruction or modification of wetlands; Avoid direct and indirect support of floodplain development and new construction in wetlands wherever there is a practicable alternative; Reduce the risk of flood loss; Promote the use of nonstructural loss reduction methods to reduce the risk of flood loss; Minimize the impact of floods on human health, safety and welfare; Minimize the destruction, loss or degradation of wetlands; Restore and preserve the natural and beneficial values served by floodplains; Preserve and enhance the natural and beneficial values served by wetlands.”²⁹

The fill of such a large area itself is in violation of the federal and state anti-degradation policy for the Amite River. When we consider the hundreds of acres that have been permitted to be removed from this area in the last 5 years, water quality downstream is affected. Since the storms of 2016, the waters downstream of the Amite, such as Lake Ponchartrain, are very prone to algal blooms from the residential pollution that washed into the lake after those large rains.

The Louisiana policy states that “administrative authority will not approve any wastewater discharge or certify any activity for federal permit that would impair water quality or use of state waters.”³⁰

The Corps and LDEQ have permitted too many of this kind of project to alter hydrology, affect wetlands in this watershed, and place residents in harm's way.

²⁸ LA. ADMIN. CODE tit. 33, pt. IX §1109(A)(2).

²⁹ 18 C.F.R. §725.2.

³⁰ LA. ADMIN. CODE tit. 33, pt. IX §1109(A)(2).

6. The Applicant must notify local floodplain officials of this permit application, since the proposed site sits within an area vulnerable to flooding.

The location of this proposed project is critical because of high amount of recent fill, the lack of mitigation, and proven and increasing flood hazards. The public interest is overwhelmingly for maintaining the local flood mitigation functions that these wetlands are providing.

The responsibility of managing flood risk in Louisiana lies largely with individual parishes. Since parish officials are charged with administering the hazard mitigation program, they should also be informed of this CUP extension request that impacts flood-mitigating wetlands. Relevant to this particular instance, the Livingston Parish Floodplain Administrator is Dee Dee Delatte ((225) 686-3021, dddelatte@livingstonparishla.gov).

We request that local floodplain managers be notified of the associated, significant flood risks.

6. The Public Notice fails to adequately describe the Mitigation Plan.

The Applicant fails to provide information on wetlands mitigation, and the nearest mitigation banks are outside of the Amite watershed, and thus would not mitigate ecological functions necessary to comply with the Clean Water Act.

Federal law also requires the Applicant to compensate for, or mitigate, the damages resulting from the destruction of our nation's wetlands, should a permit be issued. In the public notice, there is only a vague mention of proposed plans for the use of a mitigation bank to offset already enacted plus future losses to wetland functions caused by project implementation, although no mitigation bank exists in the Amite watershed.³¹

The Corps "must ensure that adequate [mitigation plan] information is included in the Public Notice to enable the public to provide meaningful comment," providing exception only for data which is "legitimately confidential for business purposes."³² According to the joint EPA/USACE "Compensatory Mitigation for Losses of Aquatic Resources; Final Rule," mitigation plans for all wetland compensatory mitigation projects must contain the twelve elements, including:³³

- site selection criteria
- baseline information for impact and compensation sites
- ecological performance standards
- monitoring requirements

³¹ [Joint Public Notice, MVN 2008- 03207-CQ EV.](#)

³² 40 CFR § 230.94(b).

³³ 33 CFR § 322.4[c].

The mere mention of legally-required details does not satisfy this requirement of “adequate information” to allow “meaningful comment.” Considering that localities in coastal Louisiana have a strong public interest in minimizing the effects of storm surge and localized river flooding, the nature and location of compensatory mitigation is of vital importance to those who wish to provide public comments. As these areas are Forest Floodplains of Special Concern, canopy-cover values ought to be publicly provided, given the significant impacts to forests that make up the majority of this proposal’s potential wetland destruction.

For the sake of detail, further mitigation requirements in 33 C.F.R. § 332 are included below.

To satisfy the Clean Water Act, mitigation plans must provide a level of detail “commensurate with the scale and scope of the impacts”³⁴ and include the following information:

1. “A description of the resource type(s) and amount(s) that will be provided, the method of ecoregion, physiographic province, or other geographic areas of interest.”³⁵
2. “A description of the factors considered during the site selection process. This should include consideration of watershed needs, onsite alternatives where applicable, and the practicability of accomplishing ecologically self-sustaining aquatic resource restoration, establishment, enhancement, and/or preservation at the compensatory mitigation project site.”³⁶
3. “A description of the legal arrangements and instrument, including site ownership, that will be used to ensure the long-term protection of the compensatory mitigation project.”³⁷
4. “A description of the ecological characteristics of the proposed compensatory mitigation project site.... This may include descriptions of historic and existing plant communities, historic and existing hydrology, soil conditions, a map showing the locations of the impact and mitigation site(s) or the geographic coordinates for those site(s), and other site characteristics appropriate to the type of resource proposed as compensation. The baseline information should also include a delineation of waters of the United States on the proposed compensatory mitigation project site.”³⁸
5. “A description of the number of credits to be provided, including a brief explanation of the rationale for this determination,” including “an explanation of how the

³⁴ 33 C.F.R. § 332.4(c).

³⁵ 33 C.F.R. § 332.4(c)(2).

³⁶ 33 C.F.R. § 332.4(c)(3).

³⁷ 33 C.F.R. § 332.4(c)(4).

³⁸ 33 C.F.R. § 332.4(c)(5).

compensatory mitigation project will provide the required compensation for unavoidable impacts to aquatic resources resulting from the permitted activity.”³⁹

6. “Detailed written specifications and work descriptions for the compensatory mitigation project, including, but not limited to, the geographic boundaries of the project; construction methods, timing, and sequence; source(s) of water, including connections to existing waters and uplands; methods for establishing the desired plant community; plans to control invasive plant species; the proposed grading plan, including elevations and slopes of the substrate; soil management; and erosion control measures.”⁴⁰
7. “A description and schedule of maintenance requirements to ensure the continued viability of the resource once initial construction is completed.”⁴¹
8. “Ecologically-based standards that will be used to determine whether the compensatory mitigation project is achieving its objectives.”⁴²
9. “A description of parameters to be monitored in order to determine if the compensatory mitigation project is on track to meet performance standards and if adaptive management is needed. A schedule for monitoring and reporting on monitoring results to the district engineer must be included.”⁴³ The mitigation plan must provide for a monitoring period that is sufficient to demonstrate that the compensatory mitigation project has met performance standards, but not less than five years. A longer monitoring period must be required for aquatic resources with slow development rates (e.g., forested wetlands, bogs).⁴⁴
10. “A description of how the compensatory mitigation project will be managed after performance standards have been achieved to ensure the long-term sustainability of the resources, including long-term financing mechanisms and the party responsible for long-term management.”⁴⁵
11. “A management strategy to address unforeseen changes in site conditions or other components of the compensatory mitigation project, including the party or parties responsible for implementing adaptive management measures. The adaptive management plan will guide decisions for revising compensatory mitigation plans and

³⁹ 33 C.F.R. § 332.4(c)(6).

⁴⁰ 33 C.F.R. § 332.4(c)(7).

⁴¹ 33 C.F.R. § 332.4(c)(8).

⁴² 33 C.F.R. § 332.4(c)(9).

⁴³ 33 C.F.R. § 332.4(c)(10).

⁴⁴ 33 C.F.R. § 332.6.

⁴⁵ 33 C.F.R. § 332.4(c)(11).

implementing measures to address both foreseeable and unforeseen circumstances that adversely affect compensatory mitigation success.”⁴⁶

12. “A description of financial assurances that will be provided and how they are sufficient to ensure a high level of confidence that the compensatory mitigation project will be successfully completed, in accordance with its performance standards.”⁴⁷
13. The mitigation plan must provide for a monitoring period that is sufficient to demonstrate that the compensatory mitigation project has met performance standards, but not less than five years. A longer monitoring period must be required for aquatic resources with slow development rates (e.g., forested wetlands, bogs).⁴⁸
14. The compensatory mitigation requirements must be clearly stated and include special conditions that “must be enforceable.” The special conditions must: “(i) Identify the party responsible for providing the compensatory mitigation; (ii) Incorporate, by reference, the final mitigation plan approved by the district engineer; (iii) State the objectives, performance standards, and monitoring required for the compensatory mitigation project, unless they are provided in the approved final mitigation plan; and (iv) Describe any required financial assurances or long-term management provisions for the compensatory mitigation project, unless they are specified in the approved final mitigation plan...”⁴⁹ “The special conditions must clearly indicate the party or parties responsible for the implementation, performance, and long-term management of the compensatory mitigation project.”⁵⁰
15. “The real estate instrument, management plan, or other mechanism providing long-term protection of the compensatory mitigation site must, to the extent appropriate and practicable, prohibit incompatible uses (e.g., clear cutting or mineral extraction) that might otherwise jeopardize the objectives of the compensatory mitigation project.”⁵¹

A key element of a legally adequate mitigation plan is the inclusion of ecological performance standards for assessing whether the mitigation is achieving its objectives, and these are described under 33 C.F.R. § 332.5:

⁴⁶ 33 C.F.R. § 332.4(c)(12).

⁴⁷ 33 C.F.R. § 332.4(c)(13).

⁴⁸ 33 C.F.R. § 332.6.

⁴⁹ 33 C.F.R. § 332.3(k).

⁵⁰ 33 C.F.R. § 332.3(l).

⁵¹ 33 C.F.R. § 332.7(a).

“Performance standards should relate to the objectives of the compensatory mitigation project, so that the project can be objectively evaluated to determine if it is developing into the desired resource type, providing the expected functions, and attaining any other applicable metrics (e.g., acres).”⁵²

And, further:

“Performance standards must be based on attributes that are objective and verifiable. Ecological performance standards must be based on the best available science that can be measured or assessed in a practicable manner. Performance standards may be based on variables or measures of functional capacity described in functional assessment methodologies, measurements of hydrology or other aquatic resource characteristics, and/or comparisons to reference aquatic resources of similar type and landscape position. The use of reference aquatic resources to establish performance standards will help ensure that those performance standards are reasonably achievable, by reflecting the range of variability exhibited by the regional class of aquatic resources as a result of natural processes and anthropogenic disturbances. Performance standards based on measurements of hydrology should take into consideration the hydrologic variability exhibited by reference aquatic resources, especially wetlands. Where practicable, performance standards should take into account the expected stages of the aquatic resource development process, in order to allow early identification of potential problems and appropriate adaptive management.”⁵³

The information provided on impacts and mitigation is wildly insufficient to allow for meaningful comments, especially regarding forested wetlands. However, what is clear is that the federal regulations are not being followed.

To assure that minimization and mitigation in the same watershed and for the correct type of wetlands are occurring, we request that, at the minimum, mitigation banks and avoidance and minimization statements used are included in the Public Notice. Since this regulation is not followed, the Public Notice is incomplete and must be reissued with a mitigation plan.

7. The final plan, with mitigation plan included, should be made available to the public before any permits are granted.

We feel that the current Public Notice system is not adequate to fully involve the public in the Section 404 permitting process. Significantly, the joint Corps/LDEQ Public Notice documents are released now after-the-fact and before The Corps and the Applicant go through the “avoid, minimize, and mitigate” process.

⁵² 33 C.F.R. § 332.5(a).

⁵³ 33 C.F.R. § 332.5(b).

The public is therefore never given an opportunity to comment on the final project, including the mitigation plan. We have often been told that many changes happen to the permits before they are issued, but the public never sees them until the wetlands have already been filled and water quality altered.

We request more information in the initial Public Notice (e.g., mitigation plans, efforts made to avoid impacts, necessity of project location, adequate alternative analysis, environmental assessments, etc.). Because this regulation is not followed, the Public Notice is incomplete and must be reissued with a mitigation plan.

8. We question whether any wetland mitigation could completely replace the functions and values lost.

Should any impacts to wetlands occur because of the Project, mitigation is required. Given the history of failure of mitigation, particularly in the New Orleans District, we feel that it would be extremely difficult to replace the function and values of this particular wetland if offsite mitigation takes place. Recent scientific literature reviews of wetland mitigation sites have described these kinds of failure in detail, but the failure is due partially to the fact that the functions of wetland soils are largely unaccounted for:^{54,55}

A recent LSU master's thesis has outlined the failure to replace ecological functions by the New Orleans District 404 regulatory branch.⁵⁶ Although acreages were replaced around a 1:1 ratio, a functional analysis showed that the acreage of improved wetland needed to replace ecological functions was close to 2.4:1 for every acre destroyed.

The mention of possibly purchasing compensatory credits is inadequate information to base an evaluation of cumulative impacts from loss of wetland function. Even if mitigation were to take place within the same hydrologic basin, we question whether any amount of acreage offsite would be able to replace the functions and values (local flood mitigation, local flora/fauna, etc.) that these wetland tracts currently perform.

As outlined in the below table of values provided with the joint Public Notice, the majority of proposed work would impact forested wetlands (Table 1). While re-creating habitat is already a difficult task, forested regions require perhaps the most ingenuity and commitment. Unlike

⁵⁴ Spieles, D. J. 2005. Vegetation Development in Created, Restored, and Enhanced Mitigation Wetland Banks of the United States. *Wetlands*. 25:51-63.

⁵⁵ Moreno-Mateos D, Power ME, Comín FA, Yockteng R, 2012 Structural and Functional Loss in Restored Wetland Ecosystems. *PLoS Biol* 10(1): e1001247. [doi:10.1371/journal.pbio.1001247](https://doi.org/10.1371/journal.pbio.1001247).

⁵⁶ WETLAND MITIGATION BANKS AND THE NO-NET-LOSS REQUIREMENT: AN EVALUATION OF THE SECTION 404 PERMIT PROGRAM IN SOUTHEAST LOUISIANA by Abbey Anne Tyrna
https://digitalcommons.lsu.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=4115&context=gradschool_theses (accessed 16 December 2018)

their peers, these sorts of habitats develop over centuries. These time-scales are in stark contrast to those expected by regulators, so we accordingly question any accompanying mitigation measures as well as the ‘temporary’ classification. As a whole, it is essential to avoid and minimize wetland impacts.

We request more information in the initial Public Notice on efforts made to avoid impacts, necessity of project location, and agency comments.

9. The Project warrants a Programmatic, or Area-Wide, Environmental Impact Statement (PEIS).

We submit this additional section to address concerns that have been raised about comprehensive environmental review.

Claim: A PEIS is not warranted because The Corps has no program for comprehensively analyzing impacts to hydrology and riparian wetland forests in the Amite watershed.

Facts: Wrong. NEPA expressly contemplates preparation of an EIS for situations just like this one: where an agency is facing multiple independent permitting decisions that have overlapping, shared, or cumulative impacts.^{57,58,59}

Claim: A comprehensive review of multiple residential projects would be unprecedented.

Facts: Wrong. There is ample precedent for such a review, including regional examples. The Corps reviewed four independent phosphate mining projects that have cumulative impacts within a 1.32 million acre area of Central Florida.⁶⁰ This Florida EIS examined multiple independent projects from different applicants that share impacts on important resources.

Claim: A programmatic EIS will take too much time, and be too speculative.

Facts: Wrong. Should the cumulative impacts information be necessary to make an informed and lawful decision—which it is—the agencies must develop it, whether it is part of a PEIS or individual EISs. There is no reason why one would go faster than the other. Nor are the questions to be asked speculative. It is, in fact, relatively simple to calculate future impacts from past trends. For issues where there is a disagreement over the existing impacts to forested

⁵⁷ See Native Ecosystems Council v. Dombeck, 304 F.3d 886 (9th Cir. 2002) (“A single NEPA review document is required for distinct projects when ... the projects are ‘_connected,’ ‘_cumulative’ or ‘_similar’ actions ...”).

⁵⁸ 40 C.F.R. § 1508.25 (mandating single EIS for separate independent actions under some circumstances).

⁵⁹ 40 C.F.R. §1502.4(a), (c) (requiring a single EIS where proposals are “related to each other closely”).

⁶⁰ Areawide Environmental Impact Statement for Phosphate Mining in the Central Florida Phosphate District <http://www.phosphateeis.org/>.

floodplains and local hydrology, the PEIS will provide the best opportunity to develop data that is crucial to an informed decision.

Federal guidance and courts sometimes refer to these reviews as “programmatic,” while in other cases, they are called “area-wide” or “overview” EISs. The label is not important. Rather, it is the content of such an assessment that matters. The federal Council on Environmental Quality offers further guidance (in Q&A format):

Question: When is an area-wide or overview EIS appropriate?

Answer: The preparation of an area-wide or overview EIS may be particularly useful when **similar actions, viewed with other reasonably foreseeable or proposed agency actions, share common timing or geography.** For example, when a variety of slab-on-grade projects may be located in a single watershed, or when a series of new energy technologies may be developed through federal funding, the overview or area-wide EIS would serve as a valuable and necessary analysis of the affected environment and the potential cumulative impacts of the reasonably foreseeable actions under that program or within that geographical area.⁶¹

Courts have agreed that a single EIS is required for multiple discrete actions under some circumstances, for example, when the projects have common timing, geography, and/or impacts.^{62,63} Such circumstances exist here.

10. The Project does not appear to be in the public interest.

As already noted, The Corps must not only consider alternative residential sites and methods, it must also choose the least-damaging practicable alternative.⁶⁴ The least-damaging practicable alternative is the “no action” alternative. This alternative goes to the heart of this entire process – whether there even exists a public need for such a Residential Commercial Project in a vulnerable area already subject to many such bad development ideas.

As noted, this watershed is notorious among areas in Louisiana for its repetitive flood loss properties, incurring over \$1.5 Billion from a single event in 2016.⁶⁵ Residents often purchase homes on such property without any knowledge of their flood risk; yet local residents and the

⁶¹ Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations 40 CFR Parts 1500 - 1508 (1987). <http://energy.gov/sites/prod/files/G-CEQ-40Questions.pdf>.

⁶² See, e.g., *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1215 (9th Cir. 1998) (multiple timber sales must be evaluated in a single EIS where the sales were reasonably foreseeable, in a single general area, disclosed at the same time, and developed as part of a comprehensive strategy).

⁶³ *Earth Island Institute v. U.S. Forest Service*, 351 F.3d 1291 (9th Cir. 2003) (confirming that “similar actions”—i.e., actions which have similarities, such as common timing or geography, that warrant comprehensive review—must be considered in a single EIS if it is the “best way” to consider their impacts).

⁶⁴ 40 C.F.R. § 230.10(a).

⁶⁵ [FEMA Louisiana Watershed Resiliency Study, July 2017, Appendix A: Amite Watershed](#). p. 4.



federal government are left to subsidize the negligence of Applicants in order to sustain the economy of Livingston Parish against recurring, foreseeable, and the increasing cost of disasters.

No mention is made regarding how the residents of Livingston Parish would benefit from the Project, when the risks of displacing riparian flood mitigation are obvious. Community members are likely to be left with the usual unaccounted, externalized costs of the Project that come from reduced flood protection.

SUMMARY

- 1. The Project is inconsistent with Louisiana's Comprehensive Master Plan for a Sustainable Coast and a 2016 Executive Order.**
- 2. Water dependence of the Project has not been demonstrated by the Applicant.**
- 3. Project Alternatives have not been addressed.**
- 4. Direct, indirect, secondary, and cumulative impacts must be fully considered.**
- 5. The Applicant must notify local floodplain officials of this permit application, since the proposed site sits within an area vulnerable to flooding.**
- 6. The Public Notice fails to adequately describe the mitigation plan.**
- 7. The final plan, with mitigation plan included, should be made available to the public before any permits are granted.**
- 8. We question whether any wetland mitigation could completely replace the functions and values lost.**
- 9. The Project warrants a Programmatic, or Area-Wide, Environmental Impact Statement (PEIS).**
- 10. The Project does not appear to offer any public benefit or be in the public interest.**

In conclusion, The Corps and LDEQ must take the mandates put forth by the Clean Water Act, Louisiana's *Comprehensive Master Plan for a Sustainable Coast*, Governor John Bel Edwards, and the Louisiana Supreme Court seriously. These responsibilities are only heightened when faced with the inadequacy of the Applicant's public documents and the after-the-fact permit application.

The Applicant has not shown that the basic purpose of the Project is water-dependent, has not demonstrated a lack of practicable alternatives, has not assessed significant impacts, has only vaguely described plans for compensatory mitigation, and has not explained how the Project offers public benefit or is in the public interest.

More than decade since the 2005 hurricane season, and since the Gulf rains of 2016, GRN is beyond alarmed by the wetland destruction occurring throughout Louisiana and the Gulf Coast. We hope The Corps and LDEQ will act upon the above comments accordingly.

In order to keep us and the public properly informed, we request notification of denials, approvals, and/or changes to the Applicant's request for a Section 404 Permit and WQC. As



previously stated, we see pressing needs to conduct a PEIS and to hold a public hearing to fully weigh the continued impacts to hydrology and riparian forests in the Amite watershed.

We look forward to a written response.

For a healthy Gulf,

[sent via e-mail]

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