UNITED STATES DISTRICT COURT
FOR MIDDLE DISTRICT OF LOUISIANA

ATCHAFALAYA BASINKEEPER, LOUISIANA CRAWFISH PRODUCERS ASSOCIATION-WEST, GULF RESTORATION NETWORK, WATERKEEPER ALLIANCE, and SIERRA CLUB and its DELTA CHAPTER, Plaintiff, v. U.S. ARMY CORPS OF ENGINEERS Defendant.	Civ. No. 3:18-cv-00023-SDD-EWD MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

The Atchafalaya Basin, the largest swamp ecosystem in North America, is one of the nation's ecological crown jewels. Its unique cypress-tupelo forests provide habitat for countless bird species and other wildlife, and flood protection for millions of people in the Mississippi River valley and coastal Louisiana. It is an economic powerhouse, providing rich opportunities for commercial and sport fishing, recreation, and tourism. The most productive swamp in the world, it provides the last bastion of a swamp-based Cajun culture in the nation, and is vital to the livelihoods and heritage of local fishing communities. But the Basin is under siege, with numerous threats including poor management of water and sediment, construction of barriers, and the "death by a thousand cuts" of habitat loss. Leading this charge is the oil and gas industry, whose activities have irrevocably degraded the Basin. Keenly aware of the threats, state and federal agencies have prioritized efforts to restore the Basin, spending hundreds of millions of dollars to protect this priceless component of our natural and cultural heritage.

Against this backdrop, the U.S. Army Corps of Engineers ("Corps") recently issued permits authorizing a major pipeline—the Bayou Bridge pipeline, capable of carrying nearly half a million barrels a day of crude oil—to cross the Basin. It did so without the full environmental review and assessment of risks required by law. Plaintiffs Atchafalaya Basinkeeper, the Louisiana Crawfish Producers Association-West, Gulf Restoration Network, Waterkeeper Alliance, and Sierra Club filed this lawsuit to challenge the Corps' violations of the Clean Water Act ("CWA") and National Environmental Policy Act ("NEPA").

In this motion, plaintiffs seek a limited preliminary injunction preventing construction of the pipeline through the Atchafalaya Basin while the case is resolved on the merits. This Court should grant the motion because plaintiffs are likely to prevail on the merits of its claims, and because plaintiffs and their members will be irreparably harmed in the absence of an injunction.

The balance of equities and public interest also support a temporary delay in the pipeline's construction schedule while this case is resolved.

FACTUAL BACKGROUND

A. THE ATCHAFALAYA BASIN

1. The Atchafalaya Basin Is a Priceless Part of our National Heritage.

The Atchafalaya Basin contains the largest contiguously forested wetlands in North America, and the largest relatively intact, functioning riparian area in the lower Mississippi Valley. Declaration of William Conner, Ph.D. ("Conner Decl.") ¶ 7; Declaration of Jan Hasselman ("Hasselman Decl."), Ex. 1, at 15.[1] Characterized by the presence of unique cypress-tupelo forest wetlands that spend a significant portion of the year flooded, the Basin supports half of America's migratory waterfowl, more than 250 bird species, and provides the most important habitat for neo-tropical migratory land birds and other birds in the Mississippi Flyway. About 100 species of fish, crawfish, shrimp and crabs support sport and commercial fishing, and feed birds, reptiles and mammals. Ex. 2 at 6. Other animals that call the Atchafalaya home include the Louisiana black bear, white tail deer, bobcat, coyote, alligator, beaver, mink, otter, musk rat, armadillo, fox, and opossum. The Atchafalaya is considered the most productive swamp in the world, and the most productive land in the Northern Hemisphere. Ex. 3 at 3; *Sabine River Authority v. U.S. Dep't of Interior*, 951 F.2d 669, 672 (5th Cir. 1992) ("Wetlands…are an ecological treasure.").

The Atchafalaya River is the largest distributary of the Mississippi River, and forms part of the Mississippi River Delta. The State of Louisiana estimates that the ecosystem functions served by the Mississippi River delta provide $330 billion to $1.3 trillion per year in economic benefits. Ex. 4, at ES-10. The Basin is the most important spillway in the Mississippi, and

[1] Hereinafter, all references to Exhibits are to those attached to the Hasselman Declaration.

during major floods water is diverted into the Basin to protect communities living downstream. Ex. 2, at 5; *La. Crawfish Producers Ass'n-West v. Rowan*, 463 F.3d 352, 355 (5th Cir. 2006) (Atchafalaya Basin drains "approximately 41% of the continental United States"). Louisiana's Comprehensive Master Plan for a Sustainable Coast proposes to expend billions of dollars in the Basin on wetland restoration and flood risk reduction. Ex. 4, at 96.

The Basin supports extensive subsistence hunting and fishing, and contributes significantly to the state's economy. Tourism and travel expenditures in the Basin exceed $400 million annually. Ex. 2, at 10. During 2016, Louisiana sold over 190,000 recreational hunting, fishing and trapping licenses, and thousands of commercial licenses. *Id*. at 6. The economic impact of travel in the Atchafalaya Basin in 2015 alone contributed well over $100 million in tax receipts. *Id*. at 5. Local commercial fishermen (which include members of plaintiff organizations in this case), from January to August 2014, harvested over 11 million pounds of wild crawfish from the Basin, with a dock side value of $9.7 million. *Id.* at 7.

2. The Atchafalaya Has Been Highly Degraded by Oil and Gas Development.

Oil and gas pipelines have degraded extensive portions of the Basin's wetlands and waterways. Declaration of Scott Eustis Decl. ("Eustis Decl.") at ¶¶ 12, 46; Declaration of Jody Meche ("Meche Decl.") at ¶¶ 8-9. Routing pipelines through the Basin involves: a) permanent removal of forest vegetation and creation of devegetated canals, and b) creation of "spoil banks" which are linear piles of dredged soil dumped adjacent to canal trenches. Canals transport and deposit sediments into sensitive cypress-tupelo ecosystems, destroying these highly productive wetlands. Ex. 1, at 17, 19; Eustis Decl. at ¶¶ 18-22, 25-30. Spoil banks—which act like levees cutting across the swamp—inhibit the historical sheeting pattern of water flow, deteriorating water quality within nearly all of the large, interior swamps. *Id*.; Ex. 5, at 15.

The thousands of linear miles of spoil banks from past pipeline construction crisscrossing

the Basin are the biggest cause of damage to wetlands. *See* Eustis Decl. at ¶¶ 12, 46. Spoil banks lead to stagnant water devoid of dissolved oxygen, a condition known as hypoxia. *Id*. at ¶16; Ex. 1 at 17. Hypoxia is "extremely stressful" to fish and other aquatic organisms, and "significantly affect[s] the abundance and species composition of basin food-web organisms, such as zooplankton, aquatic insects, amphipods, crawfish and fish." Ex. 1 at 17, 19. Today, major portions of the Basin that once sustained crawfishing families for generations are no longer fishable due to the ecological effects of spoil banks. Meche Decl. at ¶¶ 25-30; 36-40.

The State of Louisiana is spending millions of dollars of public funds on restoration projects in the Atchafalaya Basin, many of which remediate the damage created by spoil banks and canals created for oil and gas pipelines. *See, e.g.,* Ex. 5 at 36, 41. For example, the State of Louisiana proposes to expend $3,701,400 to remediate the Beau Bayou Swamp, that was "once known as a highly productive fisheries area," but has since deteriorated from hypoxic conditions due in part to pipeline spoil banks. *Id.* at 42-43. In 2017, the Louisiana Legislature passed a Senate Resolution requesting that the Department of Natural Resources "study potential solutions that may mitigate spoil banks" and questioned whether "construction, maintenance, or any other work should be permitted" in the Atchafalaya Basin. Ex. 6.

Leaving spoil banks in place after construction has been completed is typically a violation of permits issued by the Corps. Declaration of Dean Wilson ("Wilson Decl.") ¶¶ 12-19. Such noncompliance has special relevance in this case, as the Bayou Bridge pipeline will follow the right of way ("ROW") of two existing pipelines, the Sorrento pipeline and the Wanda pipeline. Spoil banks remain, in violation of permit conditions, in the rights-of-way for both pipelines. *Id*.; Memo. at 12 ("the location selected for the pipeline ROW occurs near an existing ROW that was constructed with spoil banks that block north to south sheet flow in the

Atchafalaya Basin."); Eustis Decl. at ¶¶ 36, 42. The Corps permit for the Sorrento pipeline includes a condition that "All impacted wetland areas shall be returned to pre-project conditions and elevations within two weeks of the project." Ex. 7 at 4. The permit also requires that "[m]aterial excavated as a result of pipeline trench construction shall be stockpiled no longer than 120 days in wetlands areas." *Id*. at 5. ("Excess material must be removed to upland areas.") Sorrento remains in violation of these requirements, causing considerable damage to the Basin. Wilson Decl. ¶¶ 12-19. The Corps permit issued to Wanda Pipeline Co. states that "any material dredged in the prosecution of the work authorized herein shall be removed evenly and no large refuse piles, ridges across the bed of the waterway, or deep holes that may have a tendency to cause injury to navigable channels or to the banks of the waterway shall be left." Ex. 8. at 2 ("There shall be no unreasonable interference with navigation by the work authorized herein.") The Wanda Pipeline is in violation of these conditions. Wilson Decl ¶ 15. Plaintiffs have expended considerable effort seeking to hold the Corps and permit holders accountable for violating permits, with limited success. *See, e.g., Atchafalaya Basinkeeper v. Chustz*, 682 F.3d 356, 360 (5th Cir. 2012) (citizens have no right to sue to enforce conditions of § 404 permits).

B. THE BAYOU BRIDGE PIPELINE WOULD CARRY NEARLY HALF A MILLION BARRELS OF CRUDE OIL DAILY ACROSS THE BASIN

Against this backdrop, in 2016, Bayou Bridge Pipeline LLC ("Bayou Bridge"), a joint venture between Energy Transfer Partners ("ETP") and Philips 66 Partners LP, sought permits to build a new pipeline across most of the state of Louisiana, transecting the Atchafalaya Basin. Ex. 9. Bayou Bridge previously built a 49-mile, 30-inch pipeline running from the terminus of another pipeline in Texas to Lake Charles, Louisiana, that went into service in April 2016. The next phase of the project would build a pipeline running 162 miles from Lake Charles to a terminal near St. James to reach to crude oil refineries and export terminals. Ex. 9 at 2.

On October 3, 2016, the Corps released a public notice seeking comment on the proposal. Ex. 9. The notice gave few details about the project and its impacts, but identified 500 acres of "temporary" impacts to wetlands and other waters, and the permanent conversion of 159 acres of forested wetlands (i.e., swamp) into non-forested wetlands, as construction would require a 75-foot cleared right of way through wetlands. *Id*. at 2. A few days before the close of the comment period, the Corps released a "supplemental" application that offered additional project details. Ex. 35. That document broke down wetlands impacts by basin, revealing nearly 250 acres of wetlands impacts in the Atchafalaya. *Id*. at 19-20.[2] No details were provided regarding mitigation for these impacts. *Id*. at 19. The supplemental project application also revealed, for the first time, that capacity of the pipeline would be 280,000 barrels of crude oil per day. *Id.* at 2.

Plaintiffs and many others submitted extensive comments to the Corps, focusing on the extraordinary values at risk in the Atchafalaya Basin, the need for full environmental review, and the history of noncompliance with Corps permits. *See, e.g.*, Ex. 3, 10 through 15. Plaintiffs provided voluminous materials about the risk of pipeline spills and the history of incidents in Louisiana. Ex. 14 (attaching numerous exhibits related to spill risk); Ex. 16, 17, 18. Plaintiffs also provided the Corps with evidence that the pipeline would be used not just for conventional crude, but also tar sands bitumen, which involves substantially different safety risks and response capabilities. Ex. 15. Additional comments were provided about the abysmal safety record of ETP, the corporate parent of Bayou Bridge. One analysis of federal reporting data reported that ETP and its subsidiary Sunoco Inc. were responsible for 329 "significant" pipeline incidents between 2006 and 2017—a rate of over two a month—losing over a million gallons of crude oil

[2] The project would "temporarily" impact about 170 acres of wetlands in the Basin, and "result in permanent conversion" of 78 acres of forested wetlands in the Basin, the majority of which are cypress or cypress-tupelo dominated wetlands.

and imposing an estimated financial cost of over $67 million. Ex. 19; Ex. 11 at 2-3. Commenters also pointed out how ETP's mismanagement has resulted in other environmental catastrophes, such as when ETP released 2.05 million of gallons of drilling fluid into wetlands in Ohio in April of 2017. Ex. 19. Later, the State of West Virginia ordered work on that pipeline shut down due to a pattern of permit violations. Ex. 20. Just within the last few weeks, another ETP/Sunoco pipeline received a federal enforcement compliance order for failing to adequately inspect the Mariner gas pipeline in Ohio. Ex. 21.[3] Commenters further pointed out that ETP is out of compliance with a pipeline permit *in the Basin*. Ex. 11 at 3. ETP shares ownership of the Florida Gas Pipeline, a natural gas pipeline project that connects Texas with Florida, crossing the Atchafalaya Basin.[4] The Corps permit for the Florida Gas Pipeline prohibited the erection of spoil banks. Ex. 22. Even so, a spoil bank was created, and it remains to this day, blocking bayous and countless waterways, damaging extensive areas of wetlands by filling them with sediments, causing hypoxic conditions and degradation of water quality, and restricting access to and use of navigable waterways. Eustis Decl. at ¶¶ 20, 26, 55; Wilson Decl. ¶ 33.

Many commenters also raised concerns regarding reduced natural flood protection from construction of the Pipeline. *See* Memo at 9, 19, 20; Meche Decl. at ¶¶ 52-53. The Atchafalaya River is the most important spillway for the Mississippi River. Construction of an additional canal in the Pipeline right-of-way that crosses the full-length of the Basin may cause floodwaters to bypass healthy cypress swamps that ordinarily hold back these flows, and instead accelerate

[3] ETP's record as a corporate citizen is no better. *Energy Transfer Partners, L.P. v. F.E.R.C.*, 567 F.3d 134, 136 (5th Cir. 2009) (FERC issued $82 million penalty for manipulation of wholesale natural-gas prices, discrimination against shippers, and excessive rates)

[4] "The Florida Gas Transmission [] pipeline . . . is owned by Florida Gas Transmission Company, LLC, a 100% owned subsidiary of Citrus Corp. Citrus Corp is a 50/50 joint venture between KinderMorgan, Inc. [] and Energy Transfer." KinderMorgan, *Natural Gas Pipelines*, https://www.kindermorgan.com/pages/business/gas_pipelines/east/FGT/default.aspx.

down the canal threatening increased flood impacts to Morgan City and Berwick. Ex. 1 at 28. By altering sediment transport, the canal and spoil bank created by the project could aggravate flooding issues by constraining the natural north-south flow of water, accumulating sediment along spoil banks, and filling in wetlands. *Id*. Furthermore, by preventing downstream transport of sediment the project could have long-term cumulative impacts on coastal wetland loss and reduced natural flood protection. *Id*.; Ex. 10 at 9-10 ("The ability of the Atchafalaya Basin to move flood waters is severely diminished due to the increase in accretion.")

Plaintiffs were not the only ones expressing alarm about the Corps' proposal to authorize the pipeline. U.S. Representative Cedric L. Richmond, whose Congressional District encompasses portions of the Atchafalaya Basin and the pipeline route, asked for a full environmental impact statement ("EIS") as part of a "thorough and transparent environmental review." Ex. 23. The Ranking Member of the House Committee on Natural Resources, Raul Grijalva, also requested a full EIS, specifically pointing to ETP's abysmal safety record and the history of noncompliance with Corps permits in the basin. Ex. 24.

C. THE CORPS AUTHORIZED THE PIPELINE WITHOUT AN ENVIRONMENTAL IMPACT STATEMENT AND WITHOUT ASSESSING CRITICAL FACTORS

Notwithstanding the widespread calls for thorough environmental review and careful consideration of project risks, on December 14, 2017, the Corps issued a § 404 permit authorizing the project. Ex. 25 ("Permit"). The Permit was accompanied by a 92-page memorandum that constituted the Corps' environmental review. Ex. 26 ("Memorandum" or "Memo."). In most other pipeline situations, the Corps asserts jurisdiction only over narrow components of the entire project, with most of the pipeline either outside Corps jurisdiction or exempt under streamlined permitting procedures. *See, e.g., Sierra Club v. U.S. Army Corps of Engineers*, 803 F.3d 31, 34 (D.C. Cir. 2015) (Corps' jurisdiction covered 5% percentage of total

pipeline, and hence Corps did not need to consider impacts of entire project); *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 255 F. Supp. 3d 101, 130 (D.D.C. 2017) (Corps only evaluated segment of pipeline under Missouri River). With respect to Bayou Bridge, however, the Corps issued an *individual* CWA permit covering the pipeline's entire 163-mile length, including segments of the pipeline outside of Corps jurisdiction. Memo. at 3.

Despite this broad scope of review, a thoroughly documented record of environmental impacts arising from project construction and operations, and a long history of noncompliance for other Corps pipeline permits, the Corps concluded that the project's impacts were not significant enough to warrant a full EIS. Memo. at 91. With respect to the issue of oil spills and leaks, and their particularly critical risks in a special aquatic environmental like the Atchafalaya, the Corps dismissed them as outside of its regulatory "purview," and declined to address the evidence of spill risk before it. *Id*. at 30.[5] With respect to the long-standing pattern of noncompliance with other pipeline permits in the Basin, the Corps dismissed the concerns as "irrelevant" and offered no assurances that these conditions would be enforced. *Id*. at 26.

The Permit authorizes the proponent to clear a 75-foot wide right of way through the wetlands of the Basin for construction. The applicant has stated that it would permanently maintain 30-feet of this cleared ROW, allowing the remainder to regenerate. Memo. at 37.[6] The Corps proposed to offset the impacts of permanent loss of forest swamp with compensatory mitigation, authorizing the purchase of mitigation "credits" for a different kind of forest than the

[5] Mysteriously, although the original application cited a capacity of 280,000 barrels of oil a day ("bbl/day"), the Corps' Memorandum revealed that the capacity was now nearly double that—480,000 bbl/day—compounding the risks and impacts of spills and leaks. *Id*. at 42.

[6] The Permit does not identify the width of the permanent ROW. It only requires adherence to project "drawings." Ex. 25 at 1. Those drawings, in turn, show a 50-foot permanent ROW through wetlands. *See* Ex. 27. Plaintiffs are unable to discern whether the Corps used a 30-foot or a 50-foot ROW in its determination of mitigation requirements.

one being cleared, at a site far away from the project. Memo. at 68; Eustis Decl. ¶¶ 32-36; Conner Decl. ¶¶ 24-28. The Corps did not respond to multiple comments that the appropriate mitigation for the project should be to restore the existing out-of-compliance ROW.

Plaintiffs filed this case on January 11, 2018 challenging the §404 permit for the project. Construction in the Atchafalaya is either imminent or has already commenced. This motion seeks a preliminary injunction directing the Corps to withdraw the Permit, to the extent it authorizes activities in the Atchafalaya Basin, pending resolution of this case.

STANDARD OF REVIEW

To obtain a preliminary injunction, a movant must show: (1) a substantial likelihood that it will prevail on the merits, (2) that it will suffer irreparable injury if the injunction is not granted, (3) the balance of harms tips in its favor, and (4) granting the injunction will not disserve the public interest. *Planned Parenthood of Gulf Coast v. Gee*, 862 F.3d 445, 457 (5th Cir. 2017). A preliminary injunction preserves the position of the parties until a determination of the matter on the merits. *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981).

Challenges to decisions under NEPA and CWA are reviewed under the Administrative Procedure Act, 5 U.S.C. § 706, to determine whether the decision was "arbitrary, capricious, or contrary to law." Under this standard, a reviewing court does not substitute its judgment for that of the agency, but must "studiously review the record to ensure that the agency has arrived at a reasoned judgment based on a consideration and application of the relevant factors." *Sabine River*, 951 F.2d at 678; *O'Reilly v. U.S. Army Corps of Engineers*, 477 F.3d 225, 230 (5th Cir. 2007) ("[T]his restriction does not turn judicial review into a rubber stamp. In conducting our NEPA inquiry, we must make a searching and careful inquiry into the facts and review whether the decision ... was based on consideration of the relevant factors and whether there has been a clear error of judgment."). An agency must "articulate a satisfactory explanation for its action

including a rational connection between the facts found and the choice made." *Motor Vehicles Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co*, 463 U.S. 29, 43 (1983).

STATUTORY OVERVIEW

A. NEPA REQUIRES A FULL ENVIRONMENTAL IMPACT STATEMENT FOR FEDERALLY PERMITTED PROJECTS WITH "SIGNIFICANT" EFFECTS

NEPA, 42 U.S.C. §§ 4321–4370f, is our "basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). It makes environmental protection a part of the mandate of every federal agency. 42 U.S.C. § 4332(1). NEPA requires that federal agencies "take a 'hard look' at the environmental consequences before taking action." *Baltimore Gas and Elec. Co. v. Natural Resources Defense Council*, 462 U.S. 87, 97 (1983). One of NEPA's purposes is to ensure that an agency, "in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts." *Robertson v. Methow Valley Citizens Counc.*, 490 U.S. 332, 349 (1989). NEPA requires agencies to disclose all potential adverse environmental impacts of its decisions before deciding to proceed, 42 U.S.C. § 4332(2)(C), and requires them to use accurate information. 40 C.F.R. §§ 1500.1(b), 1502.24.

If an agency action has adverse effects that are "significant," they need to be analyzed in a full EIS. 40 C.F.R. § 1501.4; *State of Louisiana v. Lee*, 758 F.2d 1081, 1086 (5th Cir. 1985) (agency action that "*may* cause a significant degradation of some human environmental factor" requires an EIS); *Grand Canyon Trust v. FAA*, 290 F.3d 339, 34 (D.C. Cir. 2002) ("If *any* significant environmental impacts might result from the proposed agency action then an EIS must be prepared *before* an agency action is taken[.]") (quotation omitted). NEPA regulations define significance to "require considerations of both context and intensity." 40 C.F.R. § 1508.27. With respect to context, the regulations acknowledge that significance "must be analyzed in several contexts such as the society as a whole… the affected region, the affected

interests and the locality. Significance varies with the setting of the proposed action." *Id.* With respect to "intensity," the regulations articulate multiple factors that must be considered, for example, "the degree to which the proposed action affects public health or safety"; "unique characteristics of the geographic area such as…wetlands…or ecologically critical areas"; the degree to which the effects on the environment "are likely to be highly controversial," are "highly uncertain" or "involve unique or unknown risks"; "whether the action is related to other actions with individually insignificant but cumulatively significant impacts"; and "the degree to which the action may adversely affect" species listed under the Endangered Species Act. *Id.* If the agency determines that the impacts of a decision are not significant, it must document its conclusions in a finding of no significant impact ("FONSI"). The justification for such findings must be clearly demonstrated: "simple, conclusory statements of 'no impact' are not enough." *Foundations on Economic Trends v. Heckler*, 756 F.2d 143, 154 (D.C. Cir. 1985).

In making this determination, agencies must consider both direct *and indirect* effects of its decisions "which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R. § 1508.8(b); *O'Reilly*, 477 F.3d at 228. An impact is "reasonably foreseeable" if a "person of ordinary prudence would take it into account in reaching a decision." *City of Shoreacres v. Waterworth*, 420 F.3d 440, 453 (5th Cir. 2005). The Corps must consider such impacts even if they fall outside its direct regulatory jurisdiction. *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 869 (9th Cir. 2005) (Corps must consider increased risk of oil spills caused by permitting tanker dock); *White Tanks Concerned Citizens v. Strock*, 563 F.3d 1033, 1042 (9th Cir. 2009). Moreover, it must consider relatively unlikely events with significant impacts, like accidents. 40 C.F.R. § 1502.22(b)(4) (reasonably foreseeable includes impacts which have catastrophic consequences, even if their probability is

low); *Sierra Club v. Sigler*, 695 F.2d 957 (5th Cir. 1983) (Corps "may not hide behind its ignorance of the worst case consequences" of oil spills when approving tanker dock); *New York v. Nuclear Regulatory Comm'n*, 681 F.3d 471, 481-82 (D.C. Cir. 2012) (agency must consider the consequences of "catastrophic" risks under NEPA even if the chances are low); *Gov't Province of Manitoba v. Norton*, 398 F. Supp.2d 41, 64 (D.D.C. 2005) (rejecting EA for water pipeline for not considering low-risk mishap); *Sierra Club v. Watkins*, 808 F. Supp. 852, 868 (D.D.C. 1991) (rejecting EA for failing to consider accidents that are "possible" even if "extremely unlikely").[7]

B. SECTION 404 OF THE CWA REQUIRES A BROAD ANALYSIS OF THE PUBLIC INTEREST AND ENVIRONMENTAL RISKS OF PROJECTS

The requirements of CWA § 404 in some respects overlap with NEPA, with one significant difference: whereas NEPA establishes *procedures* intended to inform decisionmakers and involve the public, § 404 of the CWA also puts strict *substantive* limits on issuance of permits. *Greater Yellowstone Coal. v. Flowers*, 359 F.3d 1257, 1273 (10th Cir. 2004). These standards are intended to achieve the law's sweeping goal to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a); 40 C.F.R. § 230.1(a). Permits that have more than minimal adverse effects, or otherwise don't meet the CWA's substantive standards, cannot be issued. 33 U.S.C. § 1344(e)(1); 40 C.F.R. § 230.1(c).

The CWA prohibits the discharge of any pollutant into water unless authorized by a

[7] A key factor in determining whether a project's impacts are "significant" enough to require an EIS is if it is "highly controversial." 40 C.F.R. § 1508.27(b)(4); *Center for Biological Diversity v. U.S. Fish & Wildlife Service*, 202 F.Supp.2d 594, 657–58 (W.D.Tex. 2002) (controversial means "a substantial dispute ... as to the size, nature, or effect of the major federal action"). In another challenge to Corps permits for an ETP crude oil pipeline, the court found that the Corps' failure to address substantial expert input on oil spill risks rendered the project "controversial" for purposes of NEPA, requiring a remand. *Standing Rock Sioux Tribe*, 255 F. Supp. at 129.

permit. *Id*. § 1311(a). The Corps issues permits under § 404(a) after a review involving, among other things, site specific documentation and analysis, public notice and opportunity for a hearing, a public interest analysis, and formal determination. *Id*. § 1344(a); 33 C.F.R. § 322.3; Parts 323, 325. The Corps is prohibited from approving a project "unless it can be demonstrated that such a discharge [from the project] 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). Permits also cannot be issued if they will result in significant adverse effects to water quality. 40 C.F.R. § 230.10(c)(3).

Prior to issuance of a CWA permit, the Corps is required to conduct a "public interest" review. 33 C.F.R. § 320.4(a). In conducting this review, the Corps must consider the probable impacts of the proposed action, its putative benefits, and weigh all "relevant" considerations. *Id*. The Corps must balance the benefits "which reasonably may be expected to accrue" from the action against the "reasonably foreseeable detriments." *Id*. The regulations call out floodplains for special protection, noting that even a minor change could have cumulative impact that significantly degrades the floodplain values and functions. 33 C.F.R. § 320.4 (l)(2). The Corps must further ensure adherence to guidelines promulgated by the U.S. Environmental Protection Agency ("EPA"), which direct the Corps to closely analyze the impacts of a proposed discharge on a number of parameters. 40 C.F.R. § 230.11. As the Fifth Circuit observed in *Buttrey v. U.S.*, the regulations presume "that the 'unnecessary alteration or destruction of (wetlands) should be discouraged as contrary to the public interest.'" 690 F.2d 1170, 1180 (5th Cir. 1982) (*quoting* 33 C.F.R. § 320.4(b)(1)). "This presumption is very strong." *Id.* (*citing* 40 C.F.R. § 230.1(d)). After considering "all factors that may be relevant" to the proposal, permits must be denied if the Corps finds that such permit is not in the public interest. 33 C.F.R. § 320.4(a)(1).

ARGUMENT

A. PLAINTIFFS ARE LIKELY TO PREVAIL ON THE MERITS OF THEIR NEPA AND CWA CHALLENGES TO THE BAYOU BRIDGE PIPELINE PERMIT

The Corps' conclusion that the impacts of a 162-mile long crude oil pipeline, capable of carrying nearly half a million barrels of oil every day, through one of the most unique and valuable ecosystems in the nation, is not "significant" enough to warrant a full EIS can only be described as astonishing. Similarly, its determination that the project is in the "public interest" is equally fundamentally flawed. First, the Corps failed to consider perhaps the single most salient factor associated with crude oil pipelines: the risks of spills and leaks and their impact on sensitive ecosystems like the Atchafalaya. *Infra* § II.A. Second, it improperly ignored the long history of noncompliance with Corps permit conditions for other pipelines that have resulted in irreparable ecological damage to the Basin. *Infra* § II.B. Third, it improperly relied on "mitigation" that is physically distant from, and totally unconnected to, the harms that the project would cause. *Infra* § II.C. Finally, it relied on an arbitrary and unlawful balancing in which the benefits of operating the crude oil pipeline were expressly weighed, while the risks of such operations were ignored. *Infra* § II.D.

If the Bayou Bridge pipeline does not trigger an EIS, it is hard to imagine what kind of project would. Courts have set aside agency decisions to sidestep an EIS on projects with far less impact than this. *O'Reilly*, 477 F.3d at 240 (residential development allowing dredging and filling in 39.54 acres of wetlands); *Grand Canyon Trust v. F.A.A.*, 290 F.3d 339 (D.C. Cir. 2002) (airport expansion); *Delaware Riverkeeper Network v. F.E.R.C.*, 753 F.3d 1304 (D.C. Cir. 2014) (gas pipeline upgrade); *Bluewater Network v. Salazar*, 721 F. Supp. 2d 7 (D.D.C. 2010) (decision to allow jet-skis in park); *Friends of the Earth v. U.S. Army Corps*, 109 F. Supp. 2d 30, 41 (D.D.C. 2000) (permit for riverboat casinos). This Court should find that plaintiffs are likely

to prevail on the merits of their NEPA and CWA claims.

1. The Corps Violated NEPA and the CWA by Failing to Assess the Risk and Impacts of Oil Spills.

A key issue before the Corps was the risk that the Bayou Bridge pipeline could spill or leak oil. Voluminous materials concerning this risk were before the Corps. *See, e.g.,* Ex. 14. Not only are such events commonplace, even in modern pipelines, but the release and recovery of crude oil in a swamp environment like the Atchafalaya raises heightened challenges. *Id.* Many commenters—including the ranking member of the House Natural Resources committee—also urged the Corps to review ETP's abysmal safety and compliance record. Ex. 24. Others provided information that the pipeline could be carrying both "light" oil from the Bakken as well as diluted bitumen from Canadian tar sands, a unique form of heavy crude that involves different environmental impacts and requires different response capabilities. Ex. 15.

The Corps disregarded all of this input. Instead, while acknowledging that potential impacts to surface and groundwater from spills are "clearly important factors," it found that they are regulated by other entities and hence "not within the defined purview of the Corps."

> From a broad perspective, when matter arise in the course of project review that are subject to oversight by other agencies, the Corps relies on those agencies, because they have delegated authority and specific experience, to ensure the project conforms with applicable standards, and enforce compliance with those criteria.

Memo. at 30. With that dismissal, the memorandum reaches its conclusion that project impacts are not "significant" enough to warrant an EIS without even the most cursory consideration of the single most important factor affecting the project's impacts. That decision is unlawful.

a. *The Failure to Consider Spill Risk Violates NEPA*

As explained above, NEPA requires the Corps to disclose and consider both the direct and indirect effects of its permitting decisions, including unlikely but serious events like accidents and oil spills. *Supra*, at 12; *Sigler*, 695 F.2d at 968. Simply put, whether oil spills are

with the "defined purview" of the Corps' is the wrong question—if an oil spill is a "reasonably foreseeable" impact of its decision, the Corps must consider it as part of its NEPA review. *Foundation on Economic Trends*, 756 F.2d at 154 ("An [EA] that fails to address a significant environmental concern can hardly be deemed adequate for a reasoned determination that an EIS is not appropriate."); *Holy Cross v. U.S. Army Corps of Eng'rs*, 455 F. Supp.2d 532, 539 (E.D. La. 2006) (invalidating Corps EIS) ("To ignore these facts is to ignore reality. For the law to have any credibility or respect, it must be grounded in reality."). As documented in the record, oil spills and leaks from crude oil pipelines are not just "foreseeable"—they are commonplace. *See supra*, at 6-7. This is especially true for ETP, with its worst-in-the-industry safety record. Ex. 19. Especially given that the scope of the Corps' review encompasses the entire 162-mile pipeline, a person of "ordinary prudence" plainly would consider the risk that someplace along this pipeline would at some point leak or spill oil. *City of Shoreacres*, 420 F.3d at 453.[8] The Corps, however, refused to do so.

The Corps further misunderstands the role of the Pipeline and Hazardous Materials Safety Administration ("PHMSA"), the federal agency charged with overseeing pipeline safety. In its memorandum, the Corps concludes that PHMSA "has the primary responsibility for issuance of DOT special permits and approvals" for crude oil pipelines. Memo. at 3. But that is wrong: PHMSA does not review and "approve" crude oil pipelines, which can be planned and built without any prior federal authorization unless they require § 404 permits. *Sierra Club*, 803 F.3d at 55 n. 8 ("Pipelines transporting oil within the United States are not subject to any general

[8] Moreover, the dispute about risks and impacts of oil spills and leaks in the Basin renders the project highly "controversial," weighing in favor of an EIS. 40 C.F.R. § 1508.27(b)(4); *Standing Rock Sioux Tribe*, 255 F. Supp. at 129 (remanding Corps permit for crude oil pipeline in light of controversy over spill risk).

requirement of federal governmental evaluation and approval."). Nor does PHMSA conduct environmental review of oil pipelines under NEPA. Instead, project proponents must only meet PHMSA minimum construction criteria, which are widely regarded as inadequate. Ex. 28, ¶ 7-8; Ex. 29, at 27-28. The idea that the Corps can ignore spill risks because they are regulated by another federal agency is simply incorrect.

Even if it wasn't, the premise that a project's impacts can be ignored whenever it meets criteria under another regulatory program is mistaken. *See, e.g., Washington Toxics Coal. v. EPA*, 413 F.3d 1024, 1032 (9th Cir. 2005) (EPA's compliance with pesticide law that protected the environment does not relieve it from complying with Endangered Species Act); *Seattle Audubon Soc'y v. Evans*, 952 F.2d 297, 301-302 (9th Cir. 1991) (designation of owls as endangered does not excuse Forest Service from obligations under National Forest Management Act). If this were true, only projects that *violated* regulatory criteria would be subject to an EIS. This is not the law. NEPA requires an EIS whenever impacts are significant, as they are here.

Moreover, the Corps' position here is flatly inconsistent with its position in other pipeline permitting situations.[9] *See, e.g., Sigler*, 695 F.2d at 968 (EIS for Corps permit for port looked at probability of oil spill, dispersion model, and environmental impact analysis). For example, the Corps' approval of a single river crossing of the controversial Dakota Access pipeline ("DAPL") resulted in considerably more analysis of oil spill risk than occurred here.[10] The project's initial

[9] The permits issued by the Corps for the Wanda and Sorrento pipelines regulating dredge and fill navigable waters prohibit oil spills. Ex. 7 at 4 ("No hydrocarbons, substances containing hydrocarbons or toxic substances shall be allowed to enter adjacent waterways and wetlands."); Ex. 8 (see condition (k)). Thus, the Corps in the past asserted jurisdiction over oil spill risks in past pipeline approvals in the Basin.

[10] The DAPL litigation involved *only* the Corps' authorization for the crossing of a single river, as the remainder of the pipeline was exempt from § 404 permitting. Bayou Bridge stands in a different posture, as it received an individual permit covering its entire length. Memo. at 3.

environmental assessment included a limited review of the risks of oil spills and impacts. *See* Ex. 30 at 28-30. The Interior Solicitor issued a formal opinion explaining in detail why NEPA called for close consideration of oil spill risks, observing that spills and leaks are "reasonably foreseeable" in light of their frequency. *Id*. The Corps then pledged to undertake a full EIS that would contain an "analysis of potential spill risk and impacts" at the pipeline crossing site. *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 255 F. Supp. 3d 101 (D.D.C. 2017). After the new federal administration reversed course and the Corps issued the permit, a federal court found the Corps NEPA analysis deficient in several critical respects relating to oil spill risk. *Id*. The Court ordered a remand of the NEPA review for the Corps to evaluate these issues more closely. While that remand is underway, the Court has imposed several measures designed to reduce the risks and impacts of oil spills from the pipeline. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 2017 WL 6001726 (D.D.C., Dec. 4, 2017). There is no way to square the Corps' position on the DAPL permit with its position here.[11]

b. *The Failure to Consider Spill Risk Violates the CWA*

The Corps' refusal to consider oil spills also violates the CWA. EPA guidelines direct the Corps to closely analyze the impacts of a permit on a number of water quality and other parameters. 40 C.F.R. § 230.11. The regulations expressly prohibit issuance of the permit where it would cause or contribute to violations of a water quality standard, violate a toxic effluent standard, or jeopardize the survival of any federally protected species, among other things. 40 C.F.R. § 230.10(b); *see also id.* § 230.10(c). The Corps must deny a permit if it finds that it is

[11] Other agencies with permitting authorities over crude oil pipelines put the risks and impacts of oil spills at the center of their NEPA analyses, invariably in an EIS. For example, the U.S. Department of State must authorize crude oil pipelines that cross international borders. While the State Department has no more authority over pipelines than the Corps, it understands that spills are a potential impact of its decision and needed to be expansively considered in an EIS. Ex. 31 (risk analysis for Keystone XL pipeline); Ex. 32 (excerpts from EIS for Line 67 pipeline).

not in the "public interest." 33 C.F.R. § 320.4(a). These determinations must be made only after consideration of "*all factors* that may be relevant" to the proposal. *Id*. Regulations explicitly require close consideration of "secondary" effects, defined as "effects on an aquatic ecosystem that are associated with a discharge of dredged or fill materials, but do not result from the actual placement of the dredged or fill material." 40 C.F.R. §230.11(h).

Plainly, the Corps did not consider "all factors" relevant to the proposal, and certainly not "secondary" effects. By dismissing the risks and consequences of oil releases as outside of its regulatory "purview," it sidestepped any analysis of the risk of a spill or the impacts that one would have. There was no consideration of whether such a commonplace event would violate applicable water quality standards, or the "public interest" in fishing, recreation, and tourism in the Basin. Having failed to consider this critical issue, the Corps' decision that the project was in the public interest and otherwise met the requirements of § 404 was fundamentally flawed.

In sum, the NEPA duty to consider "the environmental impact of the proposed action" requires an agency to consider *all* environmental effects and to incorporate this information into its final decision. 42 U.S.C. § 4332(C)(1); *Fritiofson v. Alexander*, 772 F.2d 1225, 1244 (5th Cir. 1985) ("The Corps…cannot avoid NEPA responsibilities by cloaking itself in ignorance."). The CWA similarly requires close scrutiny of "all factors" relevant to the proposal. During the comment phase, the Corps obtained extensive input from plaintiffs and others, raising concerns about the dangers of spills and risk, and providing a mountain of documentary evidence. Oil spills and leaks are unquestionably foreseeable impacts of the decision to authorize the Bayou Bridge pipeline; the fact that it crosses one of the most unique and valuable ecosystems in the world removes any doubt as to its "significance." The Corps, however, sidestepped the issue completely, using a legal justification that falls apart on modest scrutiny. It is hard to imagine a

more blatant case of failing to consider an "important aspect of the problem"—the very definition of "arbitrary and capricious" agency action. *Motor Vehicles*, 463 U.S. at 43; *Louisiana Wildlife Fed, Inc. v. York*, 761 F.2d 1044, 1054 (5th Cir. 1985) ("The Corps cannot avoid the strictures of NEPA by simply assuming away potential problems").

2. The Corps Violated NEPA and the CWA by Ignoring the Extensive History of Noncompliance with other Pipeline Permits.

Equally problematic is the Corps summary dismissal of another critical issue at the heart of this permit: the oil and gas industry's extensive record of noncompliance with Corps' pipeline permits. As discussed above, past pipeline construction has left spoil banks across much of the Basin which have been devastating to its ecology and hydrology. Ex. 3 at 3-6; Meche Decl. ¶14-17.; *see also Bd. of Comm'rs of the S. E. La. Flood Prot. Auth. v. Tenn. Gas Pipeline Co., LLC*, 29 F. Supp. 3d 808, 816 (E.D. La. 2014). Virtually every commenter who participated in the permit process brought up this history of noncompliance as a reason either to deny the permit or to conduct a full EIS. *See, e.g.*, Ex. 3 at 4-5, Ex. 10, at 19; Ex. 14 at 1-3. However, as it has in the past, the Corps simply imposed the same permit requirements requiring restoration of pre-project conditions, with no assurances that these conditions would be met. Memo. at 51.

Given the extensive pattern of non-compliance with the identical conditions in other permits—including one applicable to the same corporate entity as Bayou Bridge—non-compliance is a "reasonably foreseeable" outcome warranting careful consideration. *City of Shoreacres*, 420 F.3d at 452-53 (5th Cir. 2005). The Corps may forgo such an analysis only if compliance with permit conditions is assured to occur. *Wyoming Outdoor Council v. U.S. Army Corps of Eng'rs,* 351 F. Supp. 2d 1232, 1250 (D. Wyo. 2005) (holding mitigation measures speculative when Corps failed to "point to shred of scientific evidence . . . demonstrat[ing] that wetland replacement is a successful mitigation measure"). In concluding that no EIS is required,

an agency cannot rely on measures that "are speculative without any basis for concluding they will occur." *Davis v. Mineta*, 302 F.3d 1104 (10th Cir. 2002). If the effectiveness of these conditions is not assured, then an agency must prepare an EIS. *Found. for N. Amer. Wild Sheep v. U.S. Dep't of Agric.*, 681 F.2d 1172, 1180-82 (9th Cir. 1982).

The Fourth Circuit confronted an analogous situation in *Friends of Back Bay v. U.S. Army Corps of Eng'rs*, 681 F.3d 581 (4th Cir. 2012). There, the Corps issued a § 404 permit for a controversial mooring facility adjacent to a wildlife refuge. The issue before the Corps was the impact of watercraft on sensitive refuge wildlife habitat. Rejecting calls to either deny the permit or conduct a full EIS in light of these impacts, the Corps imposed a requirement that a "no wake zone" ("NWZ") be established to reduce impacts. But a NWZ adjacent to the refuge had been in place for two years, and had been almost entirely ignored. *Id*. at 588 ("The NWZ, however, is entirely unenforced."). The Corps' argued that it was "hopeful" that there would be compliance with the NWZ in the future. The Court forcefully rejected this approach. *Id.* at 589 ("Measures designed to render minimal a particular action's impact upon the environment, whether proposed in mitigation or assumed to already exist, are more readily deemed efficacious (and thus more comfortably within an agency's broad prerogative to propose or assume) when they are likely to be policed."); 33 C.F.R. § 325.4(c) (if permit conditions are not "reasonably implementable or enforceable," the permit must be denied); *Ohio Valley Envtl. Coal. v. Hurst*, 604 F. Supp. 2d 860, 868 (S.D.W. Va. 2009) (invalidating nationwide dredge and fill permit when Corps "provided no evidence that the mitigation process would be successful or adequately enforced").

The Corps may be "hopeful" that the project proponent will defy the near-universal pattern of noncompliance in the Basin, but such hope does not provide a sufficient basis on which to rest a § 404 permit and FONSI. *Friends of Back Bay*, 681 F.3d at 588. Illegal spoil

banks and canals from oil and gas pipelines are the single biggest threat to the Atchafalaya Basin. The substantial public interests in protecting these critical resources—and the many values they promote, like flood protection, erosion protection, and wildlife habitat—requires careful consideration of the history of noncompliance.[12] Instead, the Corps' decision almost completely ignores historic noncompliance, except in two places. In a section in which Bayou Bridge provides its perspective on public comments, it states: "Some existing infrastructure BPP parallels in the utility corridor pre-date the Clean Water Act and Section 404 permitting, thus they are not out of compliance." Memo. at 23. This argument enjoys the twin distinction being both incorrect and irrelevant. The Bayou Bridge right of way overlaps that of the Sorrento pipeline, which received a permit in 2001, decades after the CWA was enacted. Ex. 7; Wilson Decl. ¶ 16. The Wanda pipeline Permit predates the CWA but is regulated under § 10 of the Rivers and Harbors Act. 33 U.S.C. § 403. The Wanda pipeline RHA permit contains conditions prohibiting spoil banks, which are being violated to this day. Ex. 8; Wilson Decl. ⁋ 14.

The Corps next dismisses historic noncompliance as "irrelevant" to the current permit. Memo. at 26. That is simply wrong as a matter of law. The Corps must consider "all factors" which bear on the public interest determination, and even specifically calls out the kinds of impacts imposed by spoil banks. 33 C.F.R. § 320.4(a); 40 C.F.R. § 230.41(b) ("When disruptions in flow and circulation patterns occur, apparently minor loss of wetland acreage may result in major losses through secondary impacts."). Illegal spoil banks create hypoxic

[12] "[W]etlands are critical to flood control . . . their rapid disappearance is setting the stage for what may eventually become a significant environmental catastrophe." *Sabine River Auth.*, 951 F.2d at 672. Even a minor change to floodplains can be cumulatively significant. 33 C.F.R. § 320.4 (l)(2). Destroying forested wetlands of the Basin "significantly enhances the risk of hurricane impacts on the built environment." Ex. 1 at 14; *see* Meche Decl. at ¶¶ 51-54; Wilson Decl. ¶¶ 7-10. The Corps provided no support at all for its conclusion that the project will not increase flood hazards. Memo at 53; s*ee O'Reilly*, 477 F.3d at 235.

conditions that destroy fisheries in the Basin, Meche Decl. ¶¶ 14-17, impede public navigability, Wilson Decl. ⁋⁋ 26-28, and are changing the hydrology of the Basin, Eustis Decl. ¶¶ 9-12. On this record, a critical "factor" is the applicant's history of compliance. *Or. Natural Desert Ass'n v. U.S. Forest Serv*., 465 F.3d 977, 984 (9th Cir. 2006) ("extent of the permit holder's compliance with" previous permit relevant factor in new permit). As noted repeatedly, ETP itself is out of compliance on another pipeline in the very same basin. Ex. 22; Eustis Decl. at ¶¶ 22, 26, 55; Wilson Decl. ⁋ 31-34. It also has an egregious history of violating environmental standards.[13] *See supra* at 7. The Corps' refusal to grapple with these issues is arbitrary and capricious.

3. The Corps Violated NEPA and CWA by Relying on Inadequate Mitigation.

Both the CWA and NEPA contemplate that significant adverse impacts can be "mitigated" to the point where a § 404 permit can be authorized, or an EIS avoided. *O'Reilly*, 477 F.3d at 231. However, the substantive and procedural requirements for doing so are considerable. *Id*. (requiring "a serious and thorough evaluation of environmental mitigation options" in order to comply with NEPA… "mere perfunctory or conclusory language" is insufficient). Here, the Corps authorized the destruction of unique and rare forested wetlands based on purchase of "credits" from mitigation banks. Memo. at 68. Since insufficient "in kind" credits were available to offset lost cypress-tupelo swamps in the Atchafalaya, the Corps authorized "out of kind" mitigation, allowing Bayou Bridge to purchase credits from a bank many miles away from the project site restoring bottomland hardwood forests—an entirely

[13] Indeed, one of the Corps' sister federal agencies—the Federal Energy Regulatory Commission ("FERC")—made the remarkable finding recently that one of ETP's subsidiary companies "could not be relied upon to comply with the environmental regulations" at another pipeline project. Ex. 33 at 2.

different ecosystem. Eustis Decl. ¶¶ 32-35; Conner Decl. ¶¶ 24-28. The Corps' proposed mitigation falls far short of statutory requirements.

a. *Insufficient notice and opportunity to comment*

First, the opportunities for public input on the mitigation plan were irretrievably flawed. Under CWA regulations, the notice issued by the Corps must include "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); *id*. § 325.3(a)(13) (notice must include "any other available information which may assist interested parties in evaluating the likely impact of the proposed activity, if any, on factors affecting the public interest."). These requirements are particularly prescriptive with respect to mitigation, and require the notice to include details regarding the amount, type, and location of proposed compensatory mitigation. *Id*. § 332.4. "Compensatory mitigation is the single most important material issue related to the justification of a [§ 404] permit." *Ohio Valley Envtl. Coal. v. U.S. Army Corps of Engineers*, 674 F. Supp. 2d 783, 804 (S.D.W. Va. 2009) ("*OVEC*") (citations omitted). In *OVEC*, the court invalidated a § 404 permit because the Corps failed to include information in its public notice on the mitigation plan, even though compensatory mitigation was critical to the Corps' determination that the permit was consistent with CWA standards. 674 F. Supp. 2d 783, 803–05 ("information on proposed mitigation is the rationale and pivotal data that must be entered into the administrative record and released for public review and comment *before* the close of comment on a the § 404 permit").

These considerations are equally applicable under NEPA. Full and effective public participation in agency decision-making is a cornerstone of NEPA. 42 U.S.C. § 4332(2)(C); *Robertson,* 490 U.S. at 349; 40 C.F.R. § 1500.1(b) ("NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken."); *Bering Strait Citizens for Responsible Dev. v. U.S. Army Corps*

of Eng'rs, 524 F.3d 938, 953 (9th Cir. 2008) ("An agency, when preparing an EA, must provide the public with additional environmental information, considered in the totality of the circumstances, to permit members of the public to weigh in with their views and thus inform the agency decision-making process.") In *O'Reilly,* the Fifth Circuit found an EA invalid because it relied on mitigation with little description or analysis.

> [T]he EA provides only cursory detail as to what those [mitigation] measures are and how they serve to reduce those impacts to a less-than-significant level…. the EA provides too little information as to the workability of the mitigation measures to conclude that the Corps took a 'hard look' at the project, realistically assessed its individual cumulative environmental effects, and reasonably found that the mitigation measures imposed will reduce those effects to a less-than significance level.

477 F.3d at 234-35. Similarly, in *OVEC*, the Court agreed that a public notice that contained no substantive information on mitigation violates NEPA as well as the CWA. *OVEC*, 674 F. Supp. 2d at 809 ("[T]he notice not only fails to concentrate on the 'truly significant' issues posed by the application… but it also fails to solicit appropriate information from the public").

The Corps' notice for the Bayou Bridge project falls far short of these requirements. The Oct. 3, 2016 public notice simply states that "The applicant proposes to offset unavoidable wetland impacts by purchasing mitigation credits from Corps-approved mitigation banks within the New Orleans District." Ex. 9 at 2. No other information was provided. The Corps released a "supplemental application" a few days before the close of the comment period, which provided additional information on the acreage of wetlands damaged by the project in the Basin. However, the document did not provide any additional detail regarding mitigation. Ex. 35. Frustrated commenters complained to the Corps about its failure to disclose this pivotal data and decried their inability to comment effectively. Ex. 3 at 2; Ex. 13. at § 6. While commenters highlighted the inappropriateness of using either out-of-basin or out-of-kind mitigation (neither of which was foreclosed by the notice), they were unable to provide any input on the actual

mitigation plan that ended up being at the core of the proposal.[14] The details of the mitigation plan—using "out-of-kind" mitigation credits far from the project site—were not revealed until the permit was issued. Memo. at 67-68. There are profound problems associated with this plan, Eustis Decl. ¶¶ 15-35, that the public and other agencies never had an opportunity to address.

In short, the "lack of information on mitigation in the notice deprived Plaintiffs of an existing procedural right—the right to comment intelligently." *OVEC*, 674 F. Supp. at 804; *Citizens for Better Forestry v U.S. Dep't of Agric*., 341 F.3d 961, 970-71 (9th Cir. 2003) (withholding information of consequences of planned action and failing to allow public comment "undermines the very purpose of NEPA, which is to ensure[] that federal agencies are informed of environmental consequences before making decisions and that the information is available to the public"); *Air Transp. Ass'n v. FAA*, 169 F.3d 1, 7 (D.C. Cir. 1999) ("[T]he most critical factual material that is used to support the agency's position on review must have been made public in the proceeding and exposed to refutation."). The failure of the Corps to provide the public any opportunity to comment on the mitigation plan for this project was unlawful.

b. *Failure to consider mitigation of project right of way*

The Corps' mitigation proposal ignored what would have been by far the most effective "mitigation" of all: restoration of the pipeline's ROW by removing the existing spoil bank. *See* Eustis Decl. ¶ 36. The pipeline runs along the path of two existing pipelines that left a spoil bank crossing much of the Basin, with major hydrologic and ecological implications. *See supra*, at 4-5; Wilson Decl. ¶ 14. Plaintiffs and others explicitly asked the Corps to consider requiring removal of existing spoil banks as mitigation, an action that "could restore the hydrology for

[14] The state and federal agencies who commented on the proposal all recommended or assumed that mitigation would be "in-kind." Memo. at 9.

thousands of acres of wetlands." *See* Memo. at 15; Ex. 10 at 16. But the Corps never responded, nor gave any consideration to this on-site, "in-kind" mitigation. Memo. at 70.

By failing to consider this restoration option, and instead mitigating using distant out-of-kind credits that lack the critical aquatic resource functions of cypress swamps, *see* Eustis Decl. at ¶¶ 32-35, the Corps violated its own regulations. 33 C.F.R. § 332.3(b)(6) (Corps can mitigate with out-of-kind mitigation only if "the district engineer determines that [on-site, in-kind] compensatory mitigation opportunities are not practicable"). The Corps' regulations require the agency to consider in-basin, in-kind mitigation where "practicable and likely to be successful and sustainable" prior to considering any out-of-kind or off-site mitigation. *Id*. § 332.3 (b)(4), (b)(5), (b)(6). The failure to consider this option also violates NEPA's requirement that the Corps consider all practicable alternatives. *City of Shoreacres*, 420 F.3d at 450 (describing alternatives analysis as "heart" of NEPA review); *Friends of the Earth v. Hall*, 693 F. Supp. 904, 946-47 (W.D. Wash. 1998) (significant cost of the alternative does not by itself eliminate alternative). The Corps considered and rejected other pipeline routes (all of which crossed the Basin), Memo. at 22, and even different onsite configurations. *Id*. at 33. But it did not consider the "restoration alternative" of removing the existing spoil bank on the ROW, despite many requests. Ex. 10 at 16; Ex. 14 at 4-6. The historic noncompliance with Corps permits, and the ecological impacts of existing spoil banks in the project ROW, was perhaps the single most important issue called out in the public process. Memo. at 20. The Corps' failure to address that issue by evaluating on-site mitigation ignored "an important aspect of the problem" and was arbitrary and capricious.

c. *Failure to meet CWA standards for out-of-kind mitigation*

Under the CWA, "compensatory mitigation requirements must be commensurate with the amount and type of impact that is associated with a particular [dredge and fill] permit." 40 C.F.R. § 230.93; 33 C.F.R. § 332.3(a)(1) (same). "[R]equired compensatory mitigation … should be

located where it is most likely to successfully replace lost functions and services, taking into account such watershed scale features as aquatic habitat diversity, habitat connectivity, relationships to hydrologic sources . . ., trends in land use, ecological benefits, and compatibility with adjacent land uses." 33 C.F.R. § 332.3(b)(1). Indeed, "out of kind" mitigation can only be authorized where the district engineer determines using a specific "watershed approach," that such mitigation will best serve the needs of the watershed. *Id.* § 332.3(c)(2). Such finding must be documented in the administrative record for the action. *Id.* § 332.3(e)(2). This is particularly true for "difficult to replace" aquatic resources, a characterization that plainly fits the cypress swamps of the Atchafalaya. 40 C.F.R. § 230.93 (requiring Corps to consider "location of the compensation site relative to the impact site and their significance within the watershed").

These standards were not satisfied here. There was no "watershed analysis" justifying mitigation credits from a different kind of ecosystem, especially one so far from the impact site. Nor could there have been, as the proposed mitigation does not replace the lost functions and services of the destroyed forested wetlands. Conner Decl. ¶ 29; Eustis Decl. ¶¶ 32-35; Ex. 3 at 7 (mitigation banks do "not do anything to restore this ecologically sensitive zone that is crucial to Louisiana's wetland health"). Instead, the Corps simply plugged numbers into a controversial and untested model, without any analysis of how the mitigation and the harm were related to each other.[15] *See* Ex. 34 (criticisms of "LRAM" approach). The Corps further failed to address significant criticism that mitigation bank credits would not be adequately maintained. Ex. 3 at 8;

[15] The Corps uses a controversial and untested method of calculating mitigation credits called the Louisiana Rapid Assessments Method ("LRAM"). LRAM has never been formally promulgated or analyzed under NEPA. Ex. 3 at 5. The Corps announced that it would begin using it on an "interim" basis despite significant unaddressed criticism. *Id*. Information on how it works remains unavailable to the public. *Id*. at 6 ("It is essentially impossible for the public to evaluate any LRAM proposal.") LRAM cannot serve as a substitute for the careful case-by-case analysis, using a "watershed approach" as required under the CWA regulations for out-of-kind mitigation.

see Wyo. Outdoor Council v. U.S. Army Corps of Eng'rs, 351 F. Supp. 2d 1232, 1251–52 (D. Wyo. 2005) (mitigation was insufficient when the Corps had no plan for monitoring, and previously did a poor job of tracking past impacts on wetlands).

The Corps' failure to adequately connect the impacts of the permitted action and the proposed mitigation is grounds to invalidate the decision. In *O'Reilly*, the Fifth Circuit rejected an EA which relied on a mitigation plan that did little more than announce that the permittee would have to purchase credits to offset the losses. 477 F.3d at 233-34 ("The record before us…is simply not sufficient to determine whether the mitigated FONSI relies on mitigation measures which compensate for any adverse environmental impacts stemming from the original proposal…."). Similarly, in *National Parks and Conservation Assoc. v. Babbitt,* the Ninth Circuit rejected a mitigation plan, holding that a "mere listing of mitigation measures, without supporting analytical data, is insufficient to support a finding of no significant impact. . . . The EA's speculative and conclusory statements are insufficient to demonstrate that the mitigation measures would render the environmental impacts so minor as to not warrant an EIS." 241 F.3d 722, 734 (9th Cir. 2001); *O'Reilly v. U.S. Army Corps of Engineers*, 2004 WL 1794531, at *5 (E.D. La. 2004) ("The Corps must provide enough analysis and data [on mitigation plan] so that a reviewing court can insure that the Corps has complied with NEPA"); *Hill v. Boy*, 144 F.3d 1446, 1450–51 (11th Cir. 1998) (Corps' refusal to prepare EIS is arbitrary and capricious where no evidence supported mitigation assumption and no analysis conducted); *Nat'l Audubon Soc'y v. Hoffman*, 132 F.3d 7, 17 (2d Cir. 1997) (agency unlawfully bypassed EIS where record failed to establish efficacy of mitigation proposal); *Kentucky Riverkeeper v. Rowlette*, 714 F.3d 402, 413 (6th Cir. 2013) (invalidating 404 permit for failure to provide evidence showing that compensatory mitigation alleviated significant impacts). The Corps did no more here.

Accordingly, plaintiffs are likely to prevail on the merits of their claim that the mitigation plan—at the heart of the Corps' finding of insignificance—does not meet the standards of the law.

d. *Failure to adequately mitigate for "temporary" impacts*

The Permit also undercounts mitigation for impacts that are claimed to be "temporary" in nature. It authorizes Bayou Bridge to clear a 75-foot wide corridor through the Basin, and then maintain a permanent right of way (of either 50 feet or 30 feet) for purposes of access. Memo. at 31, 37. The Permit considers the portion of the destroyed swamp outside the permanent corridor to be a "temporary" impact, based on the assumption that it will regenerate, and hence requires substantially reduced mitigation for it. Memo. at 48-49, 63. However, abundant evidence in the record indicated that such "temporary" impacts will not be temporary at all. Ex. 10 at 13 (destruction of forests "is not a temporary impact, particularly when the project, as projects previous to this, contemplate large indirect hydrological impacts that cause siltation and vast changes to the forest canopy"); Ex. 12 at 11 ("Impacts to Wetland Forest are not 'Temporary,' especially granted the severe hydrological alterations within the Atchafalaya Basin."). Once cut, these forests are likely gone forever. Conner Dec.¶ 23; Eustis Decl. at ¶¶ 15-23.

The amount of compensation necessary to offset impacts must be sufficient to replace lost aquatic functions. 33 C.F.R. § 332.3(f)(1); § 323.2(d)(5). Mitigation must account for temporal losses of aquatic resource functions, and difficulty of restoring the desired aquatic resource type. *Id.* § 332.3(f)(2). The Corps' failure to require appropriate mitigation for claimed "temporary" impacts based on factually incorrect assumptions ignores an important aspect of the problem and is arbitrary and capricious. *Stewart v. Potts*, 996 F. Supp. 668, 680-81 (S.D. Tex. 1998) (invalidating Corps' EA for failing to consider impacts of clearing forest); *O'Reilly*, 477 F.3d at 232-235 (Corps provided no rational basis for concluding that mitigation measures will reduce effects to less than significant level); *Wyoming Outdoor Council*, 351 F. Supp. 2d at 1252

(holding a grand generalization, unsupported by substantial evidence, that a 1:1 replacement ratio will be effective to prevent significant impacts to wetlands was arbitrary and capricious). The failure to weigh this critical information further undermines the Corps' findings that project impacts were insignificant.

4. The Corps Unlawfully Weighed the Benefits of Operating the Pipeline but Ignored the Risks.

In its decision, the Corps repeatedly touts the benefits of operating the pipeline. Memo. at 52. The decision claims that the project will result in $829 million in "direct, indirect, and induced" impacts from the construction of the pipeline, and will create 1,500 temporary construction jobs that generate labor income and tax revenue. *Id.* "Operation of the proposed project is estimated to generate a total of $9.5 million" during the first five years of operations, and would generate $7 million in wages for permanent employees and hundreds of thousands of dollars in state and local tax revenue. *Id.* Elsewhere, the decision touts other benefits of operating the pipeline, for example, the satisfaction of U.S. "consumers' energy demands." *Id*. at 54. The Corps further makes a series of claims about the relative safety of pipelines compared to other modes of crude oil transportation, observing that transporting "hazardous materials" like crude oil by tanker truck or rail is "unacceptably dangerous." *Id*. at 22.

The invocation of these claimed benefits is not, by itself, problematic as long as they are accurate. 40 C.F.R. § 1508.8 (effects includes economic impact). But the Corps explicitly weighed the benefits of operating a crude oil pipeline at the same time as it explicitly refused to consider the risks. Memo. at 30 (leaks and ruptures not within the "purview" of the Corps and hence omitted from consideration). Such a one-sided comparison violates NEPA, which requires a "full and fair" treatment of risks and benefits. 40 C.F.R. § 1502.1; *see also* § 1500.1 (information in NEPA document "must be of high quality"); § 1502.23 (cost-benefit analysis), §

1502.24 (requiring agencies to insure professional and scientific integrity of NEPA documents). In a case that is directly on point, the Fifth Circuit invalidated a Corps EIS for a port project that "painted a rosy picture" of the economic benefits but totally ignored the risk of oil spills associated with those benefits. *Sierra Club v. Sigler,* 695 F.2d 957, 976 (5th Cir. 1983).

> Once the Corps chose to trumpet the benefits of bulk cargo activities in the EIS as a "selling point" for the oil project, it rendered a decision that these activities were imminent. NEPA therefore requires full disclosure and analysis of their costs…The Corps cannot tip the scales of an EIS by promoting possible benefits while ignoring their costs. . . There can be no "hard look" at costs and benefits unless all costs are disclosed.

Id. at 979. Other Circuits agree. *Hughes River Watershed Counc. v. Glickman*, 81 F.3d 437, 446 (4th Cir. 1996) (rejecting EIS that overstated benefits of project: "it is essential that the EIS not be based on misleading economic assumptions."); *Van Abbema v. Fornell,* 807 F.2d 633, 640-42 (7th Cir. 1986) (economic analysis used inaccurate data, unexplained assumptions, and outdated reports); *Johnston v. Davis*, 698 F.2d 1088, 1094 (10th Cir. 1983) (use of artificially low discount rate results in misleading EIS and violates NEPA).

The Corps not only sidestepped the serious ecological risks of operating the pipeline, it ignored the considerable economic benefits put at risk by this project. Tourism and travel revenues in the Basin regularly exceeds $400 million annually, generating millions of dollars in local and state taxes, and in commercial crawfish harvest. *Supra*, at 2-3; Meche Decl. at ¶¶ 36-39. Nor did it consider impacts to ecosystem services, such as flood control, that the state has valued in the billions of dollars, to say nothing of the cultural and heritage values of a centuries-old way of life in the Basin under siege. Meche Decl. ¶ 4. Without considering these impacts, the Corps unlawfully "tipped the scales" in favor of project approval, in violation of NEPA. *Sigler*, 695 F.2d at 979 ("[A]void[ing] citation of accompanying costs" reduces the cost benefit analysis "to a sham" that "would always be tipped in favor of benefits.").

The Corps' "sham" analysis also violates the CWA, which prohibits impacts to wetlands unless the Corps finds that "the benefits of the proposed alteration outweigh the damage to the wetlands resource." 33 C.F.R. § 320.4(b)(4). Of course, the Corps cannot properly weigh the benefits against the harm when it refuses to consider the harm. *See Hough v. Marsh*, 557 F. Supp. 74, 86 (D. Mass. 1982) (invaliding permit when "[Corps] sidestepped any consideration of adverse economic effects" of economic losses incurred by local industries, and thus "ignore[d] the directive in the Corps regulations to consider all economic factors."). Plaintiffs are likely to prevail on their claim that the Corps violated the CWA and NEPA by balancing the economic benefits of pipeline operations while ignoring the risks.

B. PLAINTIFFS WILL BE IRREPARABLY HARMED WITHOUT AN INJUNCTION

To qualify for a preliminary injunction, Plaintiffs must show "some concrete injury or environmental harm resulting from Defendants' actions" that is both actual and imminent. *W. Ala. Quality of Life Coal. v. U.S. Fed. Highway Admin.*, 302 F. Supp. 2d 672, 683-84 (S.D. Tex. 2004). "The focus of this inquiry is not so much the magnitude but the irreparability of the threatened harm." *Monumental Task Committee, Inc v. Foxx*, 157 F.Supp. 3d 573, 583 (E.D. La., 2016). Injury must be permanent or of long duration, not subject to redress by either equitable or legal remedy. *See Aquifer Guardians in Urban Areas v. Fed. Highway Admin.*, 779 F. Supp. 2d 542, 556 (W.D. Tex. 2011). "Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable." *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987).

For example, numerous courts have found that the loss of trees constitutes irreparable injury, even where they constitute a relatively small part of a larger ecosystem. *Sierra Club v. Block*, 614 F. Supp. 134, 137 (E.D. Tex. 1985) ("the loss of a significant number of trees constitutes an irreparable harm, at least to the extent that decades are required to replace the lost

trees and their accompanying undergrowth."); *Deer Slayers, Inc. v. Louisiana Motel & Inv. Corp.*, 434 So. 2d 1183, 1188 (La. Ct. App.), *writ denied*, 440 So. 2d 151 (La. 1983) (enjoining timber harvest because "testimony in the record indicates it would take over 50 years for these trees to regrow."); *Bair v. California Dep't of Transp*., No. C 10-04360 WHA, 2011 WL 2650896, at *3 (N.D. Cal. July 6, 2011) (injury to root systems of 108 trees, including 37 trees at risk of great harm or death, demonstrated a likelihood of irreparable harm); *Tioronda, LLC. v. New York*, 386 F. Supp. 2d 342, 350 (S.D.N.Y. 2005) ("[P]ermanent damage to rare and horticulturally significant trees is irreparable harm that is sufficient to warrant relief on a preliminary injunction motion."). In *Callaway*, the Fifth Circuit found that the loss of trees along a river, impacting the river's ecology, could constitute irreparable harm, even though the total acreage affected was relatively small. *Callaway*, 489 F.2d at 575–576. Similarly, the Ninth Circuit held that "logging of mature trees," is irreparable harm because "[n]either the planting of new seedlings nor the paying of money damages can normally remedy such damage." *League of Wilderness Defenders v. Connaughton*, 752 F.3d 755, 764 (9th Cir. 2014); *see also Puerto Rico Conservation Foundation v. Larson*, 797 F. Supp. 1066, 1072 (D.P.R. 1992) ("No money damages would be sufficient to compensate society for the permanent loss of one of our most precious natural resources, biological diversity…").

Plaintiffs easily meet this standard. Construction of the project has commenced. In the Basin, construction will start with clearing a 75-foot wide path through the unique and valuable cypress forest swamp, including countless trees over a century old. Conner Decl. ¶¶ 11-14. Trees in the pipeline's path provide valuable habitat for wildlife and other a variety of other

ecological benefits. *Id.*[16] Moreover, there are many individual "heritage" trees—trees of exceptional age, size, and value—in the right of way that will be cut if construction proceeds. These rare trees were already ancient at the time of the Louisiana Purchase, and provide invaluable habitat for countless species of wildlife. Wilson Decl. ¶¶ 39-40; Conner Decl. ¶ 15.[17] The loss of these ancient trees would be incalculable. Moreover, due to numerous changes to the Basin's hydrology that result in extended periods of high water in most years, it is highly unlikely that any cypress forests will regenerate. Conner Decl. ¶ 16-23. These forests and individual trees, once cut for the pipeline, cannot be replaced—certainly not for many decades, and probably not ever. *Id.* It is hard to imagine a more compelling example of "irreparable" harm than that. *Sierra Club v. Martin*, 71 F.Supp.2d 1268, 1327 (N.D. Ga. 1996) (granting preliminary injunction because "logging will destroy certain sensitive plants and animals located in the timber project areas, as well as suitable habitats for these and other similar sensitive and endangered species in the two Forests. No monetary award can recompense this injury[.]")

Construction will have a number of other irreversible ecological effects, such as altering the basin's hydrology and siltation rates, leading to the loss of yet more cypress-tupelo swamp due to sediment accretion. Declaration of Ivor Van Heerden ¶ 4 and Ex. 2 of Van Heerden Decl.; Eustis Decl. ¶¶ 24-31. Furthermore, spoil banks from construction of the Bayou Bridge pipeline—even if temporary in nature—will aggravate hypoxic conditions in the Basin by inhibiting the natural north-south flow of water, degrading aquatic habitat, and further

[16] Black bears den in hollow trees from December to April. Memo. at 11. Numerous large hollow trees are in the project ROW. Wilson Decl. ¶ 42-44. Although the proponent claimed to the Corps that construction would occur "primarily" outside of the denning season, Memo. at 30, construction has begun.

[17] Even though the Louisiana Department of Fish and Wildlife called for these large trees to be protected from destruction, Memo. at 11, the Permit itself only calls for the protection of these large trees "to the extent practicable" a term that the Permit fails to define. Ex. 25 at 9.

suffocating fish, and crawfish. Ex. 1 at 19-20; Eustis Decl. ¶ 16; Meche Decl. ¶¶ 21-23. These impacts are not just irreparable to the environment, they have real consequences for plaintiffs and their members. For example, plaintiff Louisiana Crawfish Producers Association-West has hundreds of members who struggle to make a living in the Basin harvesting crawfish, a profession that once sustained Basin communities for generations. Meche Decl. ¶¶ 36-39.

C. THE BALANCE OF HARMS WEIGHS IN FAVOR OF AN INJUNCTION

If irreparable injury to the environment is probable, the balance of harms will usually favor issuance of an injunction. *Amoco*, 480 U.S. at 542. Environmental destruction is irreversible, and "[o]nce [] acres are logged, the work and recreational opportunities that would otherwise be available on that land are irreparably lost." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1137 (9th Cir. 2011). On the other side of the balance, there is no harm at all to the Corps from an injunction vacating a permit while this case proceeds. *Sierra Club v. Norton*, 207 F. Supp. 2d 1310, 1341 (S.D. Ala. 2002) ("The proposed injunction threatens little tangible harm to the governmental entities named as defendants in this action."). Compliance with federal environmental law is more than "merely a 'speed bump' on the road to a predetermined destination." *Blanco v. Burton*, No. CIV.A. 06-3813, 2006 WL 2366046, at *17 (E.D. La. Aug. 14, 2006). As to the Corps, the balance of equities weighs strongly in plaintiffs' flavor.

The Court may wish to consider the impacts on proposed intervenor Bayou Bridge. While an injunction could delay the schedule for this project, it is well established that temporary economic harm does not outweigh permanent environmental degradation such as loss of forests—especially ancient trees—or damage to wetlands. *League of Wilderness Defenders*, 752 F.3d at 765 ("the balance of equities tips toward … plaintiffs, because the harms they face are permanent, while the interveners face temporary delay"); *Sierra Club v. Franklin Cty. Power of*

Illinois, 546 F.3d 918, 936–37 (7th Cir. 2008) ("[T]he balance of harms favors issuing an injunction. An injunction protects Sierra Club from irreparable injury while simply requiring the Company to defer construction until it obtains a permit that complies with the Clean Air Act."); *Bair*, 2011 WL 2650896, at *8 ("Although…economic hardship is a serious concern, in balancing the equities, the scale tips sharply to the safety of our 3,000-year-old redwood trees."); *Ohio Valley Envtl. Coal. v. U.S. Army Corps of Engineers*, 528 F.Supp.2d 625, 632 (S.D. W. Va. 2007) ("[T]emporary economic harm can be outweighed by the permanent harm to the environment that comes from the filling of streams and valleys…. Money can be earned, lost, and earned again: a valley once filled is gone.").

Further, plaintiffs ask this Court to temporarily enjoin the Corps to withdraw the Permit within the Atchafalaya Basin only. Construction outside the Basin could proceed within the limits of the law.[18] Moreover, it is possible that the only economic harm would be the marginal impact of moving the financial benefits from the project down the road. *League of Wilderness Defenders*, 752 F.3d at 765–66. Such a delay can hardly come as a surprise for a highly controversial project with major environmental impacts, which has generated intense controversy in Louisiana. *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, No. CV 16-1534 (JEB), 2017 WL 4564714, at *9 (D.D.C. Oct. 11, 2017) ("Defendants' *cri de coeur* over lost profits and industrial inconvenience is not fully convincing. Such is the nature of doing business, especially in an area fraught with bureaucracy and litigation.... By nonetheless proceeding with

[18] While Plaintiffs seek an injunction applicable to the Atchafalaya, it would be unlawful for Bayou Bridge to construct other portions of the pipeline that foreclose the possibility of route alternatives that do not cross the Basin. 40 C.F.R. § 1506.1 (prohibiting proponent from taking action which "limits the choice of reasonable alternatives" while NEPA process is ongoing). Bayou Bridge should also not be allowed later to use the fact of its decision to continue construction outside the Basin, while an injunction is in place, to limit potential remedies should Plaintiffs ultimately prevail on the merits. Plaintiffs ask the Court to make this clear in its ruling.

its venture, the company assumed some risk of economic disruption."); *Larson*, 797 F. Supp. at 1073 (holding injury to defendants was self-inflicted where they voluntarily proceeded with a construction bid while litigation was pending). Plaintiffs are willing to expedite summary judgment briefing once the Corps produces an administrative record, so that any delay will be minimal. Even considering the impact of an injunction on Bayou Bridge, the balance of harms tips in plaintiffs' favor.

D. THE PUBLIC INTEREST WEIGHS IN FAVOR OF A PRELMINARY INJUNCTION

"The public interest is always served by requiring compliance with Congressional statutes." *ADT v. Capital Connect, Inc.*, 145 F. Supp. 3d 671, 700 (N.D. Tex. 2015) (citations omitted); *American Rivers v. U.S. Army Corps of Engineers*, 271 F. Supp.2d 230, 261 (D.D.C. 2003) (public interest weighs in favor of protecting environment over avoiding economic harms.) Moreover, "there is a strong public interest in meticulous compliance with the law by public officials. . . [T]he Constitution itself declares a prime public interest that . . . the Executive Branch 'take Care that the Laws be faithfully executed.'" *Fund for Animals, Inc. v. Espy*, 814 F. Supp. 142, 152 (D.D.C. 1993) (citations omitted). The public interest is best served by granting the preliminary injunction and having Corps address "the public's expressed environmental concerns" and comply with the requirements of NEPA and the CWA prior to construction of the project. *Fund for Animals v. Clark*, 27 F. Supp. 2d 8, 15 (D.D.C. 1998); *see also Sierra Club v. Norton*, 207 F. Supp. 2d 1310, 1342 (S.D. Ala. 2002) ("[T]he public interest, as identified by Congress in passing NEPA and the ESA, favors informed agency decision-making.").

Federal and state legislatures have prioritized the protection and restoration of the Atchafalaya Basin through multiple projects, reflecting the strong public interest in protecting and recovering this special place. It is also in the public interest to preserve the unique cypress swamps of the Atchafalaya, especially where the evidence before the Court is that such forests

are unlikely to regenerate—ever. *See Bair*, 2011 WL 2650896, at *8 ("The public interest is best served by letting the ancients thrive a little longer while the merits of their future are evaluated in court."). Similarly, the Corps two-sentence analysis of flood protection impacts, unsupported by studies or data, gives alarmingly short shrift to one of the most significant potential impacts of this project. *Sargent v. United States*, No. CIV.A.08-3887, 2008 WL 3154761, at *9 (E.D. La. Aug. 5, 2008) ("In the wake of hurricane Katrina and the devastation it wrought on the City of New Orleans, there can be no greater public interest for this City than flood protection."); *Blanco*, 2006 WL 2366046, at *20 n.43 ("The real "climate of uncertainty," however, hovers over south Louisiana as its resources are harvested by way of miles of pipelines and navigation channels, its infrastructure is taxed to the near breaking point, its natural buffer against hurricanes is carved and shredded as a result of ongoing and future [oil and gas] activities[.]"). In sum, the public interest supports a limited injunction preventing construction in the Atchafalaya Basin while this case proceeds on an expedited schedule.

CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that their motion for a preliminary injunction be granted.

Respectfully submitted this 29th day of January, 2018.

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