

UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF LOUISIANA

ATCHAFALAYA BASINKEEPER, INC., )  
LOUISIANA CRAWFISH PRODUCERS )  
ASSOCIATION—WEST, )  
WATERKEEPER ALLIANCE, )  
HEALTHY GULF, and SIERRA CLUB )  
and its DELTA CHAPTER )

*Plaintiffs* )

v. )

LIEUTENANT GENERAL SCOTT )  
A. SPELLMON, in his Official Capacity as )  
Chief of Engineers, U.S. Army Corps )  
of Engineers; COLONEL CULLEN A. )  
JONES, Commander & District Engineer )  
New Orleans District, In his Official )  
Capacity; and the U.S. ARMY CORPS )  
OF ENGINEERS, )

*Defendants.* )

Judge:

Magistrate:

Case No.:

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**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

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1. Plaintiffs Atchafalaya Basinkeeper, Inc., the Louisiana Crawfish Producers Association—West, Healthy Gulf, Waterkeeper Alliance, and Sierra Club and its Delta Chapter (collectively, “Basin Advocates”) bring this action for declaratory and injunctive relief to challenge the Defendants’ (collectively, “Corps”) December 12, 2023, Clean Water Act permit and associated decision (“decision”) authorizing the Louisiana Coastal Protection and Restoration Authority’s (“CPRA’s”) Proposed Ecological Swamp Enhancement Project (East Grand Lake), MVN-2016-01163-CM (also “EGL Project” or “the Project”).

2. Plaintiffs bring this case because the Project will result in East Grand Lake—a key

feature of one of Louisiana’s most important ecosystems and vital flood protection sources—becoming severely degraded, if not lost altogether. Basin Advocates have repeatedly cautioned the Corps against projects like the EGL Project and other Corps actions in the Basin, only to be ignored and forced to sit by and watch while the projects fail spectacularly and portions of the Basin are lost forever. Pleas to the Corps for enforcement or remediation likewise fall on deaf ears or result in excuses without action. This Court should stay the effectiveness of the EGL permit pursuant to 5 U.S.C. § 705, and, after due proceedings, enter final judgment declaring illegal and setting aside the Corps’ decision to permit the EGL Project and enjoining Permit No. MVN-2016-01163-CM.

### **INTRODUCTION**

3. The Mississippi River carries water from a drainage basin of more than 1.245 million square miles—most of the continental United States—and meets the Atchafalaya River before draining into the Gulf; together, they create the Mississippi/Atchafalaya River Basin (“Basin”), the largest swamp ecosystem and the largest remaining tract of cypress in North America and the third largest river basin in the world. The Basin is integral to Cajun life; home to hundreds of species of mammals, fish, birds, and reptiles; and the largest remaining continuous tract of cypress in the United States. This diversity contributes to the Basin’s reputation as the most productive swamp ecosystem in the world.

4. East Grand Lake is one of the Basin’s most precious resources, relied upon by commercial crawfish producers and other fishermen and recreational users, and serving an invaluable role in the diversion and storage of floodwaters from the Mississippi River, thereby preventing those floodwaters from reaching downstream areas including Baton Rouge and New Orleans.

5. Unlike Louisiana’s coast, which is starved for sediment, many areas in the Atchafalaya Basin, including East Grand Lake, suffer from excessive sedimentation.

6. The Corps has jurisdiction over the Atchafalaya Basin pursuant to federal law and

manages the Atchafalaya Basin Floodway System, which includes reviewing and overseeing projects in the Basin such as the EGL Project.

7. With the goal of increasing flow, the EGL Project will simultaneously introduce sediment- and fertilizer-laden Mississippi River water into the interior swamp of the Atchafalaya Basin, in a 5000+ acre area within East Grand Lake.

8. Guided in part by a 1982 Environmental Impact Statement (EIS), the Corps has overseen Basin projects in the past similar to the EGL Project that have purported to improve ecological conditions but which instead severely and irreversibly degraded ecological conditions.

9. Two of those projects, the Buffalo Cove Project and the Beau Bayou Project, resulted in disastrously high levels of sedimentation that infilled the floodways of Buffalo Cove and Beau Bayou, reducing their floodwater carrying capacity and severely restricting commercial crawfishermen and other Basin Advocates members' use of the areas. The Buffalo Cove Project was jointly administered by the Corps and CPRA.

10. Though the Buffalo Cove Project authorization required responsive action for excessive sedimentation—more than 1 inch per year—and though the Corps and CPRA were both obligated to repair and rehabilitate such conditions, neither took steps to modify the project or remediate the damage at any point once construction was underway and sedimentation targets were exceeded. Similarly, there has been no remediation of the damage to Beau Bayou.

11. Basin Advocates' expert, Dr. Ivor van Heerden, studied CPRA's East Grand Lake Project proposal and sounded alarm bells to the Corps in numerous reports that the Project would fail, resulting in worse water quality and disastrous sedimentation that would permanently harm the ecology of East Grand Lake, drastically reduce its ability to divert and transport floodwaters away from downstream cities and communities, and restrict access and use by crawfishermen, fishermen, and recreational users.

12. When the Corps granted the EGL permit, rather than demonstrating on the record that it had independently evaluated Dr. van Heerden's opinions, the Corps wholesale copied and pasted pages and pages of CPRA's responses into its decision and otherwise relied on checkboxes to evaluate impacts. In doing so, the Corps violated the National Environmental Policy Act (NEPA) and the Clean Water Act.

13. Despite being aware that the EGL Project will indisputably introduce sediment into the East Grand Lake swamp, that similarly designed past projects under its 1982 EIS have failed, that past projects' requirements to address excessive sedimentation have been ineffective, and that it has twice noticed an intent to supplement or re-do its 1982 EIS, the Corps permitted the EGL Project without supplementing the 1982 EIS or conducting a new EIS and without adequately considering the environmental impacts of, alternatives to, or mitigation for, the Project in its Environmental Assessment (EA).

14. The work authorized by the EGL Permit will cause destructive sediment- and fertilizer-laden river water to settle into the interior of the area, immediately causing irreparable harm to the area as soon as the cuts are made and water begins to flow. The loss of flood carrying capacity will be irreversible. There will be no second chance to reverse this damage once begun.

#### **JURISDICTION AND VENUE**

15. This case involves claims arising under the Clean Water Act, 33 U.S.C. § 1251 et seq., and the National Environmental Policy Act, 42 U.S.C. § 4321 et seq. They are litigated pursuant to the Administrative Procedure Act (APA), 5 U.S.C. § 551 et seq., which authorizes a federal court to find unlawful and set aside any final agency action that is "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* § 706. Jurisdiction arises under 28 U.S.C. § 1331 (federal question jurisdiction), § 2201 (authorizing declaratory relief), and § 2202 (authorizing injunctive relief).

16. The Corps' December 12, 2023, Permit #MVN-2016-01163-CM and accompanying decision is a final agency action subject to judicial review under the APA. 5 U.S.C. §§ 704, 706.

17. Venue in this district is appropriate under 28 U.S.C. § 1391(e) because it is the district in which one of the Plaintiffs resides and in which a substantial part of the events or omissions giving rise to the claim occurred. Plaintiff Atchafalaya Basinkeeper, Inc., is domiciled within the Middle District of Louisiana, and the Project area—the East Grand Lake area of the Atchafalaya Basin—is located east of the Atchafalaya River in Iberville Parish, within the Middle District of Louisiana.

## **PARTIES**

### ***Plaintiffs***

18. Plaintiffs are organizations dedicated to the protection and preservation of our country's most productive remaining wetlands swamps in the Atchafalaya Basin, as well as waterbodies and wetlands across Louisiana. The East Grand Lake Project, as authorized by the Corps, threatens Plaintiffs' environmental and economic interests. This lawsuit seeks to protect those interests and is germane to the Plaintiffs' purposes.

19. Atchafalaya Basinkeeper, Inc. ("ABK"), founded in 2004, is a 501(c)(3) nonprofit organization incorporated under the laws of Louisiana. ABK works to preserve, protect, and restore the ecosystems and wildlife habitat of the Atchafalaya Basin for future generations. ABK is a proud member of Waterkeeper Alliance, an international grassroots advocacy organization of over 350 programs working to protect watersheds across the globe.

20. ABK has over 2,000 members, including recreational and commercial fishermen and crawfishermen, hunters, outdoor recreationists, bird-watchers, and nature photographers who live, work, and recreate in and around the Atchafalaya Basin, including East Grand Lake.

21. Louisiana Crawfish Producers Association—West (LCPA) is a nonprofit organization

incorporated under the laws of Louisiana and operates out of Henderson, Louisiana. LCPA works to protect the economic, environmental, and cultural interests of the Basin and its residents and to promote a healthy habitat for the crawfish, fish, and other wildlife that the Basin supports. Additionally, LCPA works to protect and ensure public access to the waters of the United States within the Basin. LCPA works to ensure that the state and federal laws and regulations intended to preserve and enhance the Basin's natural resources and wildlife are followed.

22. LCPA has approximately 500 members, including recreational and commercial fishermen, hunters, and recreationists who live, work, and recreate in and around the Basin, including East Grand Lake. These members regularly use the Basin in pursuit of these interests, including the areas that have already been severely and adversely impacted by "water quality" projects like the East Grand Lake Project and areas that will be impacted by the EGL Project itself.

23. Healthy Gulf is a 501(c)(3) nonprofit organization headquartered in New Orleans, Louisiana. Healthy Gulf's organizational purpose is to collaborate with and serve communities who love the Gulf of Mexico by providing research, communications, and coalition-building tools needed to reverse the long-standing pattern of overexploitation of the Gulf's natural resources. Healthy Gulf has members and supporters who live, work, and recreate across the five Gulf states of Louisiana, Texas, Mississippi, Alabama, and Florida, and nationwide. Healthy Gulf's members and supporters include fishers, kayakers, canoers, and others who value the Atchafalaya Basin—including East Grand Lake—as part of their cultural heritage, as a natural resource, and, often, as essential for their livelihoods.

24. Healthy Gulf has long been concerned by what it perceives as the U.S. Army Corps of Engineers' mismanagement of the Basin, as well as other riverine and coastal wetlands. As a result, Healthy Gulf has monitored 404 wetlands and other Corps permitting in the Basin, as well as other coastal areas of Louisiana. It has also filed comments and legally challenged Corps permitting of

wetlands destruction. For example, in 2018 Healthy Gulf joined other plaintiffs in this case in a challenge to a Clean Water Act 404 permit that authorized construction and operation of the Bayou Bridge Pipeline across the Atchafalaya Basin, which caused irreparable damage to wetlands and waters in the Basin, including increased sedimentation deposition into forested wetlands. Healthy Gulf is concerned that sedimentation from projects like EGL prevent river sediment from reaching the Gulf of Mexico coast, where it is sorely needed.

25. Founded in 1892, Sierra Club is the nation's largest grassroots environmental organization and has a longstanding interest and expertise in the development and use of natural resources along the Louisiana and Mississippi coasts. The Delta Chapter has over 3,500 members in Louisiana. It advances the cause of protecting Louisiana's environment in a variety of ways, including working to save cypress trees and to protect the Atchafalaya Basin, America's greatest river swamp. It conducts outings and informational events so that Club members and supporters can enjoy the unique environment of Louisiana. It has worked closely with other plaintiffs to stop illegal logging of cypress-tupelo forest, to protect water in the Basin from pollution and deterioration due to oil and gas related operations and construction, and to defend the right of public access to state waters in the Atchafalaya Basin.

26. Waterkeeper Alliance is a 501(c)(3) not-for-profit corporation organized under the laws of the State of New York dedicated to protecting and restoring water quality to ensure that the world's waters are drinkable, fishable, and swimmable. Waterkeeper Alliance is also a movement uniting and supporting more than 300 community-based Waterkeeper member and affiliate organizations around the world, including more than 150 member organizations in the United States (one of which is Co-Plaintiff Atchafalaya Basinkeeper), as well as more than 15,000 individual supporting members who live, work and recreate in waterways across the country. The Waterkeeper movement patrols and protects nearly

six million square miles of rivers, lakes, and coastlines in the Americas, Europe, Australia, Asia, and Africa. Waterkeeper Alliance defends our publicly owned waters from pollution, degradation, and destruction, and frequently engages in public advocacy, administrative proceedings, and litigation aimed at reducing the ecological and public health impacts of proposed projects that will damage or destroy our precious remaining wetlands and other natural aquatic resources.

27. Plaintiffs stand in the shoes of their members who live, work, and recreate in places threatened by the East Grand Lake Project. Plaintiffs' members fish and hunt for commercial and subsistence purposes within the Basin and the East Grand Lake area specifically and depend on it as part of their cultural heritage. Plaintiffs' members also use and recreate in East Grand Lake and the surrounding area, including by kayaking, fishing, canoeing, and observing wildlife. The Project threatens these individuals' use and enjoyment, and the economic value of their property and/or livelihoods, which are based on a properly functioning ecosystem and floodway.

28. Plaintiffs' members live in cities and communities that rely on the floodwater transport and storage functions of the Basin, including East Grand Lake, to protect their homes, property, jobs, and lives.

29. Plaintiffs' members live in and rely on Gulf of Mexico coastal areas where river sediment is needed.

30. Among other injuries, excessive sedimentation from the Project will remove flood capacity, render East Grand Lake less accessible or inaccessible to Plaintiffs' members for large portions of the year, and negatively impact native fauna up and down the food chain, including crawfish, fish, and birds—resources that Plaintiffs' members use and enjoy. Project sedimentation, decreased water quality, and the Project's plan to spread dredged spoil from pipeline canals into the swamp will also negatively impact existing trees that serve as habitat and add to the beauty of the swamp that Plaintiffs'

members enjoy.

31. The Corps' approval of the East Grand Lake Project, based on a plainly inadequate environmental review and consideration of mandatory factors under the law, injures the cultural, safety, recreational, economic, environmental, professional, scientific, and aesthetic interests of Plaintiffs and their members. The relief requested in this lawsuit will redress such injuries.

### ***Defendants***

32. Defendant U.S. Army Corps of Engineers is a federal agency under the APA (5 U.S.C. §§ 701(b)(1), 702) and NEPA (42 U.S.C. §§ 4321 et seq.). It is organized under the U.S. Department of Defense and is authorized by federal law to issue permits and authorizations for activities involving dredge and fill of waters of the United States. Defendant Lieutenant General Scott A. Spellmon is the Chief of the U.S. Army Corps of Engineers and is therefore an officer of an agency under the APA (5 U.S.C. §§ 701(b)(1), 702) and NEPA (42 U.S.C. §§ 4321 et seq.).

33. The challenged permit for the EGL Project was authorized by Colonel Cullen A. Jones. Colonel Jones is the Commander and District Engineer of the New Orleans District of the U.S. Army Corps of Engineers, and therefore, an officer or employee of an agency under the APA (5 U.S.C. §§ 701(b)(1), 702) and NEPA (42 U.S.C. §§ 4321 et seq.).

34. Collectively, the Defendants are responsible for the final agency action authorizing the EGL Project.

## **LEGAL BACKGROUND**

### ***The Clean Water Act***

35. Congress enacted the Clean Water Act (CWA) to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” CWA § 101(a), 33 U.S.C. § 1251(a). To accomplish this, the CWA prohibits the discharge of any pollutant without a permit. CWA § 301(a), 33

U.S.C. § 1311(a). When the pollutant is dredged or fill material, the Corps is the agency authorized to issue permits. CWA § 404(a); 33 U.S.C. § 1344(a).

36. Pursuant to authorization under the Clean Water Act, the Environmental Protection Agency (EPA) promulgated mandatory guidelines that govern the Corps' evaluation and issuance of dredge and fill permits. 33 U.S.C. § 1344(b)(1). These requirements are known as the 404(b)(1) Guidelines ("Guidelines").

37. Fundamental to the Guidelines "is the precept that dredged or fill materials should not be discharged into the aquatic ecosystem, unless it can be demonstrated that such a discharge will not have an unacceptable adverse impact either individually or in combination with known and/or probable impacts of other activities affecting the ecosystems of concern." 40 C.F.R. § 230.1(c).

38. The degradation or destruction of special aquatic sites, including the filling in of wetlands, is considered to be one of the most severe environmental impacts covered by the 404(b)(1) Guidelines. 40 C.F.R. § 230.1(d); *see also id.* § 230.41.

39. The Guidelines prohibit the discharge of dredged or fill material that "will cause or contribute to significant degradation of the waters of the United States." 40 C.F.R. § 230.10(c).

40. Effects contributing to significant degradation considered individually or collectively include the significantly adverse effects of discharged pollutants on aquatic life, wildlife, fish and shellfish; loss of fish and wildlife habitat; and significantly adverse effects of the discharge of pollutants on recreational, aesthetic, and economic values. *See* 40 C.F.R. § 230.10(c).

41. The Guidelines further provide that no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem. 40 C.F.R. § 230.10(a); *see also id.* § 230.5(c) (mandating that the Corps "examine practicable alternatives to the proposed discharges, that is, not discharging into the

waters of the U.S. or discharging into an alternative aquatic site with potentially less damaging alternatives”).

42. “[A]ll 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 aquatic ecosystem, unless clearly demonstrated otherwise.” 40 C.F.R. § 230.10(a)(3).

43. The Guidelines require an analysis of the cumulative effects on the aquatic ecosystem of the discharge or dredged or fill material. 40 C.F.R. § 230.11(g).

44. The Guidelines state that “no discharge of dredged or fill material shall be permitted unless appropriate and practicable steps have been taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystem.” 40 C.F.R. § 230.10(d). These steps include the requirement that an applicant mitigate unavoidable impacts to the environment.

45. The Guidelines provide: “The fundamental objective of compensatory mitigation is to offset environmental losses resulting from unavoidable impacts to waters of the United States authorized by DA permits.” *Id.* § 230.93(a)(1).

46. The Corps must deny a 404 permit if the project does not comply with the 404(b)(1) Guidelines. 33 C.F.R. §§ 320.4(a)(1), 323.6(a).

47. The Corps has regulations that apply to its issuance of permits generally as well as 404 permits specifically. *See* 33 C.F.R. Parts 320, 323, 325.

48. Prior to issuing any permit, the Corps’ regulations mandate it undertake a public interest review. 33 C.F.R. § 320.4(a).

49. Under its public interest review, the Corps may only authorize a project after balancing the “benefits which reasonably may be expected to accrue” against the cumulative impacts of “reasonably foreseeable detriments,” considering what is important in terms of national concern for

“protection and utilization of important resources.” 33 C.F.R. § 320.4(a).

50. Under its public interest review, the Corps must consider virtually all aspects of a project, specifically: “conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership and, in general, the needs and welfare of the people.” 33 C.F.R. § 320.4(a)(1).

51. The Corps’ regulations list three general criteria that the Corps must consider for every permit application: “relative extent of the public and private need,” “the practicability of using reasonable alternative locations and methods,” and the “extent and permanence of the beneficial and/or detrimental effects.” 33 C.F.R. § 320.4(a)(2).

52. The Corps’ regulations provide that “[m]ost wetlands constitute a productive and valuable public resource, the unnecessary alteration or destruction of which should be discouraged as contrary to the public interest.” 33 C.F.R. § 320.4(b)(1).

53. The Corps’ regulations on permitting in wetlands provide that “[a]lthough a particular alteration of a wetland may constitute a minor change, the cumulative effect of numerous piecemeal changes can result in a major impairment of wetland resources. Thus, the particular wetland site for which an application is made will be evaluated with the recognition that it may be part of a complete and interrelated wetland area.” 33 C.F.R. § 320.4(b)(3).

54. The Corps must show the proposed project’s benefits to the public interest will outweigh the damage to the wetlands; otherwise, the project cannot be authorized. 33 C.F.R. § 320.4(b)(4).

55. For projects undertaken or funded by state agencies in wetlands, the Corps must follow Executive Order 11990 on Protection of Wetlands, which requires, inter alia, that the Corps “shall take

action to minimize the destruction, loss, or degradation of wetlands, and to preserve and enhance the natural and beneficial values of wetlands,” “shall provide opportunity for early public review of any plans or proposals,” and “shall consider factors relevant to a proposal’s effect on the survival and quality of the wetlands,” including “public health, safety, and welfare, including . . . flood and storm hazards; and sediment and erosion.” E.O. 11990, 42 Fed. Reg. 26961 (May 27, 1977); *see also* 33 C.F.R. § 320.4(b)(1).

56. The Corps’ public notice of a permit application must provide “sufficient information to give a clear understanding of the nature and magnitude of the activity to generate meaningful comment.” 33 C.F.R. § 325.3(a).

***Section 10 of the Rivers and Harbors Act of 1899***

57. Section 10 of the Rivers and Harbors Act (RHA) prohibits the obstruction of the navigable capacity of any waters of the United States, except as authorized by the Department of the Army. 33 U.S.C. § 403.

58. Section 10 of the RHA provides: “The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; . . . and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any . . . channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.” 33 U.S.C. § 403.

***The National Environmental Policy Act***

59. The purpose of NEPA is “[t]o declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; [and]

to enrich the understanding of the ecological systems and natural resources important to the Nation.” 42 U.S.C. § 4321.

60. Under NEPA, every recommendation or report on proposals for major federal actions significantly affecting the quality of the human environment must include a detailed statement on: “(i) the reasonably foreseeable environmental effects of the proposed agency action; (ii) any reasonably foreseeable adverse environmental effects which cannot be avoided should the proposal be implemented; [and] (iii) a reasonable range of alternatives to the proposed agency action.” 42 U.S.C. § 4332(C)(i)-(iii). This statement is referred to as an Environmental Impact Statement (EIS).

61. Permit approvals are “major federal actions” under NEPA. *See* 40 C.F.R. § 1508.1(q)(3)(iv) (2022).

62. Under NEPA, an agency “shall issue an [EIS] with respect to a proposed agency action requiring an environmental document that has a reasonably foreseeable significant effect on the quality of the human environment.” 42 U.S.C. § 4336(b)(1).

63. The purpose of an EIS “is to ensure agencies consider the environmental impacts of their actions in decision making”; to “provide full and fair discussion of significant environmental impacts”; and to “inform decision makers and the public of reasonable alternatives that would avoid or minimize adverse impacts or enhance the quality of the human environment.” 40 C.F.R. § 1502.1 (2022).

64. The agency may issue an Environmental Assessment (EA) if the proposed action does not have a reasonably foreseeable significant effect. 42 U.S.C. § 4336(b)(2).

65. EAs must provide sufficient evidence and analysis for determining whether to prepare an EIS or a finding of no significant impact; and discuss the purpose and need for the proposed action, alternatives, and the environmental impacts of the proposed action and alternatives. 40 C.F.R. § 1501.5 (2020).

66. Agencies must consider both the potentially affected environment and the degree of the effects of the action in determining whether the effects of an action are significant. 40 C.F.R. § 1501.3(b) (2020). With respect to “the potentially affected environment,” agencies should consider the affected area (national, regional, or local) and its resources. *Id.* para. (b)(1). With respect to the degree of the effects, agencies should consider short and long-term effects, beneficial and adverse effects, and effects on public health and safety. *Id.* para. (b)(2).

67. “In the case of a site-specific action, significance would usually depend only upon the effects in the local area.” 40 C.F.R. § 1501.3(b)(1) (2020).

68. Under NEPA, agencies “shall prepare supplements to either draft or final environmental impact statements if a major Federal action remains to occur and [ ] [t]he agency makes substantial changes to the proposed action that are relevant to environmental concerns; or [ ] [t]here are significant new circumstances or information relevant to environmental concerns and bearings on the proposed action or its impacts.” 40 C.F.R. § 1502.9(d)(1)(i)-(ii) (2020).

#### ***The Administrative Procedure Act***

69. The APA provides for judicial review of final agency actions. Thus, the APA provides the vehicle for redress of the Corps’ failure to comply with NEPA and the Clean Water Act in issuing the EGL permit. “A person” who is “adversely affected or aggrieved by agency action” within the meaning of NEPA and the Clean Water Act is entitled to judicial review thereof. 5 U.S.C. § 702.

70. The APA defines a person as “an individual, partnership, corporation, association or public or private organization other than an agency[.]” 5 U.S.C. § 551(2). Agency means “each authority of the Government of the United States . . . .” 5 U.S.C. § 701(b)(1); 5 U.S.C. § 551(1).

71. Under the APA, a court is empowered to hold unlawful and set aside agency actions, findings, and conclusions that, among other reasons, are “arbitrary, capricious, an abuse of discretion, or

otherwise not in accordance with law[,] ... in excess of statutory jurisdiction, authority, or limitations, or short of statutory right[,] ... and without observance of procedure required by law.” 5 U.S.C. § 706(2).

72. A court is further empowered, “to the extent necessary to prevent irreparable injury, . . . [to] issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.” 5 U.S.C. § 705.

## FACTUAL ALLEGATIONS

### *The Atchafalaya Basin Floodway System and 1982 EIS*

73. In 1979, the Environmental Protection Agency (EPA) issued a report entitled “Hydraulics of the Atchafalaya Basin Main Channel System: Considerations from a Multiuse Management Standpoint” that recognized the Atchafalaya Basin’s “national significance” as a floodway for the lower Mississippi River, and stated that “flood control is an essential use of the Atchafalaya Basin. Channel conditions in the Basin must meet flood control needs and provide for long-term use of the flood plain for that purpose.” The purpose of the report was to provide federal agencies, like the Corps, necessary information to comply with Congressional mandates in “maintain[ing] an acceptable level of environmental quality.”

74. The Corps, the EPA, and the state of Louisiana have all admitted that sedimentation is a serious problem in the Basin.

75. The Corps, in a 1982 Final Environmental Impact Statement (FEIS) on the Atchafalaya Basin Floodway System (ABFS), acknowledged the need to reduce sediment deposition, stating: “This process of sedimentation is destroying wetlands and open water bodies within the floodway, and this not only reduces aquatic productivity, but lowers esthetic values and compounds the loss of cultural resource sites.”

76. In its 1979 report, EPA stressed “minimizing sedimentation in the backwater areas” as

crucial to achieving flood control. It recognized additional sedimentation impacts: “Introduction of sediments . . . into the flood plain swamps greatly contributes to the present reduction of the total water area and the degradation of the quality of forested wetlands.”

77. In a December 14, 2020, press release establishing an Atchafalaya River Basin Restoration and Enhancement Task Force, Louisiana Governor John Bel Edwards said that “[t]he irony of the Atchafalaya Basin is that while it is suffering from an abundance of sediment, the rest of our coast is experiencing a severe sediment deficit.” He said this sediment is “not only harming water quality and the environment but also threatening the capacity of the basin to carry flood waters from the Mississippi and Red Rivers safely and effectively.”

78. The natural, north-south water flow and sedimentation processes within the Atchafalaya Basin have, for decades, been disrupted by Corps levees, oil and gas exploration canals, pipeline spoil banks, and other human influences that cut across the Basin.

79. The Corps’ Atchafalaya Basin Floodway System, Louisiana, Project (“ABFS Project”) was authorized by Public Law 99-88.

80. In June 1982, the Corps issued the ABFS Project Feasibility Study Main Report (“Report”) and Final Environmental Impact Statement (“FEIS”).<sup>1</sup> The purpose of the ABFS Project is to provide flood protection to south central Louisiana and preserve the wetland of national significance from filling with sediment. The three main objectives of the ABFS Project are flood control, retaining and restoring the natural environment, and maximizing public accessibility.

81. The FEIS study area includes the Red River backwater area, the Atchafalaya Basin Floodways, and the Atchafalaya Bay. Report at 1.

82. In the Report, the Corps stated that “[t]he overriding factor in any analysis of the

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<sup>1</sup> The Report and FEIS are available here: <https://law.tulane.edu/clinics/environmental/legal-documents/supporting-documents>

Atchafalaya Basin is the requirement of the Basin to function properly and adequately during major flood events. All other aspects of plan formulation must be subservient to this goal.” Report at 29.

83. One of the ABFS Project’s main purposes was to determine ways to reduce sedimentation in the Lower Atchafalaya Basin Floodway. Report at 2.

84. The Project established a water management unit (WMU) system, dividing the Lower Floodway into thirteen WMUs, each with “distinct environmental and hydrological subdivisions.” Report at 34, 45.

85. The plan also identified five water management units of the thirteen that had the best potential for implementation. Report at 45, FEIS at 111. These were Buffalo Cove, Henderson Lake, Beau Bayou, Flat Lake, and Cocodrie Swamp.

86. The FEIS did not limit which agencies could undertake WMU-related projects. *See* Report at 34.

87. The Corps cautioned that all WMU projects should be implemented so that “[s]ediment movement and deposition in the units are restricted.” Report at 34.

88. In the Report and FEIS the Corps approved two pilot units, located in Buffalo Cove and Henderson Lake, for initial construction, operation, monitoring, evaluation and analysis. Report at 67. They were chosen as the areas “which seemed to offer the best potential for ultimate implementation.” FEIS at 111.

89. Implementation of future, “conditional” WMUs would be at the Corps’ discretion “after evaluation of the operational success of the pilot units.” Report at 3.

90. The Corps recognized that if actual pilot project impacts differed significantly from those initially assessed then “a supplement to [the FEIS] would have to be prepared.” FEIS at 111.

91. In 1995, the Corps issued an intent to reevaluate the ABFS Project through an EIS. *See*

Intent to Prepare a Draft Environmental Impact Statement (DEIS) for the Lower Atchafalaya Basin Reevaluation Study, Louisiana, 60 Fed. Reg. 47157 (Sept. 11, 1995), <https://www.govinfo.gov/content/pkg/FR-1995-09-11/pdf/95-22436.pdf>. Upon information and belief, the Corps did not pursue or publish this DEIS.

92. The Corps proposed conducting a supplemental EIS (SEIS) to its 1982 EIS twice in 2005; one of these proposals was for the Flat Lake Management Unit. *See* Intent to Prepare a Draft Supplemental [EIS] for the Atchafalaya Basin Floodway System, Louisiana Project, including Flat Lake Management Unit [ ], 70 Fed. Reg. 44586 (Aug. 3, 2005), <https://docs.regulations.justia.com/entries/2005-08-03/05-15298.pdf>; *see also* Intent to Prepare a Supplemental [EIS] for Two Features of the Atchafalaya Basin Floodway System, 70 Fed. Reg. 42537 (July 25, 2005), <https://www.govinfo.gov/content/pkg/FR-2005-07-25/pdf/05-14581.pdf>.

93. The Flat Lake WMU covers essentially the same area of the Basin as the East Grand Lake Project.

94. Upon information and belief, neither SEIS for which the Corps published a Notice of Intent in 2005 was ever published as a draft or final document.

95. The Corps shares water quality management responsibilities in the Atchafalaya Basin with Louisiana.

96. Louisiana state responsibility for the Atchafalaya Basin Program was initially held by the Department of Natural Resources (LDNR). In 2018 it transferred to the CPRA. Acts 2018, No. 570, eff. July 1, 2018; La. R.S. § 49:214.8.3.

97. The CPRA is “to serve as an authority on behalf of the state to work in partnership with the United States Army Corps of Engineers and other public entities, and coordinate state and local activities, in developing and implementing the federally sponsored and funded Atchafalaya Basin

Floodway System, Louisiana Project.” La. R.S. § 49:214.8.1.

*Corps and CPRA Projects pursuant to the 1982 EIS*

98. In approximately 2003, the Corps began taking steps to implement the first pilot WMU approved in the 1982 EIS, which was the Buffalo Cove Management Unit Project (“BCMUI project” or “Buffalo Cove project”). In July 2003, the Corps published Environmental Assessment #366 (EA #366) to evaluate the impacts of the Buffalo Cove project.<sup>2</sup> On March 15, 2004, the Corps issued its Finding of No Significant Impact (FONSI) on the BCMUI project. On July 23, 2004, the Corps issued its Engineering Documentation Report (EDR) authorizing construction of the BCMUI project.

99. The LCPA and the Sierra Club expressed their opposition to the BCMUI project to the Corps. The Sierra Club’s position was that the BCMUI project should be the subject of an EIS.

100. The BCMUI project involved dredging channels to allow fast flowing river water into the swamps. The plan detailed the creation of ten elements in Buffalo Cove to improve interior swamp circulation, remove barriers to north/south flow, and improve river water input while limiting sediment deposition.

101. The Corps stated in EA #366 that “[s]upplemental environmental impact statements will be prepared to address both the direct and cumulative impacts of constructing and operating these future elements within the BCMUI and the remaining authorized management units.” EA #366 at 3.

102. The Corps’ Buffalo Cove project authorization established measurable goals and required monitoring to determine if those goals were being achieved. One of the measurable goals was to limit sediment accretion to no more than 1 inch per year within 200 yards or more of water inlets or open water areas like Jackass Bay and Bayou Gravenburg.

103. On May 16, 2005, the Corps entered into a Project Cooperation Agreement (PCA) with

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<sup>2</sup> Available here: [https://law.tulane.edu/sites/default/files/files/EA%20366%20\(2003\).pdf](https://law.tulane.edu/sites/default/files/files/EA%20366%20(2003).pdf).

the LDNR whereby LDNR would be the non-federal sponsor for the BCMU. The PCA assigned both the Corps and LDNR responsibility for design; plans and specifications; contract awards and modifications; and operation, maintenance, repair, replacement, and rehabilitation of the project. *See* <https://www.mvn.usace.army.mil/Portals/56/docs/PPMD/WRDA-Agreements/PCA-ABFSBuffaloCoveMay162005.pdf>.

104. Construction of the BCMU project elements began in 2004 and continued until completion in June 2016.

105. The BCMU project caused drastic sedimentation that can be measured in feet, far in excess of the 1-inch measurable goal set by the Corps. As a result, the former deepwater habitat areas in the BCMU are no more. Buffalo Cove Lake filled in rapidly, and Jackass Bay and Bayou Gravenburg are also essentially filled in.

106. Monitoring conducted by the Louisiana State University of the BCMU project showed that nearly half of the monitoring sites were lost, primarily due to being deeply buried in sediment.

107. Neither the Corps nor LDNR performed any rehabilitation for the damage caused by the BCMU project nor implemented any adaptive management measures to mitigate the impacts of sedimentation during the years-long project construction.

108. On May 30, 2016, the Corps publicly noticed an application for a water quality enhancement project in the Beau Bayou Water Management Unit, another of the five WMUs prioritized by the Corps in its 1982 EIS. The application for the Beau Bayou project was filed by St. Martin Parish. As with the other WMU projects, the Bayou Bayou project proposed to open channels to allow river water into the swamp, including by creating gaps in spoil banks.

109. The LCPA and the Atchafalaya Basinkeeper commented in opposition to the Beau Bayou project in October 2016, indicating that the project would quickly lead to siltation and convert open

water and cypress swamp into uplands.

110. The Corps permitted the Beau Bayou project on January 17, 2017. A condition of the permit was monitoring for sedimentation and reporting on the results of that monitoring. Construction was completed in 2017.

111. As with the Buffalo Cove project and as predicted by Basin Advocates, the Beau Bayou project introduced huge amounts of sediment into the swamp. The sedimentation was so severe that the required sediment monitoring did not take place because the feldspar monitoring set out to measure the sedimentation became buried in over three feet of sediment within months and were inaccessible.

112. Despite Basin Advocates' warnings, other Basin projects directing river water into the swamp that were implemented or permitted by the Corps, like Coon Trap, have had similarly devastating sedimentation impacts. Coon Trap completely filled the lower part of Lake Murphy, Bee Bayou, Flat Lake Pass, Keelboat Pass, Chicot Lake and huge portions of wetlands.

113. Basin Advocates also warned against and opposed Basin projects that relied on Corps enforcement of the Clean Water Act or permit terms to avoid severely destructive impacts, due to Basin Advocates' awareness of the Corps' dismal, typically non-existent, enforcement actions in the Basin. These projects, such as the Bayou Bridge Pipeline construction and Pat's Throat, resulted in destruction of Basin resources and ecology.

***Corps Lower Mississippi River Comprehensive Management Study***

114. In 2020, as part of the Water Resources Development Act (WRDA), Congress funded the Corps to conduct the Lower Mississippi River Comprehensive Management Study ("LMR mega study") to identify recommendations of actions to be taken for the comprehensive management of the basin for multiple purposes. In 2022, Congress provided 100% federal funding in WRDA for the LMR mega study.

115. The LMR mega study will cover the Atchafalaya River Basin, including East Grand Lake.

116. In Spring 2024, the Corps began scoping meetings under NEPA for the mega study.

### ***The East Grand Lake Permit***

117. The East Grand Lake project area is a navigable water of the U.S. in the Corps' designated Lower Atchafalaya Basin Floodway. *See Figure 1, infra.* The project area contains bald cypress and tupelo swamps, with bottomland hardwoods, invasive plants, and scrub-shrub

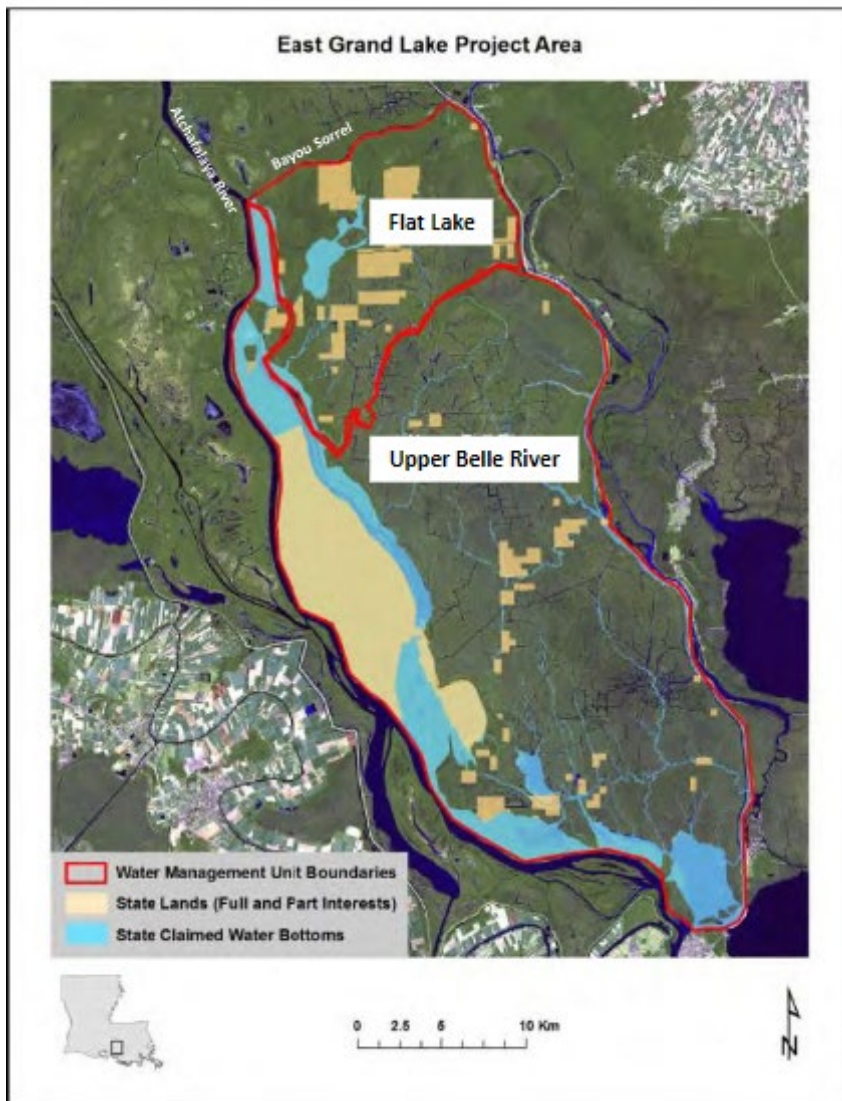


Figure 1: East Grand Lake (EGL) Area.

occurring on elevated sites and spoil banks along the waterways.

118. The cypress swamps that remain in the EGL project area provide essential wildlife habitat and ecological functions, including filtration and floodwater carrying capacity. These forested swamps feed fisheries and provide necessary habitat.

119. Despite suffering from low dissolved oxygen levels, East Grand Lake is currently a productive and valuable resource, especially for crawfish production.

120. The area's primary water source—the Atchafalaya River by way of Bayou Sorrel and the Gulf Intercoastal Waterway (“GIWW”)—carries concentrated fertilizer run-off from agricultural land and other pollutants that discharge into the Mississippi River north of Louisiana. This nitrogen and phosphorus-laden water is largely prevented from entering the East Grand Lake swamp area during low to moderate river stages due to the residual spoil banks left behind from construction of multiple pipelines. Cuts into these spoil banks would send that fertilizer-laden water into the swamp and leave it there without an exit pathway.

121. In 2016, LDNR's Atchafalaya Basin Program applied to the Corps for a permit to construct and operate the East Grand Lake project. It consisted of a number of dredged cuts or channels between waterbodies into the East Grand Lake area to bring river water into the area with the goal of increasing flow and preventing stagnation.

122. In 2016, LDNR held two public meetings, in Bayou Sorrel and Henderson, about its EGL Project. The locations allowed for participation from the local community, primarily Cajun fishermen and others who have lived in the Basin for generations, are experts on the Basin, and who rely on its resources for sustenance and income. Feedback to LDNR at these meetings was universal in opposition to the EGL Project. LDNR indicated an intent to go forward with the project regardless.

123. The Corps publicly noticed CPRA's East Grand Lake project for comment on March 19,

2018.

124. The public notice for the 2018 version of the EGL Project consisted of three paragraphs describing the project, two pages of boilerplate text, and thirty pages of diagrams. No application or supporting studies were included with the public notice.

125. Significantly, CPRA did not include—nor did the Corps require it to include—elevation studies showing how high and how widely the dredged material from the proposed dredging areas would be piled up along the sides of the proposed cuts.

126. Basin Advocates commented in opposition to the 2018 version of the EGL Project on April 19, 2018, stressing the need for an EIS. Basin Advocates' comments were supported by a thirty-two-page expert report from Dr. Ivor van Heerden.

127. Dr. van Heerden described his 40 years of experience researching and visiting the Atchafalaya Basin; his review of scientific literature and data, including USGS and LiDAR data; and his review of the EGL project as depicted in the public notice drawings.

128. Dr. van Heerden discussed how the EGL Project would cause excessive sedimentation. He explained that sediment and fertilizer-laden water flowing from a confined narrow channel to a wider area, such as the mouth of a channel, loses inertia. Most sediments suspended in the strong, fast flow of the bayou, canal, or channel are deposited into the swamp area when the flow slows down. Over time, accreted areas transition from cypress swamps into bottomland hardwoods, and accretion spreads.

129. Dr. van Heerden concluded that the EGL Project would destroy the wetlands in the East Grand Lake swamp. Specifically, with regard to sedimentation, he predicted that, conservatively, the thirteen dredge elements of the Project in one four-month flood period could result in 1,188 acres of swamp bottom being covered by 4 inches of sediment. This would be a similar rate of sedimentation as observed in the Buffalo Cove and Beau Bayou projects.

130. Dr. van Heerden also opined that water quality in East Grand Lake would suffer due to the introduction of nitrogen from fertilizer runoff in the river water, which would lead to hypoxia.

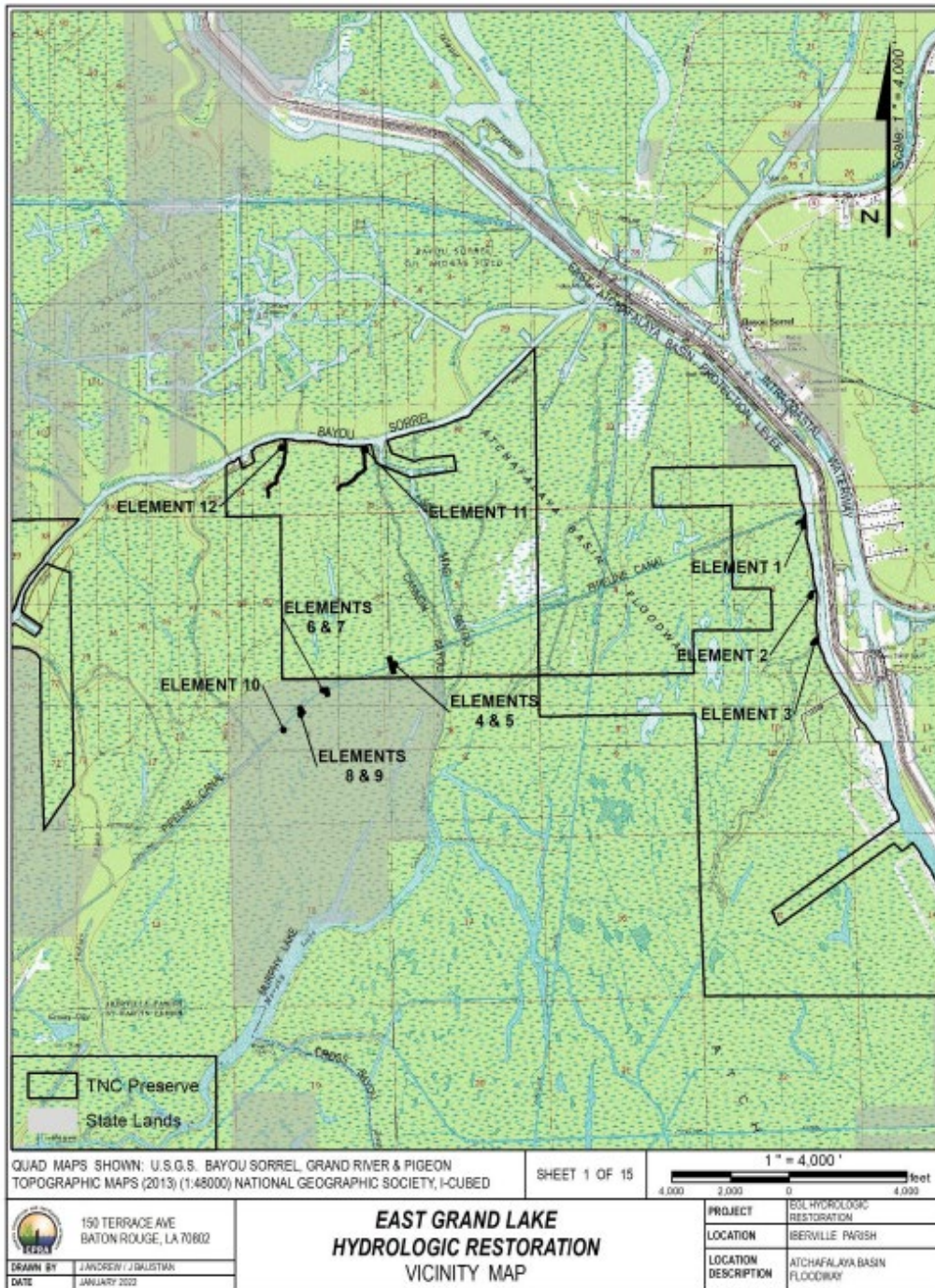
131. Basin Advocates submitted additional comments on the 2018 version of the EGL Project on April 22, 2020.

132. CPRA did not move forward with the 2018 version of the Project; the Corps ultimately withdrew that application on March 23, 2021.

133. CPRA resubmitted an application for an altered version of the Project on April 4, 2022.

134. The 2022 version of the Project proposed 12 elements, depicted below in Figure 2 below.

*Figure 2: East Grand Lake Project Elements*



135. Elements 1 through 3 of the EGL Project would occur on the elevated west bank of the Gulf Intercoastal Waterway just south of where the Florida Gas Pipeline canal intersects with the GIWW. See Figure 2, *supra*. The cuts will channel sediment- and fertilizer-laden river water into the

swamps west of the GIWW. Also, CPRA will deposit the dredged material along either side of the dredged cuts, building onto bank ridges already transitioning into bottomland hardwoods because of accretion and damaging existing trees around Element 1 by depositing 8 inches of dredged material at their roots.

136. Elements 4 through 10 will channel sediment- and fertilizer-laden river water from Salt Mine Bayou into the swamps south of the Florida Gas Pipeline canal. *See* Figure 2, *supra*. These areas that are already experiencing accretion from the Florida Gas Pipeline canal, Bayou Cannon, and Indigo Bayou will suffer from more sediment and fertilizer inputs, while the Williams Canal's spoil banks to the south—which function as ridges and a hydraulic dam—will continue to prevent sheet flow out of the area. CPRA will deposit the dredged material along either side of the cuts in the Florida Gas Pipeline canal, building the canal to the height of the already accreted ridges/former spoil banks, further exacerbating water flow and sedimentation issues.

137. Elements 11 and 12 of the EGL Project will channel fast moving, sediment- and fertilizer-laden water from Bayou Sorrel into the swamps that remain south of the bayou's accreted banks and southern ridges. CPRA will deposit the dredged material along either side of the dredged cuts, up to 8 feet alongside cut Element 11 and 8 inches alongside cut Element 12.

138. The river water directed into the swamp from all Project elements will introduce sediment into wetlands areas already suffering from excessive sedimentation, rendering currently navigable areas unnavigable for parts of the year and harming the Basin's aquatic ecosystems as well as the flood absorbing and surge protecting public health function of the Basin.

139. The spreading and deposition of dredged material from all Project elements will elevate and build up already accreted areas, contribute to the transition of these areas from swamp to bottomland hardwood forests, and damage or kill existing trees in the footprint by burying their roots, knees, and

trunks under somewhere between 8 inches and **8 feet** of dredged material (dirt, sand, etc.). The dredged material will be simply spread over the area after dredging as is, untested and untreated.

140. Once water from the project elements enters the East Grand Lake wetlands, it will have no way to flow through the area. Because the Williams Canal at the southern project boundary has east-west spoil banks that inhibit flow, the current project design does not allow for inflowing water to move through the project area. Though undiscussed in its application, CPRA is aware of this major project design flaw because the original project included cuts along the Williams Canal to allow the water to move through the wetlands, and CPRA has also planned for a Murphy Lake Depth Restoration project specifically to receive the waters that will (purportedly) flow from the East Grand Lake area once the dredging project is complete.

141. CPRA's plans for Murphy Lake have yet to be funded, and CPRA's 2022 version of the EGL Project eliminated cuts along the Williams Canal without explanation. Thus, CPRA has knowingly left waters introduced by the EGL Project from the three river water sources with nowhere to go unless the river is at high flood stages.

142. CPRA's 2022 EGL application does not describe how spoil from the dredging of elements 3, 6, 7, 8, and 9 will be distributed. Documents obtained from CPRA through public records requests reveal that the dredged materials will be piled into impenetrable barriers up to ten feet high on either side of the cuts, creating walls of spoil that will block north-south sheet flow and channel flowing water into narrow cuts. These profiles of the spoil placement were not part of CPRA's application and not part of the record available to the public.

143. The Corps publicly noticed the 2022 version of the East Grand Lake Project on April 25, 2022.

144. The 2022 EGL public notice did not state what the differences were from the 2018

project or even reference the 2018 project, only vaguely describing the Project as involving “[a]dditional enhancement and restoration features [ ], includ[ing] the deposit of excavated material to create marsh and provide nourishment for forested areas within the project site.”

145. The 2022 public notice did not explain why CPRA had made changes to the Project; neither CPRA nor the Corps has ever explained why changes were made to the Project or why the Project sat for three years.

146. As with the 2018 public notice, the 2022 public notice was mostly boilerplate text accompanied by fifteen pages of diagrams. No application or supporting studies were included.

147. The diagrams attached to the 2022 public notice evidenced that one of the 2018 elements had been removed entirely, and other dredge elements had been shortened or lengthened. Additionally, the Project now included a plan to spread the dredged spoil over the bottomland hardwood forest.

148. On May 24, 2022, Basin Advocates, through their counsel at the Tulane Environmental Law Clinic, submitted detailed comments on the 2022 EGL Project, including four reports and analyses from Dr. van Heerden which, inter alia: 1) reviewed and responded to CPRA and other project supporters’ comments on the 2019 version of the Project, 2) updated his 2018 expert report, 3) reviewed Basin monitoring data, and 4) discussed turbidity, nitrogen, and dissolved oxygen abnormalities in the Atchafalaya Basin.

149. Dr. van Heerden’s turbidity, nitrogen, and dissolved oxygen paper highlighted the fact that Mississippi River nutrient (i.e., nitrogen and phosphorus from fertilizer run-off) levels are three times higher than they were in 1975.

150. Basin Advocates submitted a supplement to their comments on September 13, 2022, which included a declaration from Dr. van Heerden in which he addressed the changes in the Project, addressing each element.

151. Dr. van Heerden noted the complete lack of publicly available scientific support for the Project.

152. Dr. van Heerden concluded that the 2022 version of the Project is fundamentally similar to the 2018 version, thus, his previous report remained valid, and the Project “will not perform as described but rather will introduce sediment into wetlands areas already suffering from excessive sedimentation to the detriment of the Basin’s aquatic ecosystems and the flood absorbing public health function of the Basin.”

153. Dr. van Heerden added that the Project will introduce fertilizer-laden river water into the wetlands, causing eutrophication and hypoxia.

154. Dr. van Heerden’s reports suggested an alternative of developing a long-term science-based management plan focusing on reducing sediment input, reconnecting former waterways with gated structures if necessary, and minimizing the impacts of existing pipeline channels.

155. In 2020 and 2021, the Atchafalaya Basin Coalition (which includes several Plaintiffs) submitted to CPRA its proposed EGL project alternatives aimed at restoring the north-south flow and hydrology that would not introduce more sediment-laden river water into the area. One practicable alternative offered is the removal of the spoil bank along the Williams Canal, an east to west canal that blocks north-south flow to the entire project area and blocking the north to south Humble Canal that is capturing the existing flows, forcing more water to move north to south through wetlands. This alternative was again submitted in comments to the Corps on May 24, 2022.

156. Basin Advocates’ May 24, 2022, comments opposing the 2022 EGL Project included numerous supporting documents, including a petition signed by hundreds of people opposing the project, and raised a host of issues, including:

- a. The project's new and troubling proposals to spread the dredged material across the top of existing forests, and to "create marsh" by filling canals with dredged material, disguised as a beneficial use, are unscientific and unsupported attempts to avoid having to conduct compensatory mitigation for wetland loss and is likely to further degrade cypress tupelo swamp without actually creating any wetlands;
- b. The public notice documentation is missing essential information, including plans for the disposal of dredged material, elevation data, and specific widths for the dredged cuts;
- c. The public notice documentation lacks evaluation of the failures of similar past projects like Buffalo Cove and Beau Bayou;
- d. The project will not increase water quality but rather, as historic project failures, LiDAR around previous cuts, and other evidence establishes, will increase sedimentation into the swamps in all directions around the cuts. In turn, this will decimate the existing flood capacity in the Basin and irreversibly reduce the cypress-tupelo swamp acreage remaining in the project area;
- e. The public notice's complete lack of supporting information for the EGL proposal is exacerbated by the Corps' failure to respond to Freedom of Information Act (FOIA) requests (necessitating a FOIA lawsuit by Basin Advocates), and the express refusal of The Nature Conservancy and Nicholls State University to respond to public records request for monitoring data they possess;
- f. There are practicable and less damaging alternatives, such as the plan proposed by several Basin advocates at meetings of the CPRA and provided to the Corps;
- g. Recent reports by the Corps' Mississippi River Science and Technology Office and LSU professor and hydrology expert Yi-Jun Xu warn that growing levels of sediment in the

- Basin are raising river water to dangerous levels and dramatically reducing the Basin's ability to absorb and transport floodwater; over the next 50 years, sedimentation in the Atchafalaya River may boost water levels by 3 feet over those recorded in the 2011 flood event;
- h. The governing documents (the 1982 FEIS and various Master Plans) are out of date and unusable without major modifications, which the Corps should require or undertake prior to approving this project;
  - i. The studies relied upon by the applicant in its materials did not support the conclusions drawn from them by the applicant;
  - j. The Corps' repeated, entrenched failure to enforce permit conditions or violations of the Clean Water Act in the Basin render harms from ill-advised projects permanent; and
  - k. Flooding is predicted to increase with climate change.

157. Basin Advocates pointed specifically to the failures of the Buffalo Cove and Beau Bayou "swamp enhancement" projects, both similar in design to the EGL Project, as information that should inform the Corps' decision and that required denial of the Project. Basin Advocates noted that at the time comments were due, they had been unable to obtain much of the data that was required to have been collected in connection with those projects, even through FOIA requests.

158. In their comments, Basin Advocates noted that CPRA did not provide sufficient scientific data or data from studies to support its new plan to spread untested and untreated dredged materials across the top of the channel banks and bottomland hardwood forests, or for its plan to plant new cypress saplings on elevated spoil banks, nor did CPRA offer support that such actions would be beneficial.

159. Planting cypress on elevated spoil banks does not create a cypress forest or otherwise turn

elevated uplands into aquatic wetland resources—the resources the 1982 EIS and all other publications consider to be the most valuable and threatened in the Basin. Filling in the Florida Canal with spoil will create an additional east to west levee.

160. The EPA submitted a comment to the Corps on June 6, 2022, highlighting Basin Advocates’ “viable concerns that the project may increase sedimentation rates in the East Grand Lake vicinity, converting productive swamp habitat to bottomland hardwood forest.”

161. The Louisiana Department of Environmental Quality held a public hearing on the East Grand Lake Project in connection with its water quality certification on December 6, 2022. There was near complete opposition to the Project by Basin residents and users.

162. On December 22, 2022, the Iberville Parish Council passed Resolution IPC# 2022-023 in opposition to the East Grand Lake Project and submitted it to the Corps.

163. Basin Advocates sent additional comments on March 24, 2023, April 8, 2023, and July 10, 2023. These comments included additional expert opinions by Dr. van Heerden and a specific argument for a programmatic or supplemented EIS for this area of the Basin.

164. On October 4, 2023, after learning that the Corps was moving forward with the LMR mega study and recognizing the critical interrelationship between the Corps’ LMR mega study and projects like EGL, the Atchafalaya Basinkeeper wrote to the Corps requesting that it not permit any further water quality/water management projects introducing river water into the backswamp areas of the Atchafalaya Basin until its LMR mega study is complete.

165. On December 12, 2023, the Corps issued permit number MVN-2016-01163-CM to CPRA authorizing the East Grand Lake Project. The permit was accompanied by a Memorandum for Record containing the Corps’ findings and environmental assessment (“Decision”).

166. In its Decision, the Corps did not respond to a single of Dr. van Heerden’s many points,

opinions and conclusions offered in his reports and declaration. Instead, the Corps cut and pasted nine single-spaced pages of CPRA's response to Dr. van Heerden and other aspects of Basin Advocates' comments, without response, analysis, or explanation.

167. The Corps' nine pages of cut-and-pasted CPRA response include multiple identical duplicate paragraphs, reflecting that the Corps did not even read what it cut and pasted into its Decision from CPRA.

168. The Corps' cut-and-pasted CPRA responses were from 2019, when CPRA was discussing the old, now-withdrawn version of its project. The Corps thereby disregarded and ignored all public comments made during the 2022 public comment period, including the comprehensive plan presented by Basin Advocates.

169. The Corps dismissed the volume of evidence about sedimentation from the EGL Project in two sentences that did not cite to any study or data, including any data to support CPRA's claim that subsidence would compensate for sedimentation from the Project.

170. In its Decision, the Corps did not mention its Atchafalaya Basin Floodway System program or its 1982 EIS.

171. In its Decision, the Corps did not address the results of the Beau Bayou or Buffalo Cove projects and the drastic sedimentation they caused. The Corps ignored LiDAR data showing huge deltas forming around cuts and channels in the Basin, as well as the admission by CPRA in the Project's draft Adaptive Management Plan that sedimentation will occur.

172. In its Decision, the Corps did not mention, or explain the impacts to the Project's goals, of CPRA's elimination of the originally-planned cuts along the Williams Canal to allow the introduced water to move through the wetlands or CPRA's unfunded plan for a Murphy Lake Depth Restoration project specifically to receive the waters that will (purportedly) flow from the East Grand Lake area

once the dredging project is complete.

173. In its Decision, the Corps did not mention the alternative project suggested by Basin Advocates.

174. In its Decision, the Corps did not mention its LMR mega study.

175. In its Decision, the Corps did not mention the increased levels of fertilizer in the Mississippi River, data showing that oxygen levels decrease when river water is introduced, the warmer temperatures, or the increased sedimentation in the Basin since 1982.

176. The Corps' determination that impacts of the Project would not be significant was based on checkboxes with little to no discussion.

177. Where the Corps included discussion of impacts below the checkboxes and stated those impacts would be minor, the Corps provided no explanation of why it found the impact would be minor.

178. In its discussion of cumulative impacts, the Corps did not list, discuss, or analyze the impacts of past, present, and reasonably foreseeable future actions in the Basin that bear on the EGL Project. Its determination that the EGL Project is "not expected to contribute to the cumulative degradation of wetland resources" was not reasonably explained or supported.

179. The Corps did not reasonably explain its finding that crawfish and other fish are expected to improve as a result of the Project nor is the finding supported by the record.

180. The Corps did not reasonably explain its conclusion that floodplain values would benefit from the Project nor is the conclusion supported by the record.

181. The Corps did not reasonably explain its conclusion that the Project would have no effect on flood and storm hazards nor is the conclusion supported by the record.

182. The Corps did not reasonably explain its conclusion that the Project would have no effect on navigation nor is the conclusion supported by the record.

183. The Corps' statement that the Project is being proposed for the benefit of the general public ignores the strong opposition to the Project by the people who make a living and depend upon the Basin.

184. The Corps did not address or require any avoidance or minimization measures due to what it described as the "site-specific" nature of the project.

185. The Corps found that the EGL Project was not water dependent.

186. The Corps ordered no mitigation for the EGL Project.

187. In its Decision, the Corps acknowledged that special conditions were necessary to ensure that granting the EGL Permit is in compliance with NEPA and the CWA and is not contrary to the public interest.

188. The primary special condition relied upon by the Corps to satisfy the requirements of NEPA, the CWA, and its public interest regulations is a permit condition that CPRA abide by a monitoring and adaptive management plan.

189. CPRA's June 14, 2023, Maintenance, Monitoring, and Adaptive Management Plan ("Plan") is described as "inform[ing] the implementation and adaptive [sic] management of the East Grand Lake Ecological Enhancement Project." It stated that "the goal of this plan is to describe key features of the project and the associated monitoring objectives."

190. Basin Advocates, in writing, urgently requested an opportunity to comment on CPRA's Adaptive Management Plan prior to permit issuance. Despite later expressly relying on that Plan to find that its issuance of the EGL permit complied with the law, the Corps refused.

191. The Plan is wholly ineffective to prevent or remediate harm from the EGL Project. The Plan includes no mandatory actions to stop sedimentation or remediate sedimentation once it occurs. Indeed, the Corps itself stated that the plan "has very little description of actual adaptive management."

192. There is no provision for project failure, remediation, or even closure of gaps under any failure scenario in the permit conditions or Plan. The Plan calls for monitoring and describes “risk endpoints,” but does not require any action to be taken even when these risk endpoints are met or exceeded. Only an assessment process will occur to compare the project’s actual performance to the desired performance; the Corps plays no role in this post-approval assessment. Various actions could be considered if risk endpoints—such as accumulating 30 centimeters or more of new sediment in 3 consecutive years—but nothing will necessarily cause closure of the cuts.

193. Recognizing the utter inadequacy of CPRA’s Plan, the Corps conditioned the permit on CPRA compliance with a CPRA email from August 29, 2023, wherein CPRA further discussed its intentions with respect to adverse outcomes.

194. CPRA’s August 29, 2023, email references but does not detail a threshold for what CPRA would consider excessive sedimentation and which triggers any responsive action. That key information appears to have been in an August 18, 2023, email from CPRA to the Corps that the Corps did not make a condition of the permit.

195. CPRA’s August 29, 2023, email does not commit CPRA to any specific action to prevent or remediate sedimentation from the Project, instead giving CPRA a range of alternatives to choose from that includes a catchall that allows CPRA to do essentially anything or nothing: “Other methods identified through implementation of the robust monitoring and adaptive management plan.”

196. No attempt at immediate action to stop damage or remediate damage once it occurs is called for under any condition of the permit.

197. Practically, it is difficult to impossible to close gaps like those in the EGL Project while water flows through them or to remove sediment accretion once it occurs. Sedimentation will occur rapidly and be widespread over thousands of acres. There will be no second chance to repair

sedimentation once it occurs.

## **CLAIMS FOR RELIEF**

### **First Cause of Action**

#### *NEPA: Failure to Complete an Environmental Impact Statement*

198. Plaintiffs hereby incorporate by reference paragraphs 1 through 197.

199. The Corps' issuance of the East Grand Lake permit was a major federal action as defined under NEPA.

200. The East Grand Lake Project is likely to have significant effects on the quality of the human environment.

201. The Corps' failure to prepare an Environmental Impact Statement (EIS) before it issued the East Grand Lake permit violates NEPA. 42 U.S.C. §§ 4332(C); 4336(b).

### **Second Cause of Action**

#### *NEPA: Failure to Complete a Supplemental EIS*

202. Plaintiffs hereby incorporate by reference paragraphs 1 through 201.

203. The Corps' issuance of the East Grand Lake permit is a major federal action as defined under NEPA.

204. In its 1982 EIS, the Corps discussed and contemplated the East Grand Lake Project—referenced at the time as the Flat Lake Project.

205. Significant new circumstances or information relevant to environmental concerns and bearing on the proposed action and its impacts have arisen since the 1982 EIS evaluated the East Grand Lake/Flat Lake Project.

206. Because a major Federal action remained to occur and there were significant new circumstances or information relevant to environmental concerns bearing on the Corps' East Grand Lake

Project permit issuance and its impacts, the Corps was required to supplement its 1982 EIS prior to issuing the EGL permit.

207. The Corps' failure to supplement its 1982 EIS before permitting the East Grand Lake Project violates NEPA. 42 U.S.C. §§ 4332(C); 4336(b).

### **Third Cause of Action**

#### *NEPA: Failure to Conduct an Adequate Environmental Assessment*

208. Plaintiffs hereby incorporate by reference paragraphs 1 through 207.

209. The Corps' Environmental Assessment on the East Grand Lake Project failed to provide sufficient information or analysis to support its finding that the Project would not have a significant effect on the environment, including cumulatively.

210. The Corps' Environmental Assessment on the East Grand Lake Project failed to provide sufficient information or analysis to support its finding that no less damaging alternatives to the Project, including the No Action alternative, were practicable.

211. The Corps' reliance on CPRA's Adaptive Management Plan to discount impacts and their significance was arbitrary and capricious and not supported by the record.

212. The Corps' Environmental Assessment gave no consideration or analysis of the flood control impacts of this project.

213. The Corps' decision was made with almost no consideration of public comments and without adequate reasoning or support; the Corps' memorandum of decision offers little to no independent analysis or reasoning and recites verbatim the applicants' own unverified statements.

214. The Corps acted arbitrarily and capriciously and violated NEPA when it failed to prepare an adequate Environmental Assessment for the East Grand Lake Project.

### **Fourth Cause of Action**

*Clean Water Act Violations*

215. Plaintiffs hereby incorporate by reference paragraphs 1 through 214.

216. The Corps: failed to evaluate the impacts on flood capacity in a critical floodway for numerous communities along the Mississippi River including major cities, the port of South Louisiana, and the industrial river corridor; failed to evaluate the risks and impacts of depositing dredged fill on top of existing trees, accreted canals, and bayou banks; failed to evaluate the risks and impacts of dredging cuts to create new channelized inputs of sediment and fertilizer rich river water into interior swamp areas with numerous existing (and unaddressed) barriers to flow, including remaining spoil banks, accreted ledges along waterways, and hydraulic dams from man-made oil and gas pipeline canals that prohibit the southern flow of water, sediments and fertilizer from the project area; and failed to evaluate the impacts to irreplaceable wildlife habitat and culturally significant wetlands.

217. The Corps' issuance of the East Grand Lake permit violates the Clean Water Act and the mandatory Guidelines issued by the EPA for avoiding destruction of wetlands.

218. The Corps' failure to adequately consider practicable alternatives which would have less adverse impact than the East Grand Lake Project violates the Clean Water Act and is arbitrary and capricious.

219. The Corps' failure to require mitigation for the East Grand Lake Project fails to adequately ensure that "no discharge of dredged or fill material shall be permitted unless appropriate and practicable steps have been taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystem." 40 C.F.R. § 230.10(d) (2020).

220. The Corps' determination that the East Grand Lake Project is not contrary to the public interest lacks sufficient analysis or support.

221. The Corps' decision to issue the East Grand Lake Permit failed to give full consideration

and appropriate weight to the comments submitted in response to the applicant's proposal. 33 C.F.R. § 320.4(a)(3) (2020).

222. The Corps failed to demonstrate that the East Grand Lake Project will not have an unacceptable adverse impact on the ecosystem, either individually or in combination with known and/or probable impacts of other activities.

223. The Corps failed to demonstrate that the East Grand Lake Project will not cause or contribute to the significant degradation of valuable waters and wetlands or fish and wildlife.

224. The Corps' decision to authorize the East Grand Lake project without adequate consideration of the 404(b)(1) guidelines is in excess of statutory authority, not in accordance with the law, without observance of procedure required by law, and arbitrary and capricious. 5 U.S.C. § 706(2)(A), (C) & (D).

### **Fifth Cause of Action**

#### *Flood Control Act Violation*

225. Plaintiffs hereby incorporate by reference paragraphs 1 through 224.

226. The Corps' authority to grant this permit arises under the Clean Water Act; however, the Corps has a statutory mandate to ensure that the Basin retains its flood control capacity under the Flood Control Act of 1928 (as amended). 33 U.S.C. § 701 *et seq.*

227. It is under its Flood Control Act authority that the Corps issued the 1982 EIS.

228. The first objective of the 1982 EIS is, accordingly, flood control: "Implement a flood control system that will safely pass the project flood to the Gulf of Mexico in an environmentally sound manner. Reduce to the maximum extent practical the deposition of sediments that reduce the ability of

the floodway to pass the project flood.” (EIS-20.)<sup>3</sup>

229. The Corps’ approval of a permit that will necessarily cause sedimentation and the reduction of the Basin’s floodwater carrying capacity, coupled with the Corps’ approval of an adaptive management plan that allows for years of significant sedimentation to accrue before any response is contemplated, is in derogation of its statutory duties under the Flood Control Act.

230. The approval of the permit without consideration of or reference to the impact the sedimentation and spoil bank construction will have on the floodwater carrying capacity of the Basin was arbitrary, capricious, and in violation of the Corps’ powers and duties under the Flood Control Act.

231. If the Atchafalaya Basin floodway cannot capture and pass the projected floods due to sedimentation and loss of capacity, there will be cascading effects through south Louisiana, including for major cities, the port of South Louisiana, and the Mississippi River industrial corridor, that will be subjected to greater and more regular flooding.

### **Sixth Cause of Action**

#### *Rivers and Harbors Act Violation*

232. Plaintiffs hereby incorporate by reference paragraphs 1 through 231.

233. The Corps’ issuance of a Section 10 RHA permit for the EGL Project was arbitrary and capricious and in violation of the Corps’ powers and duties under Section 10 of the Rivers and Harbors Act.

### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs respectfully request that this Court grant the following relief:

234. Declare that the Corps violated NEPA, the CWA, and implementing regulations when it

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<sup>3</sup> EIS, Vol. 1, p. 134;

<https://law.tulane.edu/sites/default/files/u1286/Atchafalaya%20Basin%20Floodway%20System%20Feasibility%20Study%20Final%20EIS%20V%201%201982-01%20pp%201-201.pdf>.

issued the East Grand Lake Permit;

235. Vacate the Corps' decision to issue Permit Number MVN-2016-01163-CM;

236. Preliminarily enjoin or stay Permit Number MVN-2016-01163-CM to prevent irreparable harm pending litigation of this matter to final decision;

237. Permanently enjoin Permit Number MVN-2016-01163-CM until the Corps complies with NEPA and the Clean Water Act;

238. Award Plaintiffs reasonable fees, costs, expenses, and disbursements, including attorneys' fees and expert witness fees under the Equal Access to Justice Act, 28 U.S.C. § 241(d), associated with this litigation; and

239. Grant Plaintiffs such further and additional relief as the Court may deem just and proper.

Respectfully submitted this 15th day of May, 2024

TULANE ENVIRONMENTAL LAW CLINIC

/s/ Lisa Jordan

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*Counsel for the Atchafalaya Basinkeeper, Inc., Louisiana Crawfish Producers Association – West, Healthy Gulf, Waterkeeper Alliance, and Sierra Club and its Delta Chapter, and Supervising Attorneys for Peter Ellinger and Tim Brannan*

/s/ Peter Ellinger

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Peter Ellinger, Student Attorney

/s/ Tim Brannan

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Tim Brannan, Student Attorney

**INTRODUCTION OF STUDENT ATTORNEYS**

The undersigned counsel respectfully introduces law student practitioners Peter Ellinger and Tim Brannan, to this Court pursuant to Local Rule 83(b)(15). These student practitioners are duly enrolled in Tulane Law School, a law school approved by the American Bar Association. The student practitioners have completed four full-time semesters of legal studies and have taken the oath set forth in Local Rule 83(b)(15). As the student practitioners' supervising attorney, I approve of the student practitioners' appearance in this case. Further, a Dean's certification relating to the student practitioners, filed with this Court's clerk's office on September 14, 2023, is attached as Exhibit A. The clients' written statements of consent to appearances by student practitioners on their behalf are attached as Exhibit B.

TULANE ENVIRONMENTAL LAW CLINIC

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