

24<sup>th</sup> JUDICIAL DISTRICT COURT FOR THE PARISH OF JEFFERSON

STATE OF LOUISIANA

DOCKET NO. 248-308

DIVISION K

THE LOUISIANA DEPARTMENT OF WILDLIFE AND FISHERIES, ON ITS OWN BEHALF AND ON BEHALF OF THE STATE OF LOUISIANA AS PUBLIC TRUSTEE AND ON BEHALF OF THE LOUISIANA WILDLIFE AND FISHERIES COMMISSION

VERSUS

BP OIL PIPELINE COMPANY, CHEVRON PIPE LINE COMPANY, ARROWHEAD GULF COAST PIPELINE, LLC, AND PLAINS PIPELINE, LP

FILED: \_\_\_\_\_

\_\_\_\_\_  
DEPUTY CLERK

PETITION FOR DAMAGES AND INJUNCTIVE RELIEF

INTO COURT, through undersigned counsel, come Plaintiff Louisiana Department of Wildlife and Fisheries ("the Department"), on its own behalf and on behalf of the State of Louisiana as public trustee of the Elmer's Island Wildlife Refuge and on behalf of the Louisiana Wildlife and Fisheries Commission ("the Commission") (collectively, the "Plaintiff"), who file this First Amended Petition for Damages and Injunctive Relief, and allege as follows:

STATEMENT OF THE CASE

1.

The Elmer's Island Wildlife Refuge ("Wildlife Refuge") contains nearly 1,156 acres of beaches, dunes, and marsh in Jefferson parish. The Wildlife Refuge provides important habitat for many species of fish and wildlife resources. It also offers valuable ecological functions and services, including, but not limited to, storm protection for surrounding communities and infrastructure, public recreation, and protection and enhancement of native habitats. The Department and the Commission own the Wildlife Refuge,<sup>1</sup> which is managed and operated by the Department to conserve the State's wildlife and fisheries resources and their habitat and to safeguard these natural resources for public purposes.<sup>2</sup>

<sup>1</sup> La. Rev. Stat. § 56: 702, 763, and 781.

<sup>2</sup> La. Rev. Stat. § 36:609.

2.

Within this bastion for natural resource conservation, however, stretch miles of pipeline canals, which facilitate the transportation of oil and gas through the wetlands and marsh. The pipeline companies, and ultimately the Defendants (defined in Paragraphs 24-26 below), have damaged the Elmer's Island Wildlife Refuge by causing erosion and failing to maintain these canals. Defendants have caused the continuous and foreseeable demise of the public lands located inside the Refuge. As a result of Defendants' actions large swaths of the once healthy marsh within the Refuge has been destroyed and converted into water. Defendants' actions and their failure to protect the Refuge and properly maintain the canals has converted vast swaths of land adjacent to and surrounding the pipeline canals into water by altering hydrology, causing erosion, and inducing and exacerbating subsidence. If left unabated, the eroding canals will continue to enlarge, leading to even more loss of these critical landscapes adjacent to and surrounding the pipeline canals.

Specifically, Defendants' actions and inactions have caused the deterioration and destruction of the marsh in the areas of the Wildlife Refuge outlined in Exhibits A and B that are subject to right-of-way ("ROW") servitudes under which Defendants conducted pipeline operations on the Wildlife Refuge.<sup>3</sup>

3.

The pipeline industry has known for many decades about the damage caused by the failure to properly maintain the pipeline canals. Through their own research and practical experience, pipeline companies knew at least by the 1950s that pipeline canals would widen and contribute to the loss of surrounding lands without protective safeguards and routine maintenance. But instead of instituting regular maintenance programs and taking steps to repair and redress these recognized impacts by the canals, pipeline companies undertook no significant measures to prevent or ameliorate the resulting damage to the land and the losses to the public of resources and protection.

4.

In 1972, the Battelle Columbus Laboratories issued a report entitled "Environmental

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<sup>3</sup> Specifically excluded from the lawsuit are areas of the Wildlife Refuge that Plaintiff leases from a third party.

Aspects of Gas Pipeline Operations in the Louisiana Coastal Marshes” (“the Battelle Report”). This report, commissioned by several pipeline companies, documented that the pipeline companies’ actions and inactions were causing deterioration and erosion, that they had known of these consequences for decades, and that they had known of the steps to take to prevent these consequences.

5.

The Battelle Report did not formulate new opinions or data on the effect of pipeline operations in Louisiana’s wetlands, but it was expressly “documenting the existing knowledge on the environmental effects of gas pipeline operations in the marshlands” and “[f]ormulating general conclusions, based upon the present state of knowledge, of the impacts of developments following the offshore lease sales.” Specifically defined as within the matrix of “Gas Pipeline Industry Activities” in the Battelle Report, the report included “canal maintenance” and “[f]ill and berm maintenance.”

6.

The Battelle Report recognized that bulkheads, plugs, or dams would “minimize erosion and ... prevent navigation traffic, which is a prime cause of erosion.” The report noted as an example a 284-mile line constructed in the late 1950s that employed 240 bulkheads for 135 crossings of navigable streams. The Battelle Report found that canals that are not bulkheaded or dammed had a far greater chance for “changes in salinity to be excepted to result.” The Battelle Report noted that, “where care has been taken in construction and operation of the gas pipeline, the environmental effects are minimal.”

7.

However, the Battelle Report recognized that when care is not taken, “Land loss due to canaling is a matter of serious concern in Louisiana.” The Battelle Report listed as the known disadvantages of flotation canals when such known means of care are not taken, “(1) More or less permanent alteration of landscape; greater loss of land. (2) Drainage patterns may be changed depending on use of bulkheading and on spoil bank treatment. (3) Erosion of land may result if navigation traffic is not prevented.” The Battelle Report further listed as consequences of these

physical changes when such known means of care are not taken, “a. changes in tidal flow patterns, b. changes in seasonal flow characteristics, c. flooding and storm conditions worsened, d. salinity pattern changes, ... [and] o. changes in erosional and depositional patterns.”

**8.**

The Battelle Report concluded, “Erosion of canals is a problem in coastal Louisiana.”

**9.**

Analyzing historical use of damming of canals and use of shell facing to armor the banks of canals, the Battelle Report concluded that, “when properly done, [these protection measures] eliminate[] them as foci of erosion.” “[I]n fact,” noted the Battelle Report, “the prevention of [] boat traffic is one of the principal reasons for bulkheading or plugging the canal after completion of a pipeline. (The other is to minimize alteration or existing hydrology and drainage patterns.)” The Battelle Report noted, therefore, that “where canals have been blocked” pipelining will likely not be a contributor to erosion. “However, if bulkheads and dams are not maintained they can wash out around the end permitting water flow, and inspection and maintenance is required to ensure that these continue to fulfill their designed function.”

**10.**

The Battelle report further analyzed the effects of spoil banks on the marsh and concluded that spoil banks “change the drainage and use patterns of the marsh” and that spoil banks “sink by compaction of the marsh upon which they are piled.”

**11.**

Similarly, the American Civil Engineering Handbook (1930) describes many methods for protecting the banks of navigation canals. These methods include “sloping the banks to stable slopes, protecting them from scour by brush mattresses, riprap, or block paving, timber planking, piling and sheet piling. Such work is necessary, not only on rivers to protect banks from erosion due to the flow and velocity of the current, but at tide level to protect against wave action and wash of passing vessels.”

**12.**

This case concerns the future of the Wildlife Refuge and the important services and

functions it provides. It is also about the Department's duty to conserve and manage "all renewable resources on all wildlife refuges" by requiring Defendants to honor their contractual obligations to safeguard and restore the coastal wetlands entrusted to them and by use of which they have so richly profited.<sup>4</sup> Only by making this demand, as outlined in this action, can the Plaintiff fulfill its public-trust mission and confront the unnatural threat that now imperils the Wildlife Refuge's ecosystems and all the public benefits derived from its intrinsic natural resources.

## PARTIES

### 13.

Plaintiff, the Department of Wildlife and Fisheries,<sup>5</sup> an arm of the state created by the Louisiana Legislature, co-owns the Wildlife Refuge. The Louisiana Department of Wildlife and Fisheries on its own behalf, an arm of the state created by Act 720 of 1975 and codified in La. R.S. 36: §601-610, is the public trustee of the Wildlife Refuge and the state agency tasked with "performing the functions of the state" relative to the "[1] administration, operation, and law enforcement of programs including water pollution control and prevention and review and monitoring of activities occurring in the coastal zone and wetlands...[and 2]...the maintenance and operation of certain wildlife management areas, refuges, and sanctuaries, including the law enforcement thereon...." La. R.S. 36:609 (B)(2)&(3). The Department was created by the Louisiana Legislature to, among other things, oversee more than 800,000 acres of public lands within the state's coastal zone, and it conserves and manages all natural resources on the Wildlife Refuge. The Department's principal office is at 2000 Quail Drive, Baton Rouge, Louisiana 70898. As an alter ego of the state,<sup>6</sup> the Department is not a "citizen" for purposes of diversity jurisdiction.

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<sup>4</sup> LA. R.S. § 36:602(B).

<sup>5</sup> The Department was created by the Louisiana Legislature. LA. STAT. ANN. § 36:602. The Department's source of funding is still primarily from the State General Fund. The Department is headed by a secretary who functions under the control and supervision of the governor and serves at the governor's pleasure. LA. STAT. ANN. § 36:604. The Department is concerned with statewide functions and preempts local authority.

<sup>6</sup> The Department was created in 1975 as a dependent agency of the State. La. Act 720 of 1975; La. R.S. 36: §601-610. The Secretary of the Department is appointed by the governor with consent of the Senate and serves as the executive head and chief administrative officer of the Department, provided that the secretary shall perform his functions under the general control and supervision of the governor. La. R.S. 36:604. The Department's source of funding is still primarily from the State General Fund. The Department is concerned with statewide functions and preempts local authority.

14.

Plaintiff, the Louisiana Department of Wildlife and Fisheries, on behalf of the Louisiana Wildlife and Fisheries Commission,<sup>7</sup> a policy-making and budgetary control board that was transferred into and made part of the Department in 1975 that co-owns the Wildlife Refuge and maintains its principal office at 2000 Quail Drive, Baton Rouge, Louisiana 70898. As an alter ego of the state, the Commission is not a “citizen” for purposes of diversity jurisdiction.

15.

Plaintiff, the Louisiana Department of Wildlife and Fisheries on behalf of the State of Louisiana as public trustee of the Wildlife Refuge.

16.

In 1974, by way of a constitutional amendment, which removed all prior sections and amendments, the current Louisiana Wildlife and Fisheries Commission was established. La. R.S. 56:1.

17.

In 1975, the Louisiana Legislature created the Department as part of Act 720 of 1975, the Executive Reorganization Act, which legislated the establishment of 20 cabinet level state agencies. The name and administrative structure of the Department were codified in La. R.S. 36: §601-610. Additionally, as the result of the Executive Reorganization Act of 1975, the Commission was transferred into and made part of the Department. *See* La. R.S. 36: §610 (“The following agencies are transferred to and hereinafter shall be within the Department of Wildlife and Fisheries, as provided in R.S. 36:802: Wildlife and Fisheries Commission (Article IX, Section 7 of the Constitution of Louisiana; R.S. 56:1, et seq. and other provisions of the Louisiana Revised Statutes of 1950 that apply to the commission).

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<sup>7</sup> The Commission was created by the 1974 Louisiana constitution, LA. CONST. ANN. Art. IX, § 7, which was originally codified by the Louisiana Legislature in La. R.S. § 36:601 to control and supervise the wildlife of the state.

**18.**

As a result of the Reorganization Act and the transfer of the Commission into the Department, the Commission operates solely as a policy-making and budgetary control board, with no administrative function. See La. R.S. 36:802; see also, <https://www.wlf.louisiana.gov/page/commission>.

**19.**

The Commission's capacity to sue in the foregoing regard is under La. R.S. § 56:5.

**20.**

The Department's capacity to sue in the foregoing regard is under La. R.S. § 36:602(A) and 36:602(B). The Department is vested with the authority and duty to conserve natural resources and protect and conserve wildlife management areas and refuges under La. R.S. § 36:602 and § 56:1, et seq.

**21.**

In addition, the Department, on its own behalf and on behalf of the Commission, is a public trustee that is constitutionally obligated "to protect, conserve, and replenish all natural resources, including the wildlife and fish of the state, for the benefit of the people." *State v. McHugh*, 92-KK-1852 (La. 1994), 630 So. 2d 1259, 1265.

**22.**

The Commission voted unanimously to authorize the Commission, through the Department, to demand restoration of damage to the Wildlife Refuge and file this lawsuit. Through that vote, the Commission authorized the Department to act on behalf of the Commission and to assert the rights of the Commission in this lawsuit.

**23.**

The Department has the concurrence of the Attorney General of the State of Louisiana to file this lawsuit and seek all equitable relief available under the law against Defendants.

24.

On information and belief, Defendant **BP Oil Pipeline Company** (“BP”), which is named individually and as successor-in-interest to Sohio Pipe Line Company, is a Delaware corporation having its principal place of business in Illinois.<sup>8</sup>

Therefore, on information and belief, BP is a citizen of Delaware and Illinois.

25.

On information and belief, Defendant **Plains Pipeline, LP** (“Plains”) is Texas limited partnership having its principal place of business in Texas.<sup>9</sup> Plains is a wholly owned subsidiary of Plains All American Pipeline, LP (“PAA”). PAA is a publicly traded limited partnership. Plains GP Holdings, LP (“PAGP”), which is also a publicly traded limited partnership, directly or indirectly owns many of the common units of PAA. PAA’s common units and PAGP’s Class A shares are listed on the Nasdaq Global Select Market (“Nasdaq”) under the ticker symbols PAA and PAGP, respectively. On information and belief, PAA’s common units and PAGP’s Class A shares are owned by investors domiciled in many, if not all, of the states in the union, including investors that are citizens of Texas and Louisiana.

Therefore, on information and belief, Plains is a citizen of every state in which its indirect investors are domiciled, including at least, Texas and Louisiana.

26.

On information and belief, Defendant **Arrowhead Gulf Coast Pipeline, LLC** (“Arrowhead”) is a Delaware limited liability company having its principal place of business in Texas.<sup>10</sup> Arrowhead is owned, directly or indirectly, by Harvest Midstream Company (“Harvest”). Harvest is a Texas corporation having its principal place of business in Texas.

Therefore, Arrowhead is a citizen of Texas.

27.

BP, Chevron, Plains, and Arrowhead will collectively be referred to as “Defendants.”

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<sup>8</sup> For purposes of diversity jurisdiction, a corporation is deemed to be a citizen of its state of incorporation and the state in which its principal place of business is located. *See* 28 U.S.C. § 1332(c)(1).

<sup>9</sup> For the purposes of diversity jurisdiction, a limited partnership’s citizenship is determined by the citizenship of each of its partners. *See, e.g., Harvey v. Grey Wolf Drilling Co.*, 542 F.3d 1077, 1079 (5th Cir. 2008).

<sup>10</sup> For the purposes of diversity jurisdiction, a limited liability company takes the citizenship of each of its members. *See, e.g., Harvey v. Grey Wolf Drilling Co.*, 542 F.3d 1077, 1080 (5th Cir. 2008).



28.

Defendants are jointly and solidarily liable for the damages to Plaintiff.

#### **JURISDICTION AND VENUE**

29.

This Court has personal jurisdiction over Defendants because Defendants are limited liability companies, corporations, or limited partnerships with sufficient minimum contact with the State of Louisiana to render the exercise of jurisdiction by the Court permissible under traditional notions of fair play and substantial justice. Indeed, Defendants conduct substantial business in Louisiana.

30.

Venue is proper in this Court pursuant to the Louisiana Code of Civil Procedure.

#### **ALLEGATIONS**

31.

The Wildlife Refuge is composed primarily of coastal wetlands, dunes, and beaches.

32.

Defendants or their predecessors-in-interest entered into ROW agreements with the Plaintiff's predecessors-in-interest under which Defendants were granted the authority to conduct certain pipeline operations on the Wildlife Refuge.

33.

The ROW agreements include, but are not limited to, the following:

- a. June 10, 1953, ROW between Gulf Refining Company, as grantee, and W. J. Elmer, as grantor ("June 1953 ROW");
- b. July 15, 1953, ROW between Gulf Refining Company, as grantee, from W. J. Elmer, as grantor ("July 1953 ROW");
- c. June 6, 1962, ROW between Cal-Ky Pipe Line Company, as grantee, from the City of New Orleans, as grantor ("June 1962 ROW");
- d. November 8, 1962, ROW between Cal-Ky Pipe Line Company, as grantee, from W. J. Elmer, Inc., et al., as grantor ("November 1962 ROW"); and
- e. September 10, 1970, ROW between Gulf Refining Company, as grantee, from W. J. Elmer et al., as grantor ("1970 ROW").

Collectively, all the above-named ROWs and Permits are referred to as “ROW Agreements.”

**34.**

The Plaintiff is a direct successor-in-interest and/or beneficiary to the above-referenced grantors in Paragraph 33.

**The June 10, 1953, ROW**

**35.**

The June 1953 ROW granted a “right of way over the land herein after described, for the purpose of constructing, maintaining, and operating thereon pipe lines for the transportation of oil, gas, water, steam, or any other material or substance which can be conveyed through a pipeline...”

**36.**

The June 1953 ROW provides that “it is understood and agreed that the right of way herein granted shall be one hundred (100’) feet in width” and that the Grantor can “dredge a canal through said right of way having a maximum width of forty feet and a maximum depth of six feet, except for the ditch for the pipe which may have a depth of two additional feet, and the right of ingress and egress to and from said tracts of land, for the purpose of laying, maintaining, repairing, renewing, changing the size of, and restoring of said pipe line ...”

**37.**

The June 1953 ROW further provides that “Grantee covenants and agrees with Grantor that the pipe lines shall be buried a sufficient depth so as not to interfere with the cultivation of the land and said right of way, so far as said right of way can be cultivated so as not to interfere with or impair the rights hereby granted.”

**38.**

On information and belief, the June 1953 ROW was operated by Chevron (through its predecessor in interest).

**The July 15, 1953, ROW**

**39.**

The July 1953 ROW granted a “right of way over the land herein after described, for the purpose of constructing, maintaining, and operating thereon pipe lines for the transportation of oil,

gas, water, steam, or any other material or substance which can be conveyed through a pipeline...”

**40.**

The July 1953 ROW provides that “it is understood and agreed that the right of way herein granted shall be one hundred (100’) feet in width; however, after the completion of the construction of the first pipe line provided for herein, the right of way herein granted shall be limited to a width of fifty (50’) for a distance of four thousand feet (4000’) in a westerly direction from where said right of way enters said Section No. 17, on Caminada Bay.”

**41.**

The July 1953 ROW provides that Grantee can “dredge a canal through said right of way having a maximum width of forty feet (40’) and a maximum depth of six feet (6’), except the ditch for the pipe which may have a depth of two additional feet, and the right of ingress and egress to and from said tract of land, for the purpose of laying, maintaining, repairing, renewing, changing the size of, and restoring of said pipe lines...”

**42.**

The July 1953 ROW further provides that “this right of way is granted in lieu and is meant to take the place of that certain right of way dated June 9, 1953, executed by Grantor herein in favor of Gulf Refining Company, a record in Conveyance Book No. 340, Folio 609, in the office of the Clerk of the Parish of Jefferson, State of Louisiana.

**43.**

On information and belief, the July 1953 ROW was originally operated by Chevron (through its predecessor in interest) and was assigned to BP in or around 1986, Plains in or around 2006, and Arrowhead in or around 2016.

**The June 6, 1962, ROW**

**44.**

The June 1962 ROW conveys to Grantee “a right of way one hundred (100’) feet in width over the land hereinafter described, for the purpose of laying, constructing, maintaining, operating, altering, repairing, and removing a pipe line...for the transportation of oil, gas, water, steam or any other material or substance which can be conveyed through a pipe line...”

45.

The June 1962 ROW provides that the Grantee can “dredge a canal through said right of way having a maximum width of forty (40’) feet and a maximum depth of six (6’) feet, except the ditch for the pipe which may have such additional depth as Grantee deems necessary and desirable for safe clearance under and around and in the vicinity of other pipe lines, waterways, channels, and other similar constructions, and the right of ingress and egress to and from said tract of land, for the purpose of laying, maintaining, repairing, renewing, changing the size of, and restoring of said pipe line, and for the removal of same when desired by Grantee, its successors or assigns.”

46.

The June 1962 ROW further provides that “Grantee covenants and agrees with Grantor that the pipe lines shall be buried a sufficient depth so as not to interfere with the cultivation of the land and said right of way, so far as said right of way can be cultivated so as not to interfere with or impair the rights hereby granted.”

47.

On information and belief, the June 1962 ROW was originally operated by Chevron (through its predecessor in interest) and is currently operated by Chevron.

**The November 8, 1962, ROW**

48.

The November 8, 1962, ROW conveys to Grantee “a right-of-way fifty (50’) feet in width over the land herein after described, for the purpose of laying, constructing, maintaining, operating, altering, repairing and removing a pipe line or pipe lines...for the transportation of oil, gas, water, steam or any other material or substance which can be conveyed through a pipe line...”

49.

The November 1962 ROW provides that the Grantee can “dredge a flotation canal through said right of way having a maximum width of forty-five feet (45’) and a maximum depth of eight (8’) feet, except for the pipe, which may have such additional depth as Grantee deems necessary and desirable for safe clearance under and around and in the vicinity of other pipe lines, waterways, channels and other similar constructions, and the right of ingress and egress to and from said tract

of land, for the purpose of laying, maintaining, repairing, renewing, changing the size of and restoring of said pipe line, and for the removal of same when desired by Grantee, its successors and assigns. Grantor recognizes that Grantee in doing the various things mentioned above may at times be forced to work beyond the limits of the 50 foot right of way and hereby consents to allow same.

**50.**

The November 1962 ROW provides that the "Grantee, covenant and agrees with Grantor that the pipe lines shall be buried a sufficient depth so as to not interfere with the cultivation of the land in said right of way, do far as said right of wat can be cultivated so as not to interfere with or impair the rights hereby granted."

**51.**

On information and belief, the November 1962 ROW was originally operated by Chevron (through its predecessor in interest) and is currently operated by Chevron.

**The September 10, 1970, ROW**

**52.**

The September 10, 1970, ROW provides, in relevant part, that the Grantee is granted a right of way "for the purpose of constructing, maintaining, and operating...one pipeline (with fittings, valves and appurtenances, including a scaper trap installation and cathodic protection equipment, bulkheads, air patrol and location makers) for the transportation of oil, gas, water, steam, or any other material or substance which can be conveyed through a pipeline..."

**53.**

The September 1970 ROW further provides that "it is understood and agreed that the right of way herein granted shall be one hundred (100') feet in width across the above described land; however, after the completion of the construction of the pipeline provided for herein, the said right of way herein granted shall be limited to a width of fifty (50') feet and the pipeline, as sale shall be constructed therein, shall be considered to be the centerline thereof."

**54.**

The September 1970 ROW further provides that "Grantee shall have the right to dig only

a ditch along the route shown on the plat which is attached hereto and made a part hereof and to lay its pipeline in said ditch.”

**55.**

The September 1970 ROW further provides that “Grantee agrees to lower its pipeline to as much as eight (8’) feet below mean low water level where it may be necessary for construction or improvements by Grantor, at Grantee’s expense.”

**56.**

The September 1970 ROW established that “Grantee shall install and maintain a bulkhead, plug or dam sufficiently adequate to effectively obstruct the flow of water across Grantee’s present pipeline canal and across Grantee’s ditches for the pipeline to be constructed under the terms of this agreement on the East Bank of Bayou Thunder in Sections 24 and 25, T22S-R23E.”

**57.**

The September 1970 ROW also establishes that the “Grantor reserves that right to freely use and enjoy the said premises subject to the rights herein granted.”

**58.**

On information and belief, the September 1970 ROW was assigned to BP in or around 1984, Plains in or around 2006, and Arrowhead in or around 2016.

**59.**

Evident from these ROW agreements and Louisiana law, Defendants understood and agreed that they would maintain adequate protection to prevent erosion and widening of the canals they dredged and used on the Wildlife Refuge under the ROW Agreements.

**60.**

Defendants failed to maintain adequate protection to prevent erosion, failed to maintain the canals and banks on the Wildlife Refuge and/or negligently operated, inspected, and maintained the canals and banks on the Wildlife Refuge.

**61.**

Defendants’ negligent operation, inspection, and maintenance of the rights of way, canals, and pipeline facilities are continuing.

**62.**

Defendants' failure to maintain adequate protection to prevent erosion, failure to maintain the canals and banks and/or negligent operation, inspection, and maintenance activities have resulted in widening the canals and erosion of the Wildlife Refuge.

**63.**

Defendants' continuing failure to maintain adequate protection to prevent erosion, to maintain the pipeline canals and banks and/or negligent operation, inspection, and maintenance activities have adversely impacted the Wildlife Refuge as the canals have widened, and continue to widen, significantly beyond the scope allowed by the ROW Agreements and prudent operating practices.

**64.**

Defendants' breaches have caused cumulative and collective impacts to the Wildlife Refuge. Defendants' breaches have together damaged the Wildlife Refuge in concert. Thus, there is a community of interest among Defendants. Defendants' damages to the Wildlife Refuge have commingled and are indistinguishable from one another. The combined effects of these breaches have caused cumulative impacts to the Wildlife Refuge. The required remedies for the damages are the result of all of Defendants' acts and omissions. All of Defendants named herein are jointly and solidarily liable for the damage to the Wildlife Refuge.

**65.**

Defendants' failure to comply with their obligations throughout the Wildlife Refuge has caused land loss and increased erosion and submergence on the Wildlife Refuge, resulting in increased collateral damages to Plaintiff.

**66.**

Defendants have failed to maintain banks of the canals that Defendants have dredged, used, or otherwise overseen. Those act and omissions, which continue through today, have caused both the erosion of the canal banks and the expansion beyond their originally permitted widths and depths of the canals comprising that network, resulting in changes to the hydrology, including infiltration of saltwater into the coastal lands described above. The consequent ecological

degradation to these areas has produced weakened coastal lands and extensive land loss on the Wildlife Refuge.

**67.**

Defendants' breach of the ROW Agreements, failure to maintain adequate protection to prevent erosion, failure to maintain the pipeline canals and banks, and/or pattern of continuous negligent operation, inspection, and maintenance activities, as well as their failure to restore the damaged property, is continuing and has caused, and continues to cause, severe ecological damage to the WMA by altering and/or destroying the natural hydrology of the property and causing land loss because of continuing erosion.

**68.**

The Plaintiff avers that Defendants have breached the ROW Agreements and standards of prudent operating practices by failing to maintain adequate protection to prevent erosion, maintain the pipeline canals and banks and/or by negligently performing the operation, inspection, and maintenance activities, as well as by failing to restore the property that has been damaged because of Defendants' continuing failures.

**69.**

The ROW Agreements are still in full force and effect, and the Defendants' obligations are continuing.

**70.**

The Plaintiff avers that the damage done by Defendants' breach of their obligations through Defendants' failure to maintain adequate protection to prevent erosion and/or failure to maintain the pipeline canals and banks is a continuous course of conduct that has damaged and continues to damage the Wildlife Refuge.

**71.**

The type and extent of the damage to the Wildlife Refuge were reasonably foreseeable to Defendants. Defendants knew, or should have known, that, left improperly maintained, the canals would widen or otherwise cause erosion of the lands adjacent to and surrounding the canals.



72.

Defendants knew, or should have known, that failure to prevent unauthorized access to the canals would allow for the introduction of erosive forces into the canals that would cause their widening and damage to the lands adjacent to and surrounding the canals.

73.

Defendants knew, or should have known, of the preventive measures that they could have, or should have, taken to prevent such damage to the land adjacent to and surrounding the canals.

74.

Because Defendants could foresee that their failure to take the appropriate preventive measures would result in the loss of the Wildlife Refuge and the harmful alteration of the hydrology and stability of the marsh on the Wildlife Refuge, Defendants' conduct was in bad faith.

75.

The Plaintiff detrimentally relied on fraudulent misrepresentations by the Defendants that the canals would not exceed the maximum widths agreed to in the ROW Agreements.

#### **CONTRACT CLAIMS**

76.

Plaintiff incorporates by reference all previous allegations in the preceding paragraphs as if fully set forth herein.

77.

Under the ROW Agreements and/or by Defendants' exercise of control over the Wildlife Refuge, a "right of use" was created. A right of use is a limited personal servitude that confers the benefits of the predial servitude and usufruct upon a juridical person rather than upon an estate.

78.

Pursuant to Louisiana Civil Code article 645, "[a] right of use is regulated by application of the rules governing usufruct and predial servitudes to the extent that their application is compatible with the rules governing a right of use servitude."

79.

Regarding the rules of usufruct, Louisiana Civil Code article 539 provides that a

usufructuary (here, Defendants) “is bound to use [the things subject to the usufruct] as a prudent administrator and to deliver them to the naked owner [the Plaintiff] at the termination of the usufruct.” Current article 539 is the successor to article 535 of the 1870 Code, which provides, “the usufructuary is bound to use [things subject to the usufruct] as a prudent administrator would do, *to preserve them as much as possible*, in order to restore them to the owner as soon as the usufruct terminates.” La. C.C. of 1870 art. 535 (emphasis added).

**80.**

Louisiana Civil Code article 576 provides that “the usufructuary [Defendants] is answerable for losses resulting from his fraud, default, or neglect.”

**81.**

Louisiana Civil Code article 577 similarly provides:

The usufructuary [Defendants] is responsible for ordinary maintenance and repairs for keeping the property subject to the usufruct in good order, whether the need for these repairs arises from accident or force majeure, the normal use of things, or his fault or neglect.

The naked owner [the Plaintiff] is responsible for extraordinary repairs, unless they have become necessary as a result of the usufructuary’s [Defendants’] fault or neglect in which case the usufructuary [Defendants] is bound to make them at his cost.

**82.**

Louisiana Civil Code article 579 provides that “[d]uring the existence of the usufruct, the naked owner [the Plaintiff] may compel the usufructuary [the Defendants] to make the repairs for which the usufructuary [Defendants] is responsible.”

**83.**

Civil Code article 581 provides that “[t]he usufructuary [Defendants] is answerable for all expenses that become necessary for the preservation and use of the property after commencement of the usufruct.”

**84.**

Regarding the rules governing predial servitudes, also applicable to personal servitudes of rights of use pursuant to Civil Code article 645, Defendants became the dominant estate owners while the Plaintiff is the owner of the servient estate.

**85.**

Accordingly, Defendants have a continuing obligation to refrain from aggravating the servient estate.

**86.**

Under Louisiana Civil Code article 730, “doubt as to the existence, extent, or manner of exercise of a predial servitude shall be resolved in favor of the servient estate.”

**87.**

Louisiana Civil Code article 743 provides that rights that are necessary for the use of the servitude—which here would include the right to dredge canals reasonably necessary for the construction, operation, and maintenance of the pipelines—“are to be exercised in a way least inconvenient for the servient estate.”

**88.**

Louisiana Civil Code article 745 provides that the dominant estate owner [the Defendants] must cause “the least possible damage” in performing work on the servient estate [the WMA].

**89.**

Former article 778 of the Louisiana Civil Code of 1870 provides that “he who has the right of servitude can use it only according to his title, without being at liberty to make either in the estate which owes the servitude, or in that to which the servitude is due, any alteration by which the condition of the first may be made worse.” Professor Yiannopoulos termed this duty as “the duty not to aggravate the condition of the servient estate” and noted that this duty continues to exist even after the replacement of the Code articles from the Code of 1870; and this duty has been repeatedly recognized by courts applying Louisiana law. *See, e.g., Terrebonne Parish School Board v. Columbia Gulf Transmission Co.*, 290 F.3d 313, 316 (5th Cir 2002).

**90.**

These suppletive rules supplied by the Civil Code articles applicable to personal servitudes of rights of use apply to supplement the express obligations in the ROW Agreements unless the ROW Agreements expressly exclude their operation. Here, none of the ROW Agreements expressly exclude the operation of the suppletive rules detailed above.

**91.**

Additionally, under Civil Code articles 697 and 729, any interpretation of the ROW Agreements to exclude obligations of the Defendants is prohibited if such interpretation results in a breach of the public interest or public policy.

**92.**

Under Louisiana law, including but not limited to the State's constitutional public trust mandate under Article IX, § 1 of the Louisiana Constitution of 1974, prevention of erosion of Louisiana wetlands is an inviolable public interest.

**93.**

In addition, the Plaintiff is the public trust trustee recognized in Article IX, § 1 of the Louisiana Constitution of 1974, and in its predecessor article, Article VI, § 1 of the Louisiana Constitution of 1921.

**94.**

Defendants breached the express terms of the ROW Agreements in addition to the obligations therein pursuant to the suppletive rules regarding personal servitudes of rights-of-use as set forth in the Louisiana Civil Code's articles regarding usufructs and predial servitudes, including but not limited to those articles discussed *supra*, by negligently doing or by failing to do, among other things, the following:

- a. Maintain the canals and their banks to prevent erosion of the surrounding property;
- b. Install and maintain protective structures to prevent canal widening and land loss;
- c. Prevent unauthorized use of the canals;
- d. Protect the servient estate against damage resulting from use of the servitude;
- e. Not aggravate the condition of the servient estate;
- f. Prevent the canals from widening;
- g. Prevent the canal banks from being breached;
- h. Use only so much of the Wildlife Refuge as is necessary to conduct operations;
- i. Act as a reasonably prudent operator to cause the least possible damage;
- j. Maintain the pipelines at the proper and agreed-upon depths; and
- k. Restore the property.

**95.**

Defendants breached their express obligations pursuant to the ROW Agreements, and their obligations under the Civil Code, including but not limited to those set forth herein. Defendants'

failure to properly maintain the canals, failure to maintain adequate protection to prevent erosion, negligent maintenance activities, and/or failure to restore the Wildlife Refuge constitute a breach of their obligations not to aggravate and to cause the least possible damage to the servient estate pursuant to the Louisiana Civil Code, including but not limited to articles 730, 743, and 745 and their predecessor articles, and to preserve the property subject to the servitude and make repairs as required by articles 539, 576, 577, 579, and 581 and their predecessor articles.

**96.**

Defendants have breached and continue to breach the foregoing obligations.

**97.**

Defendants' duties to not aggravate the condition of the servient estate are co-extensive with the life of the servitudes, and, accordingly, are continuous.

**98.**

Defendants are in continuing and ongoing breach of those obligations and duties, both express and implied, based upon the ROW Agreements and Defendants' exercise of and control over the Wildlife Refuge.

**99.**

The Defendants' breach of their obligations also constitutes an abuse of right.

**100.**

There is no serious or legitimate motive for the Defendants to cause damage to the Wildlife Refuge through their failure to properly maintain the banks of the pipeline canals and through their failure to prevent the erosion of the Wildlife Refuge.

**101.**

The Defendants' failure to properly maintain the banks of the pipeline canals and to prevent erosion of the WMA is against public policy.

**102.**

The Defendants' actions in improperly maintaining the banks of the pipeline canals and improperly protecting the Wildlife Refuge from erosion did not further the purpose for which the ROW Agreements were executed.

**103.**

The Plaintiff avers that they are entitled to compensatory damages because of Defendants' breach of those obligations and/or abuse of right; and the Plaintiff is entitled to injunctive relief in the form of restoration of the land that has been lost, as well as ongoing maintenance and repairs. The Plaintiff is also entitled to all remedies provided by law for abuse of right, including but not limited to the remedy in Louisiana Civil Code article 623.

**104.**

At the time that the Defendants entered into the ROW Agreements, it was reasonably foreseeable to Defendants that the failure to take appropriate actions to maintain the canal widths and the failure to maintain adequate protection to prevent erosion would lead to the loss of land because of drastic hydrological alteration on the Wildlife Refuge.

**105.**

Defendants' breaches were in bad faith, and these breaches caused damage to the Plaintiff in an amount to be proven at trial.

**106.**

As a result of Defendants' breaches, Defendants committed waste, neglected to make ordinary repairs, and otherwise abused their enjoyment of the Wildlife Refuge.

**107.**

As a result of Defendants' bad faith breach of contract, Defendants are liable to the Plaintiff not only for all damages that are foreseeable under Louisiana Civil Code article 1996, but also for all consequential damages under Louisiana Civil Code article 1997.

**TRESPASS CLAIM**

**108.**

Plaintiff incorporates by reference all previous allegations in the preceding paragraphs as if fully set forth herein.

**109.**

The Defendants owed (and continue to owe) a duty to the Plaintiff not to trespass.

**110.**

The Defendants' actions in failing to properly maintain the canals and prevent them from eroding the Wildlife Refuge, such that the canals exceed the limits authorized in the ROW Agreements, constitutes a physical invasion of the Plaintiff's rights in the Wildlife Refuge, and therefore a trespass.

**111.**

The ongoing invasion of the Plaintiff's property rights in the Wildlife Refuge by the ever-widening canals, due to the Defendants' failures to properly maintain the canal banks and to properly prevent erosion of the Wildlife Refuge also constitutes a continuing trespass on the Plaintiff's property.

**112.**

The Plaintiff avers that the Defendants' continuous actions regarding the maintenance and usage of the canals, whether authorized or unauthorized, have resulted in an encroachment of the canals that constitutes a continuous and unlawful invasion of the Plaintiff's rights in the Wildlife Refuge that the Plaintiff is entitled to have abated. The continuing widening of the canals is causing new and ever-increasing damage to the Wildlife Refuge, and such damage will continue until adequate protective bulkheads or plugs are installed and maintained, the canals are properly used and maintained, and the land is restored.

**113.**

The 1953 ROW Agreement expressly provided that the canal was "not to exceed 40 feet in width." The 1956 Pipe Line Permit expressly provided that the canal was "not to exceed forty feet in width . . . ." The 1958 Pipe Line Permit did not authorize the dredging of a canal of any width. The 1959 Pipe Line Permit expressly provided that the canal was "not to exceed forty (40) feet in width." The 1964 Pipeline Permit did not authorize the dredging of a canal of any width. The 1970 ROW Agreement did not authorize a canal of any width. And the 2002 ROW Agreement only allowed for the digging of trenches within the "fifty (50) feet" right-of-way. The Defendants have no authority for any of these canals to be larger than these "not to exceed" limits, nor do they have any authority for the unauthorized canals.

**114.**

Yet, despite having no authority for a canal to extend past the limits provided in the ROW Agreements, all of the canals exceed the authorized limits—a result the Defendants knew would occur if they failed to properly maintain the canals and their banks, failed to construct or then failed to maintain bulkheads and plugs, and failed to prevent unauthorized access to the canals.

**115.**

The canals that the Defendants failed to properly maintain and from which they have failed to properly prevent erosion of the Wildlife Refuge are continuously invading the Plaintiff's rights in the WMA without authorization.

**116.**

The operating cause of the injury consists of the Defendants' continuous operation of the pipelines within dredged or later-formed canals without the preventive measures that would have kept the canals confined to the agreed-upon widths, if any, and the failure to properly maintain the canals and adequately prevent erosion.

**117.**

This trespass has and will continue day-to-day until the offending nature of the canals is abated.

**118.**

The Plaintiff avers that they are entitled to compensatory damages because of the Defendants' acts and omissions and are entitled to injunctive relief in the form of abatement, repairs of the protective bulkheads or plugs, restoration of the land, and ongoing maintenance and repairs.

**119.**

The Defendants have received financial benefit and gain from their unauthorized operation of pipelines within canals that were never authorized or that exceed the agreed-upon maximum width memorialized in the ROW agreements.

**120.**

The Plaintiff is entitled to an accounting of all civil fruits gathered by bad faith possessors



pursuant to Louisiana Civil Code article 486 and applicable jurisprudence, which provides that a possessor in bad faith is liable for the “fruits he has gathered or their value subject to his claim for reimbursement of expenses.” The Defendants became bad faith possessors when they knowingly exceeded the rights granted to them by the Plaintiff through the ROW Agreements. The Defendants derived a substantial economic benefit from this trespass. The Plaintiff is entitled to an accounting for the Defendants’ bad faith gathering of this civil fruit.

**121.**

Further, the Defendants’ trespasses were conducted in moral bad faith as they acted with reckless indifference and in wanton disregard of the Plaintiff’s property rights. Accordingly, the Plaintiff is entitled to disgorgement of the Defendants’ revenues because of the Defendants’ moral bad faith trespasses.

**122.**

The Plaintiff desires and is entitled to require the Defendants to return the Property to the condition it was in before the agreed-upon widths were exceeded or unauthorized canals appeared. In the alternative, the Plaintiff desires and is entitled to damages to cover the cost of restoring the Property to its prior condition.

**123.**

To the extent the Defendants continue to occupy the Wildlife Refuge in a manner exceeding any authorization to do so, the Plaintiff desires and is entitled to an Order that the Defendants are required to vacate the trespassed-upon premises forthwith, in addition to abatement of the trespassing condition.

**VIOLATIONS OF THE LOUISIANA UNFAIR TRADE PRACTICES ACT**

**124.**

The Plaintiff incorporates by reference all previous allegations in the preceding paragraphs as if fully set forth herein.

**125.**

The Defendants’ acts and omissions, as described throughout this Petition, constitute unfair or deceptive practices in the conduct of trade or commerce.

**126.**

Indeed, the Defendants' failure to take appropriate actions to properly maintain the canal widths, to properly construct and maintain the required bulkheads and plugs, and to properly prevent erosion of the Wildlife Refuge, knowing that their acts and omissions would cause significant ascertainable monetary loss to Plaintiff, was immoral, unethical, oppressive, unscrupulous, and/or substantially injurious to Plaintiff.

**127.**

As a result of the Defendants' decision not to take the steps necessary to properly maintain the canal widths, to construct and/or maintain bulkheads and plugs, and to prevent unauthorized access to the canals, Plaintiff has suffered an ascertainable monetary loss of the value of the land and its ecological services lost to erosion that the Defendants knew would occur, and/or the value of the appropriate measures to restore the Wildlife Refuge, to backfill unauthorized canals, to restore and then maintain the canal banks to their agreed-to-widths, to construct and then maintain the required bulkheads and plugs, and to ensure appropriate measures to prevent unauthorized access to the canals.

**128.**

Accordingly, the Defendants' ongoing misconduct violates the Louisiana Unfair Trade Practices Act ("LUTPA"), LA. REV. STAT. ANN. § 51:1401 et seq., entitling Plaintiff to all actual damages, as well as attorneys' fees and costs, pursuant to LA. REV. STAT. ANN. § 51:1409(A). Such attorneys' fees and costs are to be paid to the Plaintiff.

**129.**

Under La. R.S. 13:4521, the Plaintiff herein is entitled to file and prosecute this suit without the payment of costs of Court in advance or as the same accrue and without the necessity of advancing costs, bond or surety therefore.

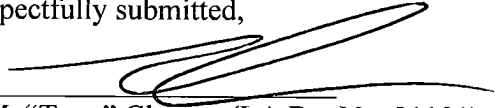
**130.**

The Plaintiff requests a jury.

ACCORDINGLY, the Plaintiff herein asks that:

- A. All Defendants named herein be duly cited and served with a certified copy of this First Amended Petition;
- B. All Defendants be required to respond in the manner and form, and within the delays, provided by law;
- C. There be a judgment in favor of Plaintiff for injunctive relief in the form of abatement and restoration of the Wildlife Refuge, including the repairs of the protective bulkheads or plugs, restoration of the land that has been lost, and ongoing maintenance and repairs for the duration of the ROW Agreements;
- D. In the alternative, there be a monetary judgment with interest from the date of judicial demand, until paid, and all costs of these proceedings, in favor of Plaintiff and against all Defendants, finding that all Defendants are liable for compensatory damages and attorneys' fees and costs resulting from all Defendants' acts and omissions;
- E. In the further alternative, after all due proceedings are had and the lapse of all legal delays, there be judgment rendered herein against Defendants for all damages for the cost of returning the property to its prior condition;
- F. All Defendants be ordered to show cause, on a date and at an hour to be fixed by this Court, why the Defendants should not be ordered to vacate the trespassed-upon premises and deliver all possession thereof in its pre-trespass condition to Plaintiff;
- G. In the further alternative, there be a judgment awarding Plaintiff any civil fruits derived from the Defendants illegal trespass and moral bad faith trespass as well as the Defendants' failure to maintain the pipeline canals and banks and restore the damaged property;
- H. Plaintiff be awarded all reasonable attorney fees for bringing this suit and all costs of these proceedings, such fees and costs to be awarded to the Plaintiff; and
- I. Such other and further relief be granted in favor of Plaintiff that the Court deems necessary and proper at law and in equity and that may be just and reasonable under the circumstances in this matter.

Respectfully submitted,



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