



UNITED FOR A HEALTHY GULF

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RE: **MVN-2018-0215-EV** - All State Financial Timber Branch II (**WQC 180314-01**)

Dear Ms. Vick, 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-2018-0215-EV**) and Water Quality Certification (**WQC 180314-01**) submitted to the United States Army Corps of Engineers (“Corps”) and Louisiana Department of Environmental Quality (“LDEQ”), respectively, by All State Financial Company (“Applicant”).

The Applicant requests Section 404 permitting and a Water Quality Certification (“WQC”) for its proposed construction of a multipurpose slab-on-grade development with parking (“Project”). The Project would remove 22.34 acres of forested wetlands from an highly vulnerable area within a heavily impacted watershed, Liberty Bayou -Tchefuncta (0809020102) in unincorporated St Tammany Parish. FEMA has spent at least \$50 Million within this watershed for DR-4263-LA alone, and over \$1.3 Billion in claims within 0809020102 over time¹. It is not in the public's interest to subsidize more residential flooding by permitting this applicant to place even more residents in harm's way, while removing much-needed flood mitigation in the form of riparian wetland forest.

¹ [FEMA LOUISIANA WATERSHED RESILIENCY STUDY, Aug 2017, Appendix I: Liberty Bayou-Tchefuncta Watershed](#)

The Corps and LDEQ must demand the Applicant conduct an Area-Wide Environmental Impact Statement (“PEIS”) for cumulative impacts to hydrology and to wetlands of residential and commercial slab construction within the Tchefuncta watershed. This is beyond urgent, given the events of March 2016, the increasing likelihood of other such events, and the extreme amount of repetitive-loss slab properties in unincorporated St Tammany Parish.

Although the Applicant also proposes to buy credits from a mitigation bank to offset any unavoidable losses to wetland functions caused by project implementation, 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 information on local hydrology and floodplain mitigation. All known mitigation banks will not mitigate floodplain impacts of this development, as they are outside this watershed.

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, the 2016 Executive Order, and SMP 2017 Project STT.01N.

Disrupting these wetlands directly conflicts with Louisiana’s restoration and community-protection goals. The *Comprehensive Master Plan for a Sustainable Coast* (“Master Plan”) clearly states that valuable wetlands must be preserved.

One of the key assumptions of 2007’s Master Plan is that “a sustainable landscape is a prerequisite for both storm protection and ecological restoration.”² And in 2012’s iteration, these land-use specifications were further clarified:

We do not want construction of new hurricane protection systems to encourage unwise development in high risk areas, as has occurred in the past. Such development increases overall levels of risk and diminishes the effectiveness of the protection structures themselves. This phenomenon is called “Induced Risk,” and it runs counter to the master plan’s objectives of sustaining wetland ecosystems and reducing the flooding risks borne by coastal communities. *Similarly, wetland areas inside the hurricane protection system need to remain intact and undeveloped [emphasis added].*³

² Coastal Protection and Restoration Authority of Louisiana, *Executive Summary, in LOUISIANA’S COMPREHENSIVE MASTER PLAN FOR A SUSTAINABLE COAST 3* (2007).

³ Coastal Protection and Restoration Authority of Louisiana, *2012 Comprehensive Master Plan for a Sustainable Coast*, p 159).

Filling in these wetlands removes both the ecosystem and flood-protection functions of these tracts of land, in direct conflict with the state's goals. The Master Plan further states that "overall hydrology must be improved by minimizing impediments to water flow."⁴ Allowing the Applicant to remove over 22 acres of forested wetlands not only limits ecological function, but it also fails to minimize water-flow impediments or improve overall hydrology in Tchefuncta.

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

The Louisiana Legislature approved the latest version of the Coastal Master Plan during the 2012 Regular Session,⁵ with overwhelming public support.⁶

On April 4th, 2016, Louisiana Governor John Bel Edwards gave even greater weight to the foundational recommendations laid out in the Master Plan by issuing Executive Order No. JBE 2016-09 ("Executive Order"). Like Executive Order No. BJ 2008-7 issued by his predecessor,⁷ the Governor's mandate again requires all state agencies, departments, 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."⁸ This requirement is intended to "effectively and efficiently pursue the State's integrated coastal protection goals."⁹

While the Executive Order strives to implement the Master Plan's goals to preserve wetland areas, the Applicant seeks to obtain a permit to remove 22 acres of riparian wetlands that protect communities from localized flooding, and fill that landscape with concrete. This is inconsistent with State Master Plan Project STT.01N, which proposes to spend \$1.06 Billion to remove concrete slabs, elevate, and otherwise floodproof existing homes.

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.

⁴ *Id.*

⁵ SCR No.62, 2012 Leg., Reg. Sess. (La. 2012).

⁶ Louisiana Coastal Master Plan Public Opinion Survey, Southern Media & Opinion Research, Inc. Online at <http://www.mississippiriverdelta.org/files/2012/04/2012-Louisiana-CMP-Opinion-Survey.pdf>.

⁷ See Exec. Order No. BJ 2008-7, issued 1/23/08:

http://dnr.louisiana.gov/assets/docs/conservation/groundwater/Appendix_B.pdf

⁸ See Exec. Order No. JBE 2016-09, issued 4/4/16: <http://gov.louisiana.gov/assets/ExecutiveOrders/JBE16-09.pdf>

⁹ *Id.*

The Project is inconsistent with SMP project STT.01N, floodproofing St Tammany Parish. There must be a consistency review under STT.01N for this destruction. The State 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 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 multipurpose development comprised of commercial space, single family residential lots, and multifamily residential development¹⁰. 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):

¹⁰ [Joint Public Notice, MVN 2018- 0215 EV](#)

[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 siting 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.¹¹

Wetlands are considered “special aquatic sites.”¹² There is no reason or explanation given by the Applicant concerning why this development 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. And according to the regulations, non-wet practicable alternatives must then exist.¹³

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.

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.¹⁴ The Corps’ regulations also require that destruction of wetlands is to be avoided to the extent practicable.

¹⁵

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.”¹⁶ If a project is not “water dependent,” as is the case with housing and

¹¹ 40 C.F.R. §230.10(a)(3) (2009).

¹² 40 C.F.R. §230.41.

¹³ 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.

¹⁴ 40 C.F.R. § 230.10.

¹⁵ 33 C.F.R. § 320.4(r).

¹⁶ 40 C.F.R. §§ 230.5(c), 230.10(a).

commercial space, 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.¹⁷

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

There are many public education efforts in St Tammany 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 Timber Branch. None of these features, such as bioswales, seem to have been considered.

Publicly-available documents provide no evidence that the Applicant has engaged in a proper alternative analysis, to determine if non-wet potential project sites exist. The alternative 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.

Feasible sites can be identified using current aerial photography. Landowners can be identified through clerk of court records and contacted to determine availability of the land for purchase. Local newspapers also provide a source of available real estate offerings. A drive-by search for lots posted for sale in the general development vicinity also can be an effective method of finding available sites. Several websites offer listings of large tracts of land. Multiple Listing Real Estate Searches (MLS) also can be used to determine the availability of property for development and also can be used to assess the current housing/real estate market in the development area. MLS or other real estate search results provided for site identification purposes must include the parameters used for the search.

¹⁷ 40 C.F.R. § 230.10(a)(3).

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 Tchefuncta watershed, surrounding land use, direct and cumulative impacts to wetlands by type, and secondary impacts like utilities necessary for residents and leasees. 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."¹⁸

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.¹⁹

Given the information available in public documents, it does not appear that LDNR 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.

¹⁸ See Article IX of Louisiana Constitution:

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

¹⁹ 452 So. 2d 1152 (La. 1984).

As mentioned above, the Project's direct impact to as many as 22 forested wetland acres in Tchefuncta is certainly significant. 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 Bachman's Sparrow, Bald Eagle, American Swallow-tailed Kite, Pine Woods Snake, and Ornate Chorus Frog.

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

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."²⁰

Federal regulations have not been fully implemented. 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.²¹

Given that the Public Notice does not thoroughly adhere to the executive order, The Corps and LDEQ should deny the permit application.

The destruction of these wetlands, in direct opposition to the Master Plan, would further weaken the state's storm defenses.

²⁰ LA. ADMIN. CODE tit. 33, pt. IX §1109(A)(2).

²¹ 18 C.F.R. §725.2.

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.”²² It is unacceptable that the Applicant offers no analysis of these probable impacts. FEMA lists the Soap Bayou-Tchefuncte sub-watershed as one of the most heavily filled in the State, with up to 2.5 % of its area converted to impervious surface from 2001-2011, according to Land Cover data.²³

The cumulative impacts on storm and flood protection must also be taken into consideration. This project would incite additional, secondary construction and jeopardize even more wetlands unique to this area. This type of activity, combined with similar wetland-destroying projects, has resulted in more flooding in nearby communities, as well as degraded water quality in the scenic Tchefuncte River and surrounding wetlands. The watershed must be looked at as an interrelated ecological unit in order to adequately assess the true cumulative impacts.

Within St Tammany Parish, from Sept 2013 to Dec 2017, USACE reviewed roughly 80 standard 404 applications, and about 75 % of those were Residential or Commercial Developments. About 40% of proposed impacts came from these two types. The overwhelming amount of Transportation impact evaluated came from one project, the Bush to I-12, a highway proposed to spur residential development in the eastern part of the Parish, through the existing mitigation areas. When that impact is considered, over 80% of total acreage is connected to slab development for residential or commercial projects.

The impacts proposed by this Project are part of many connected actions within the Parish to fill wetlands. Within St Tammany Parish and the Liberty Bayou-Techfuncta watershed, the majority of Corps actions that are not minimal impact, and thus under general permit, are for this connected purpose.

²² 40 C.F.R. §230.41.

²³ FEMA. Aug 2017 LAWRS [Appendix I. Liberty Bayou-Tchefuncta](#)

Proposed Wetland Impact		
Standard 404 Applications for Liberty Bayou-Tchefuncte Sep '13 to Apr '18		
Impact Type	Sum of Acres	Count of Applications
Transportation Projects	345.8	4
Residential Developments	197.3	45
Commercial Developments	117.5	17
Recreational Developments	41.9	5
Drainage Projects	13.58	6
Oil and Gas Facilities	3.13	2
Industrial Developments	7.75	2

Table 1. Summary of standard proposed wetland impacts USACE public notices concerning Liberty Bayou -Tchefuncte. Some acreages are outside the watershed boundaries, such as the northern portion of the proposed Bush to I-12 highway. Note the majority of applications are concerning Residential impacts.

Standard 404 Permit applications for St Tammany Parish, Sept 2013 - April 2018

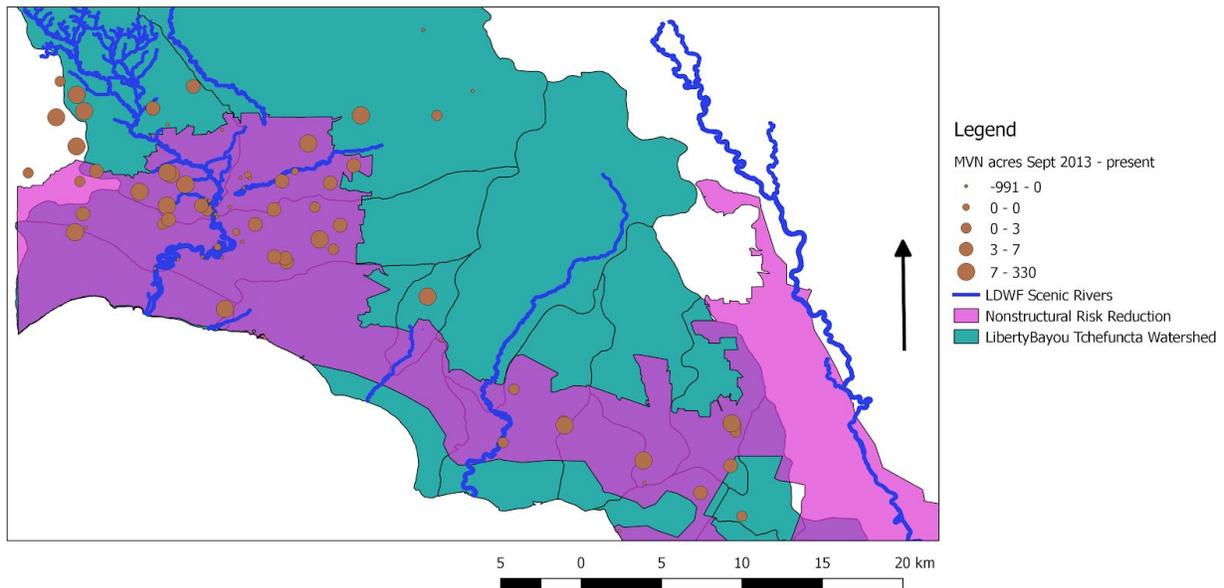


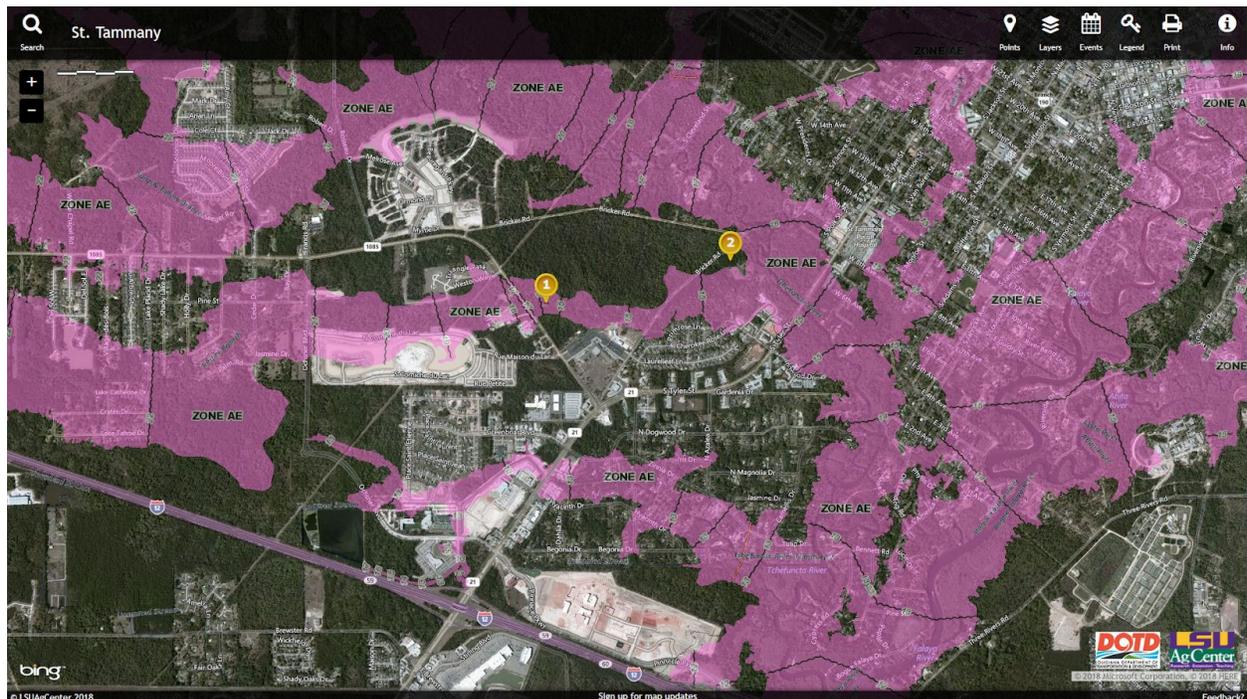
Figure 2. USACE wetland Permit applications for St Tammany Parish, in relation to Scenic Rivers, Watershed, and the 2017 Coastal Master Plan Non-Structural Risk Reduction Program

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 22 acres of forested wetlands, The Corps and LDEQ cannot approve this proposal as submitted. Degradation of the Scenic Tchefuncte River cannot be allowed. 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 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, proven and increasing flood hazards, and the Tchefuncte River's status as a scenic river. The public interest is overwhelmingly for maintaining the local flood mitigation functions that these wetlands are providing. Naturally, these 22 acres of wetlands, along with the entire site, lies within the 100-year floodplain. and are clearly susceptible to river flooding and storm-surge events (Figure 1).²⁴

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 St Tammany Parish Floodplain Administrator is Alan Pelegrin (85-898-2574, apelegrin@stpgov.org) and the Emergency Preparedness contact is Dexter Accardo (985-898-2359).



²⁴ FEMA Flood Map, St Tammany Parish <http://maps.lsuagcenter.com/floodmaps/>.

Figure 1: Proposed site in area at-risk for flooding

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.

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 any unavoidable losses to wetland functions caused by project implementation, although no mitigation bank exists in the Tchefuncta watershed.²⁵

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.”²⁶ 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:²⁷

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

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 publically 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”²⁸ and include the following information:

²⁵ [Joint Public Notice, MVN 2018- 0215 EV](#)

²⁶ 40 CFR § 230.94(b).

²⁷ 33 CFR § 322.4[c].

²⁸ 33 C.F.R. § 332.4(c).

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."²⁹
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."³⁰
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."³¹
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."³²
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 compensatory mitigation project will provide the required compensation for unavoidable impacts to aquatic resources resulting from the permitted activity."³³
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."³⁴

²⁹ 33 C.F.R. § 332.4(c)(2).

³⁰ 33 C.F.R. § 332.4(c)(3).

³¹ 33 C.F.R. § 332.4(c)(4).

³² 33 C.F.R. § 332.4(c)(5).

³³ 33 C.F.R. § 332.4(c)(6).

³⁴ 33 C.F.R. § 332.4(c)(7).

7. "A description and schedule of maintenance requirements to ensure the continued viability of the resource once initial construction is completed."³⁵
8. "Ecologically-based standards that will be used to determine whether the compensatory mitigation project is achieving its objectives."³⁶
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."³⁷ 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).³⁸
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."³⁹
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 implementing measures to address both foreseeable and unforeseen circumstances that adversely affect compensatory mitigation success."⁴⁰
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."⁴¹
13. The mitigation plan must provide for a monitoring period that is sufficient to demonstrate that the compensatory mitigation project has met performance standards,

³⁵ 33 C.F.R. § 332.4(c)(8).

³⁶ 33 C.F.R. § 332.4(c)(9).

³⁷ 33 C.F.R. § 332.4(c)(10).

³⁸ 33 C.F.R. § 332.6.

³⁹ 33 C.F.R. § 332.4(c)(11).

⁴⁰ 33 C.F.R. § 332.4(c)(12).

⁴¹ 33 C.F.R. § 332.4(c)(13).

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).⁴²

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....”⁴³ “The special conditions must clearly indicate the party or parties responsible for the implementation, performance, and long-term management of the compensatory mitigation project.”⁴⁴

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.”⁴⁵

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:

“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).”⁴⁶

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

⁴² 33 C.F.R. § 332.6.

⁴³ 33 C.F.R. § 332.3(k).

⁴⁴ 33 C.F.R. § 332.3(l).

⁴⁵ 33 C.F.R. § 332.7(a).

⁴⁶ 33 C.F.R. § 332.5(a).

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.”⁴⁷

The information provided on impacts and mitigation is wildly insufficient to allow for meaningful comments, especially regarding bottomland hardwoods and the Scenic Tchefuncte River. 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. The only information available to the public throughout the entire process is the joint Corps/LDEQ Public Notice. And significantly, these documents are released before The Corps and the Applicant go through the “avoid, minimize, and mitigate” process.

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.

⁴⁷ 33 C.F.R. § 332.5(b).

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:^{48,49}

[O]verall lack of recovery of biogeochemical functioning may have been driven largely by the low recovery of the carbon storage and the low accumulation of soil organic matter.

A recent LSU master's thesis has outlined the failure to replace ecological functions by the New Orleans District 404 regulatory branch.⁵⁰ 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.

⁴⁸ Spieles, D. J. 2005. Vegetation Development in Created, Restored, and Enhanced Mitigation Wetland Banks of the United States. *Wetlands*. 25:51-63.

⁴⁹ 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).

⁵⁰ WETLAND MITIGATION BANKS AND THE NO-NET-LOSS REQUIREMENT: AN EVALUATION OF THE SECTION 404 PERMIT PROGRAM IN SOUTHEAST LOUISIANA by Abbey Anne Tyrna
http://etd.lsu.edu/docs/available/etd-04102008-141642/unrestricted/Tyrna_thesisx.pdf.

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 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).

Approval of this permit would induce many other permit applications for development within the Tchefuncta watershed.

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 Liberty Bayou - Tchefuncta 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.^{51,52,53}

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?

⁵¹ 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 ...”).

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

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

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.⁵⁴

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.^{55,56} Such circumstances exist here.

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.⁵⁷ This Florida EIS examined multiple independent projects from different applicants that share impacts on important resources.

Similarly, the National Marine Fisheries Service is conducting a large-scale programmatic EIS on anticipated permitting activities for exploratory drilling in an area of over 200,000 square miles in the Beaufort and Chuckchi Seas.⁵⁸ In a 2010 letter to The Corps, Region IV of the EPA asked for an area-wide EIS for multiple phosphate mines in central Florida, observing the following: Addressing cumulative and secondary (indirect) effects in a piecemeal manner through the regulatory process (i.e. permit by permit) for impacts of this magnitude, cannot effectively or sufficiently address cumulative impacts to the Peace River Watershed as a whole. An area-wide EIS could adequately address these cumulative and secondary effects.⁵⁹

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

⁵⁴ 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>.

⁵⁵ 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).

⁵⁶ *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).

⁵⁷ Areawide Environmental Impact Statement for Phosphate Mining in the Central Florida Phosphate District <http://www.phosphateeis.org/>.

⁵⁸ Supplemental Draft Environmental Impact Statement (SDEIS) on the Effects of Oil and Gas Activities in the Arctic Ocean. <http://www.alaskafisheries.noaa.gov/protectedresources/arctic/>.

⁵⁹ *Need for Area Wide Environmental Impact Statement* “Bone Valley Phosphate Mining Region (Peace River Watershed, Florida) 10 Mar, 2010.

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

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.⁶⁰ 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 \$50 Million from a single event in 2016, and over \$1B over the history of the NFIP. Residents often purchase homes on such property without any knowledge of their flood risk; yet local residents and the federal government are left to subsidize the negligence of applicants like All State Financial in order to sustain the economy of St Tammany Parish against recurring, foreseeable, and the increasing cost of disasters.

No mention is made regarding how the residents of St Tammany 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.

⁶⁰ 40 C.F.R. § 230.10(a).

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 develop a spill-response plan, and local floodplain officials should be included in the notification of this permit, 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.

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 to fully weigh the continued impacts to hydrology and riparian forests in the Liberty Bayou -Tchefuncta watershed.

We look forward to a written response.

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



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