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RE: Second comment regarding **MVN-2015-02295-WII** - Bayou Bridge Pipeline in Multiple Parishes (**WQC 160921-03**)
P20161066

Dear Mr. Little, Ms. Hill, and Ms. Zumo,

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 objections to the application for a Section 404 Permit (**MVN-2015-02295-WII**) and Water Quality Certification (**WQC 160921-03**) and Coastal Use Permit (**P20160166**) submitted to the United States Army Corps of Engineers (“Corps”) and Louisiana Department of Environmental Quality (“LDEQ”), and Louisiana Department of Natural Resources (“LDNR”), respectively, by Bayou Bridge Pipeline, LLC (“Applicant”).

These Comments are supplementary to our previous letter, and we refer to the Tulane Environmental Law Clinic's letter from 31 Jan 2017 by reference.

1. **Pipeline Risks to National Security must be evaluated**

Since the 2000s, Department of Defense has listed climate risks as national security risks, mostly due to catastrophic flooding--as occurred in Louisiana in August 2016.

Climate-Related Security Risks ¹

¹ NATIONAL SECURITY IMPLICATIONS OF CLIMATE-RELATED RISKS AND A CHANGING CLIMATE 23 July 2015 Generated on 2015May27 RefID: 8-6475571

"The need for HADR and DSCA will likely rise as cities expand to encompass the majority of the global population and because flood risk threatens more people than any other natural hazard, especially in urban areas.

"Sea level rise and temperature changes lead to greater chance of flooding in coastal communities and increase adverse impacts to navigation safety, damages to port facilities and cooperative security locations, and displaced populations. Sea level rise may require more frequent or larger-scale DoD involvement in HADR and DSCA. Measures will also likely be required to protect military installations, both in the United States and abroad, and to work with partner nations that support DoD operations and activities."

All parishes in the path of the pipeline save Calcasieu filed emergency declarations in August 2016, as climate-aggravated rains destroyed over 500,000 people and over 188,000 homes². Cost of the damages from this one event was estimated at over \$10 billion³ statewide. Along the pipeline route, Jefferson Davis Parish showed the risk to the fewest people, at 716 people affected, and Lafayette, at 68,982 people affected. The Bayou Bridge Pipeline will increase carbon emissions, because of its impact to wetland soils, other soils. The Bayou Bridge Pipeline will increase carbon emissions, due to the increase in Light and Heavy Crude Oil Consumption. These increases will increase the risks of catastrophic flooding to Louisiana by increasing the rate of storms, but also their intensity.

The 2017 draft State Master Plan⁴ states that the difference in annual damages to the State of Louisiana varies by climate-driven phenomena, primarily sea-level rise. For example, in Year 25 (2042), the difference in annual expected flood damages is roughly \$2.5 billion. By year 50, the difference in annual expected flood damages is closer to \$10 billion. If Bayou Bridge were to encompass the entirety of this damage to climate, the project would clearly not be worth cost benefit. What the applicant must do is quantify their share of the damage to climate, and thus to Louisiana, as well as national security.

These changes in environmental scenario are driven by carbon emissions, such as the foreseeable emissions from the Bayou Bridge Project. It's not a matter of whether this project will increase flood risk, it's a matter of how. Without quantification of increases in emissions, USACE, LDEQ, and LDNR cannot say how important carbon released by Bayou Bridge, and whether the project is worth the burden to the public interest.

The sum of increases in carbon emissions to the atmosphere, due to the damages to the land, but also increased industrial emissions, must be quantified before LDEQ and USACE can make a determination whether the costs of this project outweigh the benefits.

² Disastermap.net, Louisiana Flood, Affected Area and Population.

³ "Louisiana flooding will cost U.S. economy more than \$10 billion". The Advocate. September 9, 2016. Retrieved November 14, 2016.

⁴ Louisiana's Comprehensive Master Plan for a Sustainable Coast, 5th January 2017, page 74.

Because the application does not contain a quantified carbon impact analysis, the application is incomplete and must be denied.

Risks to national security by placing important infrastructure on top of a floodway must also be evaluated. Pipelines float, pipelines suffer vessel strikes, pipelines are more vulnerable when wetlands and surface waters are not avoided. This pipeline will cross many navigable waters, rather than drill underneath them.

Should the pipeline be in the national security interest, the risks of not avoiding waters and wetlands must be evaluated in an environmental impact statement.

2. Pipeline Risks to State and Federal Restoration Projects must be evaluated

The pipeline crosses less than 50 feet beneath Bayou Lafourche, source for local drinking water, but also fresh water for the maintenance of over 100,000 acres of coastal marsh. These coastal marshes are listed for restoration under the federal CIAP Program, as well as the state Coastal Master Plan. The purpose of these programs is primarily an aid to suppress storm surge, and thus lessen flood risk--avoiding billions in flood damages per year. Federal monies have already been spent, and more will be spent, to secure this water for life along the bayou.

As the risk to this project, at a cost of over \$18 Million to the taxpayer in 2016 alone, have not been evaluated, the project application is incomplete and must be denied.

The USACE, in partnership with the Louisiana Department of Natural Resources, has invested over \$20 million and 15 years for the Buffalo Cove project to be implemented fully⁵. The project was completed winter 2015, and there are now 5 years remaining of monitoring water quality, sedimentation rates and fish community responses until the USACE fulfills their obligation to the project and the people of the state of Louisiana as stated in Environmental Assessment #366. The Bayou Bridge pipeline footprint cuts through the northern portion of the restoration area and runs directly across a delineated area of influence for Element 15 (Gay's Slough input)described in that same Assessment #366.

The USACE and the state of Louisiana must uphold its obligation of restoring the damage

⁵ ENVIRONMENTAL ASSESSMENT ATCHAFALAYA BASIN FLOODWAY SYSTEM
BUFFALO COVE MANAGEMENT UNIT WATER CIRCULATION IMPROVEMENTS AND SEDIMENT MANAGEMENT
INITIATIVES
IBERIA AND ST. MARTIN PARISHES, LOUISIANA EA # 366

inflicted from allowing the oil and gas industry to cut East-West access canals through Buffalo Cove area (page 1 of EA#366) as required in the Water Resources Development Act of 2000; section 906(f) and the Federal Master Plan published in 2000.

3. The Project is inconsistent with Louisiana's Comprehensive Master Plan for a Sustainable Coast and a 2016 Executive Order.

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."⁶ 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].*⁷

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."⁸ Allowing the Applicant to impact over 600 acres of wetlands not only limits ecological function, but it also fails to minimize water-flow impediment or improve overall hydrology. In one area of Buffalo Cove, this amounts to roughly 3000 acres.

The Louisiana Legislature approved the latest version of the Coastal Master Plan during the 2012 Regular Session,⁹ with overwhelming public support.¹⁰

⁶ Coastal Protection and Restoration Authority of Louisiana, *Executive Summary, in LOUISIANA'S COMPREHENSIVE MASTER PLAN FOR A SUSTAINABLE COAST 3* (2007).

⁷ Coastal Protection and Restoration Authority of Louisiana, *2012 Comprehensive Master Plan for a Sustainable Coast*, p 159).

⁸ *Id.*

⁹ SCR No.62, 2012 Leg., Reg. Sess. (La. 2012).

¹⁰ 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>.

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,¹¹ 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.”¹² This requirement is intended to “effectively and efficiently pursue the State’s integrated coastal protection goals.”¹³

While the Executive Order strives to implement the Master Plan’s goals to preserve wetland areas, the Applicant seek to obtain a permit extension for their Project that will potentially destroy 600 acres of coastal wetlands that protect communities from localized flooding. LDEQ or LDNR cannot both follow the Executive Order and issue a WQC or CUP to the Applicant.

Consistency with CZMA is not limited to the Master Plan, but in this case, there is a direct contradiction.

The destruction of water flow and loss of ecosystem services worth trillions of dollars, is contrary to the unequivocal language of the Master Plan.

4. 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

¹¹ See Exec. Order No. BJ 2008-7, issued 1/23/08:

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

¹² See Exec. Order No. JBE 2016-09, issued 4/4/16: <http://gov.louisiana.gov/assets/ExecutiveOrders/JBE16-09.pdf>

¹³ *Id.*

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.

Pipelines are inherently not water dependent, and the Applicant has not clearly 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 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.¹⁴

Wetlands are considered “special aquatic sites.”¹⁵ 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.¹⁶

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

¹⁴ 40 C.F.R. §230.10(a)(3) (2009).

¹⁵ 40 C.F.R. §230.41.

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 pipeline 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.

5. 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.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 pipelines, 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

Instead of avoiding wetlands and waters, the Applicant has avoided completing their application via a proper alternative analysis, to determine if non-wet potential project sites exist, or alternative methods. 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.

If the project is in the national security interest, it should be sited outside of floodplains that put the project and the product at risk.

Impacts to wetland areas could obviously be minimized if the development were relocated to non-wet regions, or if the pipeline used HDD methods (Fig 1). 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.

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).

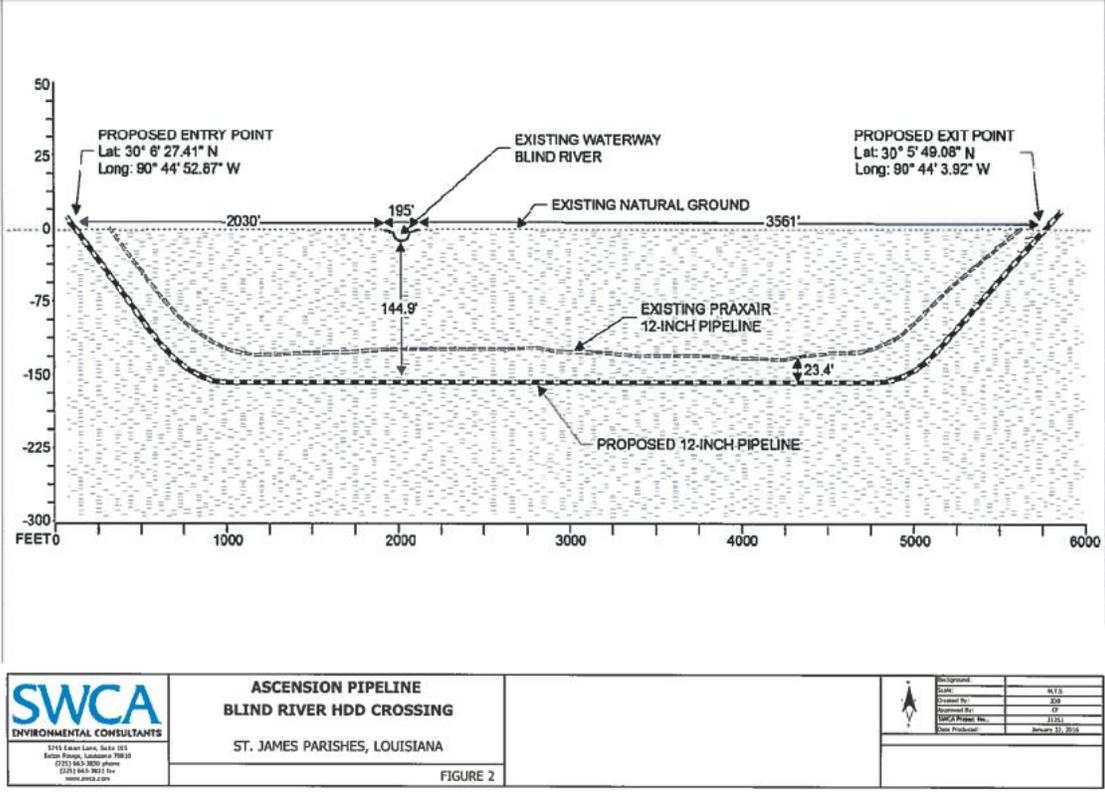
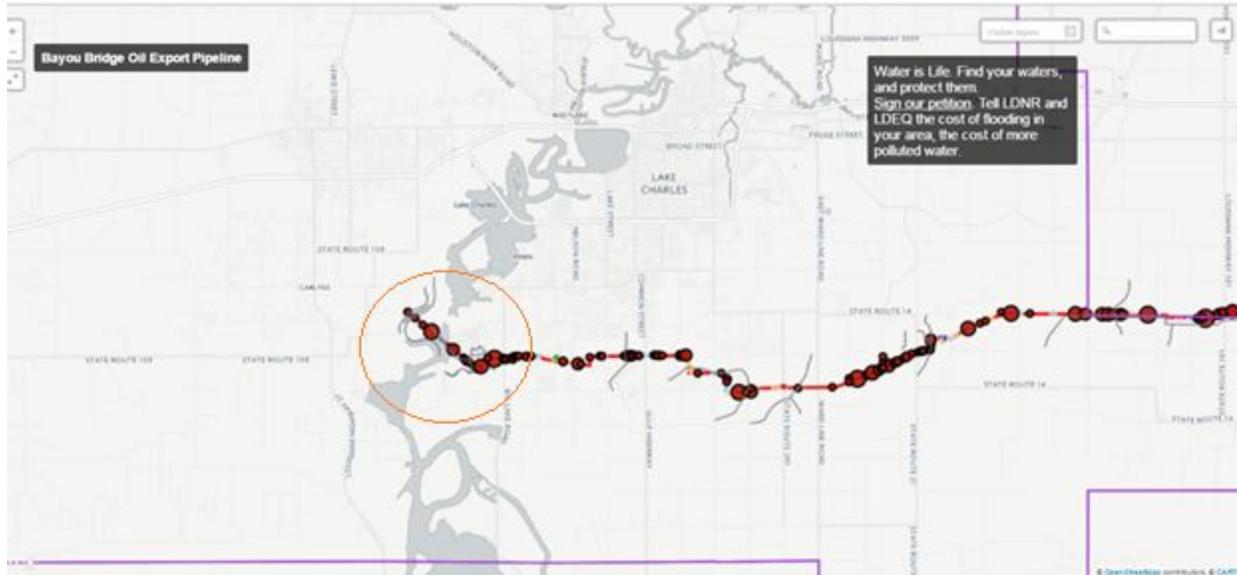


Fig 1. Horizontal drill avoidance for Ascension Pipeline (MVN 2015 1960 CM; CUP 20150393). Distance is about one mile, depth is over 140 feet.

Because the Applicant has not shown the Project to be water dependent, it is then assumed under the regulations that practicable alternatives exist to aspects of the Project that impact Waters of the United States. 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.

As an example, Here is a diagram of wetlands and waters not avoided in Calcasieu Parish:



By avoiding the Calcasieu river floodplain, the applicant could avoid 16 of ~63 acres of wetland destroyed in the parish. Only nine of eighty-seven of all stream crossings in Calcasieu Parish are avoided by HDD. The applicant could avoid many open cuts merely by drilling deeper--underneath the wetlands and waters of the United States.

In Assumption Parish, most of the land is fastland, but drilling deep under Bayou Lafourche is necessary, given the directive to avoid waters, and the facts regarding the horrendous compliance record of the applicant.

We request an alternatives analysis that includes horizontal drilling underneath major floodplain areas and major rivers as a result of this letter.

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.”²¹

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

²¹ See Article IX of Louisiana Constitution: <http://senate.la.gov/Documents/Constitution/Article9.htm#%C2%A71.%20Natural%20Resources%20and%20Environment;%20Public%20Policy>

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.²²

Why then, are 40% of the over 700 waterbody crossings by Open Trench? There are innumerable wetlands and waters could be avoided by horizontal drill (HDD)--as it is applied to eastbank communities. Why are wetlands avoided for the eastbank St James Parish, but not the westbank and western Parishes?

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.

As mentioned above, the Project's direct impact to over 600 wetland acres is certainly significant by itself. The Corps cannot show impacts to forested wetlands are "temporary" when numerous Corps and State plans exist bemoaning the loss of the Atchafalaya and Swamp forests of Louisiana to altered hydrology.

It is worth mentioning that 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."²³

Additionally, the 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

²² 452 So. 2d 1152 (La. 1984).

²³ LA. ADMIN. CODE tit. 33, pt. IX §1109(A)(2).

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.²⁴

Given that the Public Notice does not thoroughly adhere to the executive order, The Corps and LDEQ and LDNR 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. Impacts to Wetland Forest are not "Temporary," especially granted the severe hydrological alterations within the Atchafalaya Basin.

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."²⁵ Where upwards of 600 acres of wetlands are involved, it is unacceptable that the Applicant offers no analysis of these probable impacts. In Buffalo Cove, it is likely that such impact to wetlands covers roughly 3000 acres of fill, and the same amount of stagnant water, as the existing spoil bank impounds waters and is causing the settlement of sediment behind the spoil bank, which acts as a low-head dam.

The cumulative impacts on storm and flood protection must also be taken into consideration. This project could incite additional construction and in turn jeopardize even more wetlands unique to this area. This activity, combined with similar wetland-destroying projects, could result in more flooding in nearby communities, *as well as degraded water quality in the Calcasieu River, Bayou Lacassine, Mermentau River, Bayou Queue de Tort, Granges Coulee and Vermillion River, The Indian Bayou Floodplain, Bayou Tortue and Bayou Teche, the entire Atchafalaya Basin, Lower Grand River, Bayou Lafourche, and Bayou Verret, and other surrounding wetlands that depend on these rivers.* The whole area must be looked at as an interrelated ecological unit in order to adequately assess the true cumulative impacts.

Crucially though, the eventual export of oil is not isolated from its extraction. *Oil, from fracked or oil sand sources, must first be captured from underground deposits before it can be transported anywhere.* Recognizing this connection allows for the 'total cost' of the Project to then be calculated. That is, accounting for the Project's external costs in the forms of environmental and health damages felt by communities in coastal Louisiana, the National

²⁴ 18 C.F.R. §725.2.

²⁵ 40 C.F.R. §230.41.

Security Interests as executed by Department of Defense, and beyond. Citizens across the Gulf are exposed daily to air and waterborne contaminants because of the oil industry. All the while, their surrounding natural beauty is impacted by drilling wells, storage facilities, compressor stations, train cars, access roads, rail lines, and miles and miles of pipe.

Since the Public Notice does not assess, or even recognize, the potential direct, indirect, and cumulative impacts that will result from the direct destruction of over 600 acres of wetlands, The Corps and LDEQ and LDNR cannot approve this proposal as submitted.

5. The Applicant must develop disaster-response plans, and local floodplain officials should be included in the notification of this permit since the proposed site sits within an area vulnerable to flooding.

The Applicant must have plans for disaster response scenarios, in place prior to project permitting. We have yet to see any mention of this sort, in any public documents. The location of this proposed project is especially critical because of unique nature of the Atchafalaya Basin, and the critical nature of Bayou Lafourche to over 300,000 Louisiana residents.

The materials in the pipeline are not specified--the proposal is for both "light" and "heavy" crude oil. But there is a great difference in response and impact for oil sands spills than for light, Bakken crude. LDNR and LDEQ cannot evaluate a spill response plan when the material transported is not even specified.

Neither LDEQ nor LDNR can remain a "passive umpire" when it comes to permitted materials. This responsibility was distinctly highlighted in the recent ruling, *Sierra Club Delta Chapter v. La. Dep't Nat. Res.*, No. 00060916, Div. A.²⁶ LDEQ and LDNR must accept responsibility for materials permitted under the umbrella of water-quality and coastal-use. Until the Applicant has drafted an adequate spill-response plan, its application for a WQC and CUP ought to be deemed inadequate.

These wetlands also lie within the 100-year floodplain and are clearly susceptible to storm-surge events (Figure 1).²⁷ However, the Applicant makes no mention of any containment plans for brine, drilling waste, saltwater, or produced water. This is deeply concerning, given the proposed site's distinct geography. The Applicant's response plan refers to other states,

²⁶ La. 19th JDC Dec. 23, 2014.

²⁷ For example, FEMA Flood Map, Iberville Parish <http://maps.lsuagcenter.com/floodmaps/>.

when this pipeline is proposed for one state--this is clearly a xeroxed plan cut from another cloth and not made for Louisiana's waters and wetlands.

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.

The Applicant's application must be deemed inadequate until it submits parish-specific spill-response plans for specified materials transported. We also request that local floodplain managers be notified of the associated, significant flood and spill 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.²⁸ Impacts to the Atchafalaya Basin must be mitigated within the basin, due to the legacy of neglect we have witnessed inside that particular watershed, and its economic importance. We have heard, but have no access to plans that state that mitigation is planned for every basin except Terrebonne and Atchafalaya, the basins where the majority of wetland impacts occur. Such a change requires a new public notice.

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."²⁹ 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:³⁰

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

²⁸ Reference to document mentioned above

²⁹ 40 CFR § 230.94(b).

³⁰ 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 flooding, the nature and location of compensatory mitigation is of vital importance to those who wish to provide public comments. As just one example, 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”³¹ 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.”³²
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.”³³
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.”³⁴
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.”³⁵

³¹ 33 C.F.R. § 332.4(c).

³² 33 C.F.R. § 332.4(c)(2).

³³ 33 C.F.R. § 332.4(c)(3).

³⁴ 33 C.F.R. § 332.4(c)(4).

³⁵ 33 C.F.R. § 332.4(c)(5).

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."³⁶
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."³⁷
7. "A description and schedule of maintenance requirements to ensure the continued viability of the resource once initial construction is completed."³⁸
8. "Ecologically-based standards that will be used to determine whether the compensatory mitigation project is achieving its objectives."³⁹
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."⁴⁰ 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).⁴¹
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."⁴²

³⁶ 33 C.F.R. § 332.4(c)(6).

³⁷ 33 C.F.R. § 332.4(c)(7).

³⁸ 33 C.F.R. § 332.4(c)(8).

³⁹ 33 C.F.R. § 332.4(c)(9).

⁴⁰ 33 C.F.R. § 332.4(c)(10).

⁴¹ 33 C.F.R. § 332.6.

⁴² 33 C.F.R. § 332.4(c)(11).

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."⁴³
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."⁴⁴
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).⁴⁵
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...."⁴⁶ "The special conditions must clearly indicate the party or parties responsible for the implementation, performance, and long-term management of the compensatory mitigation project."⁴⁷
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."⁴⁸

⁴³ 33 C.F.R. § 332.4(c)(12).

⁴⁴ 33 C.F.R. § 332.4(c)(13).

⁴⁵ 33 C.F.R. § 332.6.

⁴⁶ 33 C.F.R. § 332.3(k).

⁴⁷ 33 C.F.R. § 332.3(l).

⁴⁸ 33 C.F.R. § 332.7(a).

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).”⁴⁹

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.”⁵⁰

The information provided on impacts and mitigation is wildly insufficient to allow for meaningful comments, especially regarding bottomland hardwoods. 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.

⁴⁹ 33 C.F.R. § 332.5(a).

⁵⁰ 33 C.F.R. § 332.5(b).

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 items available to the public throughout the entire process are the Applicant's CUP application and associated Public Notice, along with 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.

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:^{51,52}

[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.

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

⁵² 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).

A recent LSU master's thesis has outlined the failure to replace ecological functions by the New Orleans District 404 regulatory branch.⁵³ 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 recreating 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.

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

9. Neither Nationwide Permit 12 nor any other Nationwide Permit can be used for construction of any significant portion of the Project

The Nationwide Permit 12 is one of several categories of general permits issued by The Corps for activities that will have minor environmental impacts. Nationwide Permit 12 applies to specific projects required in the construction of utility lines, which include pipelines, located in waters of the United States. Federal regulations mandate that an applicant seeking a Nationwide Permit 12 must comply with general conditions.⁵⁴

As set forth in the conditions, limitations, and restrictions:⁵⁵

(e) Discretionary authority:

⁵³ 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_thesixx.pdf.

⁵⁴ 33 CFR § 330.4.

⁵⁵ §330.4, 2013.

(1) A division engineer may assert discretionary authority by modifying, suspending, or revoking NWP [Nationwide Permit] authorizations for a specific geographic area, class of activity, or class of waters within his division, including on a statewide basis, whenever he determines sufficient concerns for the environment under the section 404(b)(1) Guidelines or any other factor of the public interest so requires, or if he otherwise determines that the NWP would result in more than minimal adverse environmental effects either individually or cumulatively.

(2) A DE may assert discretionary authority by modifying, suspending, or revoking NWP authorization for a specific activity whenever he determines sufficient concerns for the environment or any other factor of the public interest so requires. Whenever the DE determines that a proposed specific activity covered by an NWP would have more than minimal individual or cumulative adverse effects on the environment or otherwise may be contrary to the public interest, he must either modify the NWP authorization to reduce or eliminate the adverse impacts, or notify the prospective permittee that the proposed activity is not authorized by NWP and provide instructions on how to seek authorization under a regional general or individual permit. . .

(4) NWPs do not authorize any injury to the property or rights of others.

To qualify for NWP authorization, the prospective permittee must comply with the applicable general conditions, in addition to any regional or case-specific conditions imposed by the division engineer or district engineer. Prospective permittees should contact the appropriate Corps district office to determine if regional conditions have been imposed on an NWP. The general conditions limit the application of Nationwide permits when they would affect:

- Aquatic Life Movements
- Spawning Areas
- Migratory Bird Breeding Areas
- Shellfish Beds
- Water Supply Intakes
- Management of Water Flows
- Fills Within 100-Year Floodplains
- Soil Erosion and Sediment Controls
- Removal of Temporary Fills
- Wild and Scenic Rivers
- Endangered Species
- Migratory Bird and Bald and Golden Eagle Permits.

A review of publicly-available documents shows the Project, as proposed, would be associated with many of the effects listed above. Moreover, the Project would result in more than minimal adverse environmental effects either individually or cumulatively and is otherwise contrary to the public interest. The Corps must accordingly modify the NWP authorization to reduce or eliminate the adverse impacts of pipeline construction (including any segment thereof) for which construction under NWP 12 or any other nationwide permit is sought. Or, The Corps must prohibit the use of NWP 12 or any other nationwide permit.

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

Approval of this permit could induce many other permit applications for development within the United States and Coastal Louisiana. The connected Dakota Access Pipeline already warrants an EIS. Phase I of the Bayou Bridge Project from Nederland, TX, will impact to federal plans to restore wetlands in Texas South of Beaumont⁵⁶. Both of these projects are connected actions, and the quickest method for analysing their impacts is through a Programmatic EIS.

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 wetland forests.

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}

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?

⁵⁶ [Texas Beneficial Use of Dredged Material Project Design Fund Phase I](#). Nov 2014

⁵⁷ See [Native Ecosystems Council v. Dombek](#), 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").

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 energy 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.⁶⁰

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.^{61,62} Such circumstances exist here.

Claim: A comprehensive review of multiple pipeline projects would be “unprecedented.” ||

Facts: Wrong. There is ample precedent for such a review, including area-wide EIS processes that are underway right now. For example, The Corps reviewed four independent phosphate mining projects that have cumulative impacts within a 1.32 million acre area of Central Florida.⁶³ 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.⁶⁴ 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.⁶⁵

⁶⁰ 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>.

⁶¹ 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).

⁶² 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).

⁶³ Areawide Environmental Impact Statement for Phosphate Mining in the Central Florida Phosphate District <http://www.phosphateeis.org/>.

⁶⁴ 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/>.

⁶⁵ Need for Area Wide Environmental Impact Statement “Bone Valley Phosphate Mining Region (Peace River Watershed, Florida) 10 Mar, 2010.

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 what such a large pipeline means for wetlands impacts, habitat impacts, contamination of groundwater, air impacts, health impacts, truck traffic, road damage, pollution, lost property values, and lost commercial opportunities in the region. For issues where there is a disagreement over the existing facts, the PEIS will provide the best opportunity to develop data that is crucial to an informed decision.

11. The Project does not appear to offer any public benefit or be in the public interest.

As already noted, The Corps must not only consider alternative pipeline routes, it must also choose the least-damaging practicable alternative.⁶⁶ 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 the Project.

There have been many promises made by the applicant, but many of them depend of the lack of an export option. We would like to see the promises made by the applicant at public fora inscribed into permit conditions.

Given the well-known volatility of oil and gas markets, the Applicant ought to demonstrate the long-term viability of the Project. The project was conceived when oil was more than \$100 a barrel. The economics of fracked oil, international relations with Russia and OPEC demonstrate that prices that high will not emerge soon. To demonstrate at least some of the projected project-related benefits, an analysis that includes no fewer than five years of historical market data should be included and weighed in the decision-making process.

⁶⁶ 40 C.F.R. § 230.10(a).

SUMMARY

- 1. Pipeline Risks to National Security must be evaluated.**
- 2. Pipeline Risks to State and Federal Restoration Projects must be evaluated.**
- 3. The Project is inconsistent with Louisiana's Comprehensive Master Plan for a Sustainable Coast and a 2016 Executive Order.**
- 4. Water dependence of the Project has not been demonstrated by the Applicant.**
- 5. Project Alternatives have not been addressed.**
- 6. Direct, indirect, secondary, and cumulative impacts must be fully considered.**
- 7. 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.**
- 8. The Public Notice fails to adequately describe the mitigation plan.**
- 9. The final plan, with mitigation plan included, should be made available to the public before any permits are granted.**
- 10. We question whether any wetland mitigation could completely replace the functions and values lost.**
- 11. Neither Nationwide Permit 12 nor any other Nationwide Permit can be used for construction of any significant portion of the Project.**
- 12. The Project warrants a Programmatic, or Area-Wide, Environmental Impact Statement (PEIS).**
- 13. The Project does not appear to offer any public benefit or be in the public interest.**

In conclusion, The Corps and LDEQ and LDNR 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.

Since the 2005 hurricane season, risks to our homeland have only increased. GRN is beyond alarmed by the wetland destruction occurring throughout Louisiana and the Gulf Coast. We hope The Corps and LDEQ and LDNR 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 and CUP. As previously stated, we see pressing needs to conduct a PEIS to fully consider the impacts to wetland storm buffers in Acadiana, the irreplaceable and abused Atchafalaya Basin, and the drinking water and coastal marshes depended on Bayou Lafourche.

We look forward to a written response.

For a healthy Gulf,

[sent via e-mail]



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