

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA

LOUISIANA CRAWFISH PRODUCERS)
ASSOCIATION-WEST, ET AL.,)

Plaintiffs,)

v.)

MALLARD BASIN, INC., ET AL.,)

Defendants,)

LOUISIANA CRAWFISH PRODUCERS)
ASSOCIATION-WEST, ET AL.,)

Plaintiffs)

v.)

LIEUTENANT GENERAL ROBERT L.)
VAN ANTWERP, ET AL.,)

Defendants.)

) No. 6:10-cv-01085-RFD-PJH (Lead)
) No. 6:11-cv-00461-RFD-PJH (Member)

) JUDGE REBECCA F. DOHERTY
) MAGISTRATE JUDGE PATRICK J.
) HANNA

**Statement of SCOTT SEBASTIEN, prior owner of Fisher Bottom,
to the U.S. Army Corps of Engineers, New Orleans District
March 7, 2012**

In April 1999 my partners and I purchased several tracts of forested wetland and upland in the Atchafalaya Basin near Interstate 10, including a 700 acre parcel known as "Fisher Bottom," which is shown in the attached aerial photographs. We acquired the property in the name of Mallard Basin, Inc. for the purpose of wildlife enjoyment and hunting. The previous owners had established a management program to reduce invasive aquatic species and maintain healthy biodiversity. We sought to continue their approach to managing Fisher Bottom, with regular input from state experts.

We contacted the Louisiana Department of Wildlife & Fisheries and invited an experienced biologist named Robert Helm to the property to give us professional guidance in aquatic wildlife and habitat management. He visited the property several times after we completed the purchase to help us refine a successful wetland stewardship program based upon the expertise of the Department of Wildlife & Fisheries.

Fisher Bottom is a shallow water body. Even during the rainy season when Fisher Bottom reaches full pool, the water is only 2' – 2 ½' deep in the middle and progressively shallower as you move toward the perimeter. It's more of a marshy wetland than a lake. We learned from Wildlife & Fisheries that the shallow water is susceptible to rapidly growing invasive aquatic species like water hyacinth, salvinia, alligator weed and cutgrass. Without active management these plants would cover the surface of the water with floating vegetation, crowding out native aquatic species and eliminating places for waterfowl to land or feed. If left unmanaged, the submerged bottom would accumulate a muck, or humus, of decomposing hyacinth and salvinia that would sharply reduce available dissolved oxygen in the water. Some of this muck would float up under the surface foliage, forming a floating mat of vegetation commonly called "floton." Floton can slowly strangle an otherwise healthy waterbody.

Controlling these invasive species would allow more light to reach the water, preserve higher dissolved oxygen levels (important for fish, frogs and other aquatic animals) and give opportunities for native perennials like sedges, wild millets, and smart weed to take root. These native seed-bearing species in turn attract waterfowl and other migratory birds as well as turkey, deer and nutria. The presence of a range of herbivores attracts carnivores like alligators, owls, foxes and hawks. Our goal was to create a healthier ecosystem with more open water to ensure a variety of animal life so that the property could provide us hunting and recreational enjoyment.

We followed the water management guidance of Wildlife & Fisheries during the 13 years we owned the property. Wildlife & Fisheries recommended an annual draw-down of water to dry-out invasive aquatic plants and accumulated bottom muck, thereby controlling these unwanted invasives and exposing the subsoil so that native plants could germinate and take hold. The state's experts advised us that without active intervention under a long-term management plan, invasive species would slowly cover Fisher Bottom with a spongy expanse of floton, making the area undesirable to most animal species and ruining its character as a healthy marsh.

At the south-east end of Fisher Bottom, where the land is lowest, an old embankment had been put up, we believe more than 50 years ago. A wooden weir or water control structure in the middle of the berm governed the outflow of water from Fisher Bottom. On the advice of Wildlife & Fisheries we replaced the old wooden weir with more easily adjustable aluminum water control structure. By removing successive panels from the improved weir we could gradually lower the water level in Fisher Bottom at the right time each year in order to combat undesirable aquatic species. We also installed a water pump in uplands we own on a separate parcel along the Whiskey Bay Pilot Channel to bring water from the Pilot Channel through several thousand feet of watercourses and ditches into Fisher Bottom at its north-east side. With this system in place we were able to raise water levels during periods of drought and we could quickly replace water after the annual draw-down.

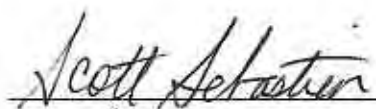
In practice we drained Fisher Bottom less often than once a year – about 9 times during the 13 years of our ownership. After six weeks or so the water would largely subside in Fisher Bottom, except for several deeper channels in the bottom contour which always retained water. Fish, frogs and alligators used these lower pools until we restored the water level. Occasionally we treated particularly heavy patches of invasive species with a herbicide like Round-Up or 2-4-

D after the annual draw-down, on the recommendation of Wildlife & Fisheries, which regularly uses these herbicides in sections of the Atchafalaya Basin under its management. But herbicides are expensive. To the best of my memory we used them only four to six times over the thirteen years we owned the property.

In summary our objective at Fisher Bottom was to build on the practice of the prior owners by using water management to combat invasive species and to encourage sufficient biodiversity among native species to attract and support a healthy animal population. We achieved some success in this endeavor and are now working with the new owner to share the habitat management techniques we learned. We also put the buyer in touch with Tony Vidrine, a biologist with the Department of Wildlife & Fisheries who worked with us after Robert Helm died, and I understand they will continue to consult with Mr. Vidrine on proper environmental management.

I, Scott Sebastien, declare that the foregoing statement is true and correct.

Executed on March 7, 2012.


Scott Sebastien



Bob R. Jones - Idlewild Research Station

4419 Idlewild Road
Clinton, Louisiana 70722
(225) 683-5848
Fax: (225) 683-2281

April 5, 2010

Don Reed Ph.D
Jones-Idlewild Research Station
4419 Idlewild Road
Clinton, La. 70722

Mr. Scott Sebastian
Mallard Basin Inc.
137 Kyle Street
Opelousas, La. 70570

Mr. Sebastian:

This letter is in reference to a site visit that was made on the morning of Tuesday March 23, 2010 to a location west of the Whiskey Bay Pilot Channel in St. Martin Parish, Louisiana. Mr. Jimmy Lagrone, an adjoining landowner, who accompanied me on the trip, had contacted me the prior week, requesting assistance with a forestry related matter.

The reason for the visit was to determine the age of several trees located on top of an old earthen embankment that served as a water control structure in the past. Increment core borings were made on three trees growing on the embankment. These included a 24-inch and 26-inch dbh (diameter breast height) baldcypress (Taxodium distichum) and a 26-inch dbh red maple (Acer rubrum). The gps coordinates for the sampled trees were as follows:

baldcypress: N-30° 20.122' W-091° 39.022'

red maple: N-30° 20.096' W-091° 39.015'

Following drying and preparation of all core samples it was determined that all sampled trees were established on the embankment well prior to the year 1960. A conservative estimate as to the age of all these trees is 50 years or older as of March 2010.

All core samples will be available in my office if you desire them for any reason in the future. Please do not hesitate to call me if I can be of further assistance in this matter.

Sincerely:

Don Reed Ph.D
Professor, Forestry and Wildlife Specialist
LSU AgCenter

For the latest
research-based information
on pest/disease/dying,
visit our Web site:
www.lsuagcenter.com

ATTACHMENT II

Management Plan for Fisher Bottom

July 2010

Prepared by:
Jason Olszak
Wetland Bird Biologist
Louisiana Department of Wildlife and Fisheries
5652 Hwy. 182
Opelousas, LA 70570
(337) 948-0255
jolszak@wlf.la.gov

Introduction/Location

This management plan is intended to guide the land manager of the property in establishing and maintaining desired habitat, to include moist-soil vegetation, conditions in order to maximize the value of food and cover for wetland dependent wildlife species within the Impounded acres of Fisher Bottom, located T8S, R8E, most in section 81, south of Interstate- 10 and west of the Atchafalaya Whiskey Bay Pilot Channel, owned by Mallard Basin Inc. 137 Kyle St. Opelousas, LA 70570. This plan does not include all management activities which the landowner may implement in managing moist-soil vegetation over time, but rather serves as a guide for the best alternatives for management on site conditions as they currently exist. As, site conditions change over time, or as additional opportunities arise, other methods of vegetative manipulation may be warranted.

Effective management of wetlands for native moist soil vegetation in the Mississippi Alluvial Valley provides abundant, high quality, food and cover for native game and non-game wildlife species in Louisiana. Many of these wetland wildlife species are of high economic, recreational, and conservation importance in the region. In order to effectively manage land for moist soil vegetation, three things are necessary: 1. The ability to add and remove water at specified times, 2. Means to manipulate vegetation in order to maintain early successional species, and 3. A monitoring program of sufficient detail where specific management actions can be evaluated and improved upon, based on the results.

SEP 23 2011

ATCHAFALAYA INVESTMENTS, LLC
131 Woodsboro Drive
Lafayette, Louisiana 70508

September 21, 2011

Mr. Ronnie W. Duke
Chief, Western Evaluation Section
U.S. Army Corps of Engineers
P.O. Box 60267
New Orleans, Louisiana 70160-0267

Re: Permit Transfer Request
MVN-2010-1080-WLL
MVN-2010-1032-WLL


Dear Mr. Duke:

Please be advised that Mallard Basin et al., transferred its interest in Sections 59, 60, 74, 75, 80, 81 and 83, T-8S-R8E, St. Martin and Iberville Parishes, Louisiana, on July 25, 2011, to Atchafalaya Investments, LLC, via various deeds and servitudes. The signed transfer page for the individual permits is enclosed, and undersigned agrees to be bound by the terms and conditions of the nationwide permit (also enclosed).

Please record this transfer request in your permit file.

We also want a use added to the permits of the following: recreational duck and deer hunting, froging, crawfishing, fishing, bird watching, alligator hunting, enjoyment of natural beauty of the area, and general wildlife enjoyment.

Sincerely,



William C. Schumacher
Managing Member

Enclosures
cc: Nicholas Gachassin, III

Figure 1. Current site conditions include large floating mats of a single species: smartweed.



Current site conditions include a seasonally flooded, low tree density, Cypress swamp where backflooding occurs at a river level of 17-18 ft at Butte La Rose. Large canopy gaps allow the establishment of a lush, ground level, moist-soil vegetative community of which management capabilities have been established. Intermittently, willow and buttonbush has grown, but mainly concentrated around the impoundment margins, and boat channels. At the time of initial site visit (7/12/2010) the unit was dominated (60-70%) by large floating mats of smartweed (*Polygonum* spp.) In other areas, floating mats consisted of a variety of species such as arrowhead (*Sagittaria latifolia*), true sedges (*Carex* spp.), and flat/nut sedges (*Cyperus* spp.), coffeeweed (*Sesbania* spp.), and wild millets (*Echinochloa* spp.). All but coffeeweed are considered good/excellent waterfowl forage, as well as excellent substrate for aquatic invertebrates, which support large numbers of wetland birds, reptiles, amphibians, and mammals. A smaller proportion of the unit, mainly around the boat channels, is choked up, annually by floating mats of noxious water hyacinth (*Eichornia crassipes*) and alligatorweed (*Alternanthera philoxeroides*).

Figure 2. Density of these floating mats, inhibit use by wintering waterfowl, wading birds, and recreational boaters.



There exists, an electric pump where water can be drawn from the Whiskey Bay pilot channel at a maximum rate of 6000-8500 gallons per minute depending on river depth. Three water control structures (stoplog structures with outflow diameters of 48 inches) at the south end of the unit allow fine-tuned dewatering of the unit assuming the water level outside the impoundment is lower than that inside. Because of the inaccessibility of tractors and implements to the site, and the presence of numerous tree stumps, mowing or disking of the dried site is not possible. Both of these activities are common methods of vegetation control in the lower Mississippi Valley. However, another common method which has been used with success on Fisher Bottoms in the past is herbicide application. The killing of the existing vegetation allows the seeds of more favorable species an opportunity to establish themselves in the absence of competition from the noxious plants that would otherwise dominate.

Objectives- Maintain early successional vegetation.

Like regional conservation objectives, annual objectives of the management plan are to maximize benefits to a diverse group of wildlife native to the Atchafalaya Basin, with an emphasis on waterbirds. This will be done by controlling noxious vegetation and encouraging a diverse suite of emergent moist-soil vegetation, which produces both food and cover for local species. Not only will such plants produce seeds and tubers for wintering waterfowl, but the underwater vegetative structure serves as both a food source and substrate for aquatic micro- and macro-invertebrates which are the primary animal drivers of aquatic food chains. Also, the ability to maintain standing water within a forested system during the summer months, when many floodplain forests have dried up as the rivers subside, and evaporation rates increase, provides additional benefits. First, wading birds often nest in rookeries over

open water, as it reduces nest and chick predation risks from terrestrial mammals. Second, one of the main limiting factors for woodland nesting waterfowl (Wood ducks, Black-bellied whistling ducks, and Hooded mergansers), is wooded wetland of sufficient size in summer for brood rearing, where vertical vegetation provides cover for ducklings vulnerable to predation from nearly every predatory animal in the forest.

Vegetation goals may be achieved by two means on this property, 1. water level fluctuation, and 2. herbicide application.

1. Water Control Climatic and soil conditions in South Louisiana promote the rapid colonization of bare ground by lush, fast growing plants. If left alone, succession to a woody stage is hastened. Woody species such as black willow (*Salix nigra*.) and buttonbush (*Cephalanthus occidentalis*) can sprout and grow quite tall during a single summer. Thus, early season drawdowns of water can be carried out when needed, but should not occur very often as this has the potential to increase annual control costs. It also eliminates the benefits to nesting wading birds and brooding waterfowl, in addition to the loss of early summer recreational crawfishing and frogging opportunities. Maintaining water levels near full pool throughout spring and into summer suppresses woody establishment. When water is drawn down in late summer, desirable vegetation such as duck potatoe, sprangletop, flatsedges, and millets are favored.

All things considered, the thick, dense, floating mats of vegetation that dominate the vegetated portions of the unit currently, preclude use of much of the area by wintering waterfowl. It may therefore be necessary to release water early and spray herbicide the following year (if river levels allow). This would give the germinating vegetation a full season of growth to substantially root into the underlying, hard ground. When water is put on in the fall, the plants are rooted in the ground rather than the floating mats and the now emergent, rather than floating vegetation is more accessible to feeding ducks in the winter.

2. Herbicide Application The initial colonization of mudflat or dry ground is achieved by fast growing, plentiful seed producing, herbaceous annuals. Perennials soon follow and, because they live more than one year, they put more energy into maintain vegetative structure than reproduction i.e. seed production. They have a tendency to form dense stands with very low species diversity. Perennial smartweed, alligatorweed, coffeeweed, and water hyacinth are the most common noxious perennials in the Atchafalaya Basin and all are present in Fisher Bottom. As stated before, mowing or disking, both effective ways of dealing with noxious perennials, cannot be done here. Thus a selective herbicide such as 2,4-D which kills broadleaf plants but not grasses is recommended for controlling these weeds.

Adaptability

Consider that environmental, economic, and personal barriers exist in putting a management plan into action at times. Perhaps, a year when the impoundment was drained early and plans were made to spray noxious weeds are ruined by an uncommonly rainy summer, preventing the use of spray equipment. High river levels in the spring may not allow an early discharge of impounded water.

Economic hardship may rule out a large herbicide purchase in a given year. Adaptability in your plans is therefore a must. Aerial herbicide application, rather than ground or boat spraying may be needed; a year without a drawdown may be necessary if environmental conditions warrant, and perhaps pumping water during a hot, dry summer to maintain high water levels for a late drawdown are all possible ways to adapt to factors out of the land manager's control.

Monitoring

Every wetland management unit is different. Even those that are separated by only a levee have differing plant communities, seed banks, and management histories. A single region-wide management plan is difficult if not impossible to implement in some areas within the region. Thus, informed management actions require knowledge of site-specific conditions, management activities, and habitat response as a result of those activities. A generic example of a format for wetland unit recordkeeping is shown in Appendix 1. This recording system may be expanded upon but represents a minimum of the variables that should be evaluated regularly.

As often as the land manager is present on the wetland unit, he should document the site conditions, management activities and response of habitat to past activities. Time, labor, and money are conserved when management actions are based on accurate records of what has and has not worked in achieving habitat goals in the past.

Recommended management actions for the coming year.

July 2010

Draw down water (4"-6" per week) until dry; or as fast as necessary to be dry enough to get in and spray herbicide in mid-August. Watch control structure and river levels. Place boards back in control structure if river begins rising to prevent inundation of the unit.

August 2010

Spray large (2-6 acre) "holes" in smartweed with 2,4-D (60 fl. oz. per acre) or glyphosate (at least 72 fl. oz. per acre). Holes in other large floating mats may be sprayed with glyphosate.

Spot spray willows and buttonbush within the unit with glyphosate (72 fl. oz. per acre). Make sure to get total foliar coverage, especially at the growing tip of the trees for a kill.

September 2010

Monitor growth of desirable vegetation. Spot spraying with 2,4-D any problem broadleaves or woody vegetation that may emerge.

Early to mid-October 2010

Position all boards in the control structures to begin catching water. Begin slowly pumping water back into impoundment 2"-4" per week (hopefully with the aid of rain).

November 2010 – March 2011

Monitor wildlife response, including harvest success. This should be done with regular observational monitoring data as well.

Late-March 2011

Begin drawdown of unit (weather/river) permitting in preparation for early spraying of the entire unit to kill off vegetation making up the floating mats. Permit grasses/sedges to establish and grow and root firmly throughout the summer.

Again, the preceding chronology of events may be hampered by conditions beyond the manager's control. Clearly, a snag in the program early on alters the possibility of activities that are scheduled later. This illustrates how adaptability to changing conditions is required.

Appendix 1. Example datasheet for monitoring wetland management units.

DATE:	Water Level (at gauge)			
	Sub-unit	1	2	3
	Vegetation presence	Sprangletop 25	millet 90	Sagittaria 20
	Species A %	Cocklebur 10		Sprangletop 30
	Species B %	chufa 10		Cattail 20
	Species C %	barryardgrass 25		
	Species D %	Willow 21		
	Species E %	10		
	Modflat %	20	10	30
	Open water %			
	Management Action Taken	sprayed 2,4-D @ 54 oz./ac.		
		spot spray willow glyphosate @72 oz. / ac.		
		Run pump for 2 days. Added 4 inches.		
		pulled board x/x/2010 4" let out in 6 days.		
	Wildlife Species Response	x herons, x egrets, and x storks feeding on crawfish in pooled water at boat channel	Trapped 4 sacks of crawfish in 50 traps	2 wood duck broods in the buttonbush on west end.
	Results of Environmental Variables	Hurricane x/x/2010 added 12" of water		
		95 degrees for 2+ weeks, no rain, water evaporating 1" per day.		
	Notes:			
	will have to spray cocklebur next year if it gets worse.	Miller seems to have benefitted from last years spraying of alligatorweed	beaver dam at end of this unit not permitting water to drain as fast	
	Sprangletop growing at waters edge in wet soil as opposed to barryardgrass in higher, dry soil			

ATTACHMENT III

Herrmann, Michael H MVN

ATTACHMENT III

From: Link, Paul [plink@wlf.la.gov]
Sent: Monday, April 02, 2012 5:09 PM
To: Herrmann, Michael H MVN
Cc: Olszak, Jason
Subject: RE: Mallard Basin site visit (UNCLASSIFIED)

Mike,

In my opinion, the wildlife habitat was greatly improved via this project's activities. Without the annual management and manipulation of the water control structures the area that currently produces a multitude of beneficial seed-producing plants for waterfowl would quickly be overtaken by less desirable species such as willow and Chinese tallow. Further, the addition of the electric pump and conveyance ditch provides dependable water to an area that historically flooded on a more routine basis prior to the construction of the flood protection levees and straightening of the Atchafalaya River.

As I stated on Friday while at the site visit, that project is very similar to many projects I have been involved with to restore or enhance habitats for waterfowl and other migratory birds. It is a project that I'd be proud to call my own.

I hope this helps,

Paul

Paul Link
North American Waterfowl Management Plan Coordinator Wildlife Division, LDWF
2000 Quail Drive, Room 436
Baton Rouge, LA 70808
plink@wlf.la.gov
Office: 225-765-2358
Mobile: 225-405-8474

-----Original Message-----

From: Herrmann, Michael H MVN [<mailto:Michael.H.Herrmann@usace.army.mil>]

Sent: Monday, April 02, 2012 4:31 PM
To: Link, Paul
Cc: Olszak, Jason
Subject: FW: Mallard Basin site visit (UNCLASSIFIED)

Classification: UNCLASSIFIED
Caveats: NONE

Paul,

Please see the message below referencing bear habitat. We are seeking an opinion from your section with the same emphasis placed on the general habitat as relating to overall wildlife.

We know that projects like this are in operation all over the Miss. Valley and are an overall success and benefit to wildlife or they would not be allowed.

Can you please give us an opinion of the Mallard Basin site habitat, its effects on wildlife and what its removal would do to the project area and its wildlife (as the message below describes).

If you have any input on crawfish and fish species and its effects from these projects, that would be excellent also.

Thanks again for putting in time with us on this project. We value your opinion, we certainly appreciate the effort and know that it will go a long way.

Mike Herrmann Jr.
US Army Corps of Engineers
New Orleans District
Regulatory Branch OD-SW
(504) 862-1954
michael.h.herrmann@usace.army.mil

In order to assist us in improving our service to you, please complete the survey found at <http://per2.nwp.usace.army.mil/survey.html>

-----Original Message-----

From: Herrmann, Michael H MVN
Sent: Monday, April 02, 2012 4:17 PM
To: 'pauldavidson'; 'Davidson, Maria'
Cc: Duke, Ronnie W MVN
Subject: Mallard Basin site visit (UNCLASSIFIED)

Classification: UNCLASSIFIED
Caveats: NONE

Thanks again for your help with the site visit Friday. I really appreciate your time.

Within 30 days, I am due to prepare a supplemental document which will summarize the visit, condition of the site and the comments we receive from each of you. As we discussed, your opinion on the site is what we are seeking; particularly what effect the project, its infrastructure, function, etc. and the pump/pipe may have on the Louisiana Black Bear and its critical habitat.

We are interested in your opinion of what effect the termination of the project and having all of its features removed, such as ditches, spoil banks, water control structure, pump/pipe and its water holding abilities or lack thereof would have on the Louisiana Black Bear and its critical habitat.

We would also like your opinion on the present condition of the 600 acre site and whether or not it exhibits benefits or detriments to the Louisiana Black Bear.

Also please explain the significance of the immediate project vicinity and how it relates to the present population of the Louisiana Black Bear.

Any other opinion you have on the site and/or its relation to the Black Bear would be valuable to us and appreciated.

For your reference, the two permits issued by the Corps of Engineers New Orleans District (numbered below) are as follows:

MVN-2010-1080-WLL
Mallard Basin Inc.

New water conveyance ditch, water control structure, placement of spoil all in association with approximately 600 acres of moist soil management area within infrastructure existing over 50 years.

MVN-2010-1032-WLL

Installation of intake pipe at Pilot Channel in association with the electric pump.

Mike Herrmann Jr.
US Army Corps of Engineers
New Orleans District
Regulatory Branch OD-SW
(504) 862-1954
michael.h.herrmann@usace.army.mil

In order to assist us in improving our service to you, please complete the survey found at <http://per2.nwp.usace.army.mil/survey.html>

Classification: UNCLASSIFIED
Caveats: NONE

Classification: UNCLASSIFIED
Caveats: NONE

ATTACHMENT IV



BOBBY JINDAL
GOVERNOR

State of Louisiana

ROBERT BARNHAM
SECRETARY

DEPARTMENT OF WILDLIFE AND FISHERIES
OFFICE OF SECRETARY

March 15, 2010

To whom it may concern:

Several years ago, at the request of the landowner, Robert Helm, former LDWF Waterfowl Biologist and I, Tony Vidrine, Region 6 Biologist conducted a survey on a property to give recommendations for improving waterfowl habitat. We conducted a survey on what is known as the Fisher Bottom of the particular property, a low lying area that normally holds water. This property is located within the Atchafalaya Basin system.

We surveyed the entire portion of this property and gave the following Waterfowl Management recommendations to the landowner. Robert and I surveyed this entire area and recommended that the existing, old control structure be replaced with a new control structure in order to better control the water level in this area. Many undesirable plant species were invading this area and without repairs to the old structure this area would be lost as desirable waterfowl habitat in the future. With the ability to control water levels on this site, more desirable waterfowl plants foods would be able to thrive on this site.

A handwritten signature in cursive script, appearing to read "Tony Vidrine".

Tony Vidrine

Mississippi Alluvial Valley South Region Manager

ATTACHMENT V

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22



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ATTACHMENT Y I**Historic Data For Atchafalaya River at Butte La Rose (03120)**

Gage Zero: 0 Ft. NGVD29

Longitude: -91.68666660

Flood Stage: 25 Ft.

Latitude: 30.28138880

Record High Stage: 27.28 Ft.

River Mile: 64.8

Record High Stage Date: 05/23/1973

Location of Gage:

Atchafalaya River at Butte La Rose, LA. Gage and data provided through a cooperative program between
USGS and U.S. Army Corps of Engineers.

** Raw data, subject to change **

Download Data**07:00 Central**

Date / Time	Stage (Ft)
03/01/2012 07:00	8.64
03/02/2012 07:00	8.37
03/03/2012 07:00	8.11
03/04/2012 07:00	7.85
03/05/2012 07:00	7.81
03/06/2012 07:00	7.23
03/07/2012 07:00	6.84
03/08/2012 07:00	6.91
03/09/2012 07:00	7.17
03/10/2012 07:00	7.87
03/11/2012 07:00	8.32
03/12/2012 07:00	8.62
03/13/2012 07:00	9.71
03/14/2012 07:00	10.72
03/15/2012 07:00	11.54
03/16/2012 07:00	11.86
03/17/2012 07:00	12.49
03/18/2012 07:00	12.98
03/19/2012 07:00	13.09
03/20/2012 07:00	13.19
03/21/2012 07:00	13.27
03/22/2012 07:00	13.72
03/23/2012 07:00	13.81
03/24/2012 07:00	13.60
03/25/2012 07:00	13.68
03/26/2012 07:00	13.83
03/27/2012 07:00	13.88
03/28/2012 07:00	13.98
03/29/2012 07:00	14.07
03/30/2012 07:00	14.12
03/31/2012 07:00	14.25
04/01/2012 07:00	14.34
04/02/2012 07:00	14.25
04/03/2012 07:00	14.22
04/04/2012 07:00	14.12
04/05/2012 07:00	13.98
04/06/2012 07:00	13.73
04/12/2012 07:00	11.70
04/13/2012 07:00	11.25
04/14/2012 07:00	

	11.14
04/15/2012 07:00	10.89
04/16/2012 07:00	10.40
04/17/2012 07:00	9.75
04/18/2012 07:00	9.00
04/19/2012 07:00	8.25
04/20/2012 07:00	7.75
04/21/2012 07:00	7.46
04/22/2012 07:00	7.29
04/23/2012 07:00	7.13
04/24/2012 07:00	6.59
04/25/2012 07:00	6.62
04/26/2012 07:00	6.79
04/27/2012 07:00	6.83
04/28/2012 07:00	6.72
04/29/2012 07:00	6.66
04/30/2012 07:00	6.28
05/01/2012 07:00	6.13
05/02/2012 07:00	5.62
US Army Corps of Engineers - New Orleans District - Water Control Center - Contact Us	



United States Department of the Interior

FISH AND WILDLIFE SERVICE
646 Cajundome Blvd.
Suite 400
Lafayette, Louisiana 70506



February 28, 2011

Mr. Ronnie Duke
Chief, Western Evaluation Section
Regulatory Branch
U.S. Army Corps of Engineers
Post Office Box 60267
New Orleans, Louisiana 70160-0267

MAR 09 2011

RE. MVN-2010-1080, MVN-2010-1032 -W/L

W/L

Dear Mr. Duke:

The U.S. Fish and Wildlife Service (Service) has reviewed your letter dated February 2, 2011, regarding the subject after-the-fact project authorizations. Mallard Basin, Inc. (MVN-2010-1080) and Scott Sebastian (MVN-2010-1032) received authorization by the U.S. Army Corps of Engineers (Corps) for previously conducted work in the Atchafalaya Basin. Service comments are submitted in accordance with provisions of the Endangered Species Act of 1973 (ESA; 87 Stat. 884, as amended; 16 U.S.C. 1531 et seq.).

The Service does not enter into section 7 consultations on permit applications when applicants are seeking "after-the-fact" authorization for projects or portions of projects that have already been completed. Such completed projects effectively limit any options for formulation or implementation of reasonable and prudent alternatives that avoid jeopardizing the continued existence of federally listed species or destroying or modifying their designated critical habitats. The consultation process is intended to address the impacts of "proposed" actions rather than past, ongoing, or future effects of completed projects. Therefore, the Service, by policy, does not consult after-the-fact on completed actions.

As always, the Service appreciates the opportunity to consult on all permits prior to project completion that are issued by the Corps. Please contact Rob Smith (337/291-3134) of this office regarding any questions you may have regarding our comments.

Sincerely,

Brad S. Rieck
Acting Supervisor
Louisiana Ecological Services Office

Cc: LDWF, Baton Rouge, LA

TAKE PRIDE
IN AMERICA



REPLY TO
ATTENTION OF

Operations Division
Western Evaluation Section

DEPARTMENT OF THE ARMY
NEW ORLEANS DISTRICT, CORPS OF ENGINEERS
P.O. BOX 80267
NEW ORLEANS, LOUISIANA 70160-0267

02 February 2011

SUBJECT: MVN 2010-1080-WLL

Mr. Robert Smith
U.S. Fish and Wildlife Service
646 Cajundome Blvd., Suite 400
Lafayette, Louisiana 70506

Dear Mr. Smith:

This is in reference to the Mallard Basin and Scott Sebastian "After-the-Fact" projects located within the Atchafalaya Basin in St. Martin and Iberville Parishes. The applicants are seeking authorization for work that was completed on-site approximately 10 years prior to applying for Corps authorization.

Mallard Basin Inc., (MVN-2010-1080-WLL), was authorized to conduct dredging operations to construct 1,878 linear feet of new ditch and to maintain 9,019 feet of existing ditch used to convey water from the Atchafalaya River, replace a deteriorated wooden water control structure with a new variable crest, four-barreled, metal structure and remove a non-functioning water control structure and replace with an earthen dam, all to provide facilities required to control water levels over a forested wetland area identified as Fisher Bottoms, in accordance with a plan recommended by staff of the Louisiana Department of Wildlife and Fisheries with an overall goal of providing high quality wetland habitat that provides amenities critical in sustaining various fish and wildlife communities. The subject management area and infrastructure has been in existence for approximately 50 years.

On March 17, 2010 the Corps conducted an on-site field inspection to determine impacts and establish jurisdictional authority. During the field inspection by Corps Biologists, it was determined that the previously completed work was found to have no remaining negative impacts or losses to wetland functions. All spoil areas associated with the previous work activity remained wetlands and supported emergent wetland communities. In addition, no evidence indicating negative impacts to Louisiana Black Bear, Black Bear habitat or destruction of denning trees was observed during the field inspection.

Scott Sebastian, (MVN-2010-1032-WLL) was approved to install a water pump with intake and outfall pipes off the Whiskey Bay Pilot Channel, located in the Atchafalaya Basin in Iberville Parish, Louisiana. During a field inspection of the above site and structure by the Corps, it was determined that the structures were installed in a non-wet site connecting to a Section 10 Waterway, with no impacts to jurisdictional wetlands. The Corps found no evidence indicating negative project related impacts to the Louisiana Black Bear, Black Bear habitat or denning trees.

FILE

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RWD

for Series/OD-S

Both projects were issued by the New Orleans District on or prior to October 6, 2010. To this date the Corps has not received comment from the U.S. Fish and Wildlife Service in response to the Public Notice issued for Mallard Basin on May 24, 2010. Furthermore, the Corps did not provide agency notification on the Scott Sebastian project on the basis of finding a "no-effect", to threatened and endangered species, outside of which the Corps does not provide agency notification on a Nationwide Permit #7.

The Corps is concerned with ensuring proper consultation with FWS concerning threatened and endangered species namely the Louisiana Black Bear. By this letter, we are providing FWS with the opportunity to express any comments or concerns regarding both projects and their possible effects on Louisiana Black Bear habitat. The Corps will then consider all comments and the possibility of a modification to the existing permit authorizations.

If you have any questions or need additional information, please contact Mike Herrmann at (504) 862-1954.

Sincerely,

A handwritten signature in black ink, appearing to read "Ronnie W. Duke". The signature is fluid and cursive, with the first name "Ronnie" being more prominent.

Ronnie W. Duke
Chief, Western Evaluation Section

Enclosure



BOBBY JINDAL
GOVERNOR

State of Louisiana

DEPARTMENT OF WILDLIFE AND FISHERIES
OFFICE OF WILDLIFE

ROBERT J. BARHAM
SECRETARY

JIMMY L. ANTHONY
ASSISTANT SECRETARY

April 20, 2012

Mr. Pete J. Serio, Chief
Regulatory Branch
United States Army Corps of Engineers
P. O. Box 60267
New Orleans, LA 70160-0267

RE: *Application Number: MYN-2010-1080-WLL - Subsequent Correspondence*
Applicant: Mallard Basin, Inc.

Dear Mr. Serio:

The professional staff of the Louisiana Department of Wildlife and Fisheries (LDWF) Habitat Section has reviewed, at your staff's request, the July 2010 Management Plan for Fisher Bottom. Based upon this review, we have no objection to the implementation of the management plan.

The LDWF Habitat Section submits this determination to the U.S. Army Corps of Engineers in accordance with provisions of the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.). Please do not hesitate to contact me at 225-765-2819 should you need further assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Kyle F. Balkum", followed by a horizontal line.

Kyle F. Balkum
Biologist Program Manager

Assessment at Mallard Basin Site in Atchafalaya Basin

On March 30, 2012, I accompanied Corps personnel, LA Dept. of Wildlife and Fisheries personnel, and the current and previous landowner to a site on the west side of the Whiskey Bay Pilot Channel, just south of Interstate 10 in St. Martin Parish. The purpose of the site visit was to assess the impacts of a water impoundment on the federally listed (ESA) Louisiana black bear (*Ursus americanus luteolus*).

We looked at the water control structure, pump and water distribution system, a boathouse and toured the impoundment. The water level in the unit was being lowered, so water was running out of the water control structure, attracting a lot of activity from fish in the outflow.

The basic habitat needs for black bears include abundant and diverse natural foods, water, escape cover, dispersal corridors, and den sites. I saw nothing at any of the sites that would be anything but good for a black bear. Soft mast, primarily blackberry, was abundant, and the area was densely vegetated, providing excellent cover for bears and any other wild fauna that might be found there. Everything that I saw was excellent bottomland hardwood habitat for bears and nothing associated with the water control structure or pump and piping could be described as detrimental to bears or bear habitat. Areas to the south of the site are likely too wet to provide good habitat for bears, but the Mallard Basin site, albeit void of bears at present, will likely attract bears as the bear population in the region continues to increase.

Paul L. Davidson, Executive Director

Black Bear Conservation Coalition

April 10, 2012



BOBBY JINDAL
GOVERNOR

State of Louisiana
DEPARTMENT OF WILDLIFE AND FISHERIES
OFFICE OF WILDLIFE

ROBERT J. BARHAM
SECRETARY

JIMMY L. ANTHONY
ASSISTANT SECRETARY

Mr. Pete J. Serio, Chief
Regulatory Branch
United States Army Corps of Engineers
P. O. Box 60267
New Orleans, LA 70160-0267



RE: *Application Number: MVN-2010-1080-WLL*

Dear Mr. Serio:

The professional staff of the Louisiana Department of Wildlife and Fisheries (LDWF) Large Carnivore Section has reviewed the above listed project. Based upon this review, and a field visit on March 30, 2012; we have found the project has no impact to the Louisiana black bear and have no objection to this project.

Please do not hesitate to contact me at 337-948-0255 should you need further assistance.

Sincerely,

A handwritten signature in cursive script that reads "Maria Davidson".

Maria Davidson
Large Carnivore Program Manager

Tim Morton & Associates, Inc.
Regulatory & Environmental Consultants
730 E. Kaliste Salvo Road
Lafayette, LA 70508

(337) 234-5124

(337) 235-3632 (FAX)

July 15, 2010

Mr. Mike H. Herrmann, Jr.
Western Evaluation Section
Operations Division
New Orleans District, Corps of Engineers
P. O. Box 60267
New Orleans, Louisiana 70160-0267

Re: MVN 2010-1080-WWI.

Dear Mr. Herrmann,

This responds to letters from the Louisiana Department of Wildlife and Fisheries (LDWF) and Leigh Haynie, representing Atchafalaya Basinkeeper and the Louisiana Crawfish Producers Association. West (Commenter) commenting on or objecting to the subject permit application.

The LDWF requested that a management plan be provided outlining management objectives and water control structure operation guidelines. The requested management plan is attached. The LDWF commented that all forested vegetation cleared during dredging and construction activities be removed and hauled offsite to a non wetland disposal location, or chipped and spread on site in a manner that is beneficial to the surrounding environment. As noted in the public notice all of the work was completed over ten years ago and no large trees were cleared by the work. No downed forested vegetation remains in the areas affected by the work. Finally, the LDWF indicated that adequate and appropriate mitigation be provided for impacts to wetland functions. The applicant will comply with the mitigation requirements as deemed appropriate by your agency.

The following response rebuts or refutes the comments of the Commenter. The opening paragraph contains a patently false statement that the applicant was able to obtain permission to close one lane of I-10 on the Atchafalaya Basin Bridge in order to position a crane to lower a pump. All of the materials associated with the installation of the pump and pipelines and the water control structures was barged to the site by the applicant. At no time did the applicant get permission to close a lane on I-10.

Paragraph 2. The Joint Public Notice clearly states that the work was conducted in St. Martin and Iberville Parishes. The permit application also clearly indicated that the work was conducted in these two parishes.

Tim Morton & Associates, Inc.
Regulatory & Environmental Consultants

Mr. Mike H. Herrmann, Jr.
New Orleans District, Corps of Engineers
July 15, 2010
Page Two

Paragraph 3. Commenter contends that the pump has no utility without the outfall structure located at the end of the area dredged by the applicant. No such outfall structure exists. Prior to the applicant's ownership of the property and the installation of the permanent pump, water was periodically pumped from the Atchafalaya River to a borrow canal associated with the installation of the Gulf States Utilities power line north of Interstate 10. A portable pump was used in this operation. This borrow canal is a prime fishing area and water was regularly pumped into the canal before the present landowners acquired the land. Today, the permanent pump is used during drought conditions to provide water to Fisher Bottoms and to the borrow canal. Accordingly, the pump is a stand alone feature of the landowner's management plan for the property. Again, the pump was not lowered over the side of Interstate 10 and therefore there is no need for engineering schematics and reports.

Paragraph 4. Our review of historic topographic maps does not indicate that a water feature named Fischer Lake ever existed. We also can not find on these maps a Bayou Cane that connects Fisher Bottoms to Warner Lake.

Paragraph 5. The permit application with attachments addresses all issues raised by this paragraph.

Paragraph 6. Activities of the applicant follow the recommendations of the LDWF for management of the area designed to provide protection for all species. We would note that the Commenter consistently disrespects the expertise of the LDWF.

Paragraph 7. Commenter makes unfounded claims regarding the disruption of sheet flow and the interference with the reproductive success of recreational and commercially important aquatic species. The project has been complete for over ten years and the area was similarly managed for over 40 years prior to the present landowner's acquisition of the property. The attached management plan was developed by the LDWF to enhance the habitat for aquatic and wetland species. Applicant notes that the property discussed is private land and may only be accessed by the Commenter through acts of trespass.

Paragraph 8. Applicant cleaned out an existing drainage ditch/natural drain. No named bayou exists in the area north of Fisher Bottoms where work was performed.

Paragraphs 9-11. [National Environmental Policy Act] Commenter contends that this project requires an Environmental Impact Statement because of the significance of the effects this

Tim Morton & Associates, Inc.
Regulatory & Environmental Consultants

Mr. Mike H. Herrmann, Jr.
New Orleans District, Corps of Engineers
July 15, 2010
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project has on waters of the United States. This project has enhanced the overall habitat quality of the area. Without the water control structures and the ability to pump water into Fisher Bottoms, the area currently managed would be densely vegetated with black willow and Chinese tallow trees. The open waters of Fisher Bottoms and the submersed aquatics so beneficial to the fish and wildlife species currently utilizing the area would disappear.

Please note that the last sentence of paragraph 11 reads "Future exploration and development activities are reasonably foreseeable indirect effects of the suspensions here that must be analyzed now under NEPA." This statement is not applicable to permit application.

Paragraphs 12-15. [Greenhouse Gasses] This is not applicable to this permit application.

Paragraph 16. [Rivers and Harbors Act] Applicant notes that the property discussed is private land and may only be accessed by the Commenter through acts of trespass.

Paragraph 17. [The Louisiana Civil Code] Not applicable to this permit application. A surveyor was not involved in the preparation of the permit plats nor is one required to be involved. The elevations depicted on the plats are based on publically available LIDAR data. The project features have been in place for over 10 years and in another form for over 40 years prior.

Paragraph 18. [Conservation] As noted by Commenter, we agree that the activity in this permit application has had "...perhaps no impact at all." Only we would modify it in this instance with the inclusion of the word adverse between no and impact.

Paragraph 19. Not applicable to this permit application as this addresses coastal lands.

Paragraph 20. [Economics] The applicants activities have enhanced wetlands.

Paragraph 21. [Clean Water Act] The applicant has enhanced the aquatic habitat through adherence to the management plan developed for this area. Crawfish production in Fisher Bottoms is particularly enhanced by a more stable water regime.

Paragraph 22. There is no evidence that the project negatively impacts dissolved oxygen in the basin. Crawfish, frogs, turtles and fish are thriving in Fisher Bottoms thanks to the prudent management of the area as recommended by the Louisiana Department of Wildlife and Fisheries.

Tim Morton & Associates, Inc.
Regulatory & Environmental Consultants

Mr. Mike H. Herrmann, Jr.,
New Orleans District, Corps of Engineers
July 15, 2010
Page Four

Paragraph 23. [Practical Alternative] The applicant improved a water control methodology that had been utilized for over 40 years to ensure an adequate water supply to sustain wildlife habitat in Fisher Bottoms. Because the only natural source of water in this portion of the Basin, other than rainfall, is backwater flooding, an alternate means of ensuring dependable and sufficient water in Fisher Bottoms for wildlife management was required. When the current owners found that impoundment and rainfall were not sufficient, the addition of water from the Atchafalaya River by pumping was instituted.

Paragraph 24. Not applicable.

Paragraph 25. Spoil banks have had no impact on the circulation patterns in Fisher Bottoms or Lake Warner. The water control structure (dam) is being operated in accordance with a management plan that enhances the Fisher Bottoms for fish and wildlife resources.

Paragraphs 26-29. [Alternatives B] Commenter makes several claims regarding adverse impacts with no substantiation and finally contends that the ecosystem could be recovered by removal of the "dam and spoil banks". The management plan ensures that adverse impacts to the Fisher Bottoms ecosystem are minimized and that habitat quality is enhanced. As addressed by the attached Management Plan developed by the LDWF, removal of the water control structure would result in the drainage of Fisher Bottoms and the subsequent loss of habitat quality as a result of the invasion of species with negative impacts on wetlands.

Paragraph 30. No stagnant standing bodies of water were created by the work conducted by the applicant.

Paragraph 31. [Practical Alternative C] Enhancement of more than 450 acres of wetlands more than compensates for the alleged impacts resulting from the dredging, spoil banks and the water control structures associated with this project.

Pages 9-11. These pages address regulatory contents and are not directed to specific issues of this permit application.

Page 12. [Endangered Species] It is our understanding that the U. S. Fish and Wildlife Service did not comment on the public notice for this project. Accordingly, we believe that threatened or endangered species were not affected by the project.

Tim Morton & Associates, Inc.
Regulatory & Environmental Consultants

Mr. Mike H. Herrmann, Jr.
New Orleans District, Corps of Engineers
July 16, 2010
Page Five

Page 13. [National Historic Preservation Act] It is our understanding that the State Historic Preservation Officer did not comment on the public notice for this project.

Page 14. [Fish and Wildlife Values] The applicant's activities were and are undertaken in accordance with a management plan developed by the LDWF.

Page 15. [Navigation] Again, applicant notes that the property discussed is private land and may only be accessed by the Commenter through acts of trespass.

Page 16. [Recreation] The applicant purchased this land solely to provide recreation for family and friends. Everything that has been done on this land was done to enhance that recreational experience. The applicant sought advice from the Louisiana Department of Wildlife and Fisheries and Ducks Unlimited to ensure that the recreational opportunities available on this property were maximized.

Page 16. [Water Quality] The Louisiana Department of Environmental Quality has not yet issued a water quality certification for this project, but we foresee no problem with issuance of that certification.

Page 16. [Food Production] No comment.

Page 16. [Needs and Welfare of the People] No comment.

Page 16. [Considerations of Property Ownership] The work was performed on property owned by the applicant and on adjacent land with that landowner's permission.

Page 16. [State of Louisiana Water Quality] Commenter contends that this project does not comply with the state of Louisiana's water quality regulations when in fact the Louisiana Department of Environmental Quality has not yet made that determination.

Pages 16-17. [Conclusion] No comment.

The applicant wishes to stress that the work subject to this permit application has been completed for over 10 years. Additionally, it is important to note that the work associated with water management in Fisher Bottoms completed by the applicant was not new, but was an improvement to water management techniques that were in existence for over 40 years prior to

Tim Morton & Associates, Inc.
Regulatory & Environmental Consultants


Mr. Mike H. Herrmann, Jr.
New Orleans District, Corps of Engineers
July 16, 2010
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the applicant's purchase of the property. Finally, the applicant believes that all of the work conducted resulted in beneficial impacts to the ecosystem.

If additional information is required, please advise.

Sincerely,

TIM MORTON & ASSOCIATES, INC.



Tim Morton, Agent
Mallard Basin, LLC

tm

Attachment

ATTACHMENT XII

FILE



DEPARTMENT OF THE ARMY
NEW ORLEANS DISTRICT, CORPS OF ENGINEERS
P.O. BOX 60287
NEW ORLEANS, LOUISIANA 70160-0287

October 15, 2012

REPLY TO
ATTENTION OF

Operations Division
Western Evaluation Section

SUBJECT: MVN 2010-1080-WLL

VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Mr. Robert Smith
U.S. Fish and Wildlife Service
646 Cajundome Blvd., Suite 400
Lafayette, Louisiana 70506

Dear Mr. Smith:

We are requesting concurrence from the U.S. Fish and Wildlife Service that Mallard Basin, LLC's projects at Fisher Bottom (described below) are not likely to adversely affect the Louisiana black bear and/or its designated critical habitat. The Department of the Army is currently re-evaluating its previous issuance of after-the-fact Individual Permit No. MVN-2010-1080-WLL and its previous approval of after-the-fact Nationwide Permit No. 7, MVN-2010-1032-WLL. These projects are located within the Atchafalaya Basin in St. Martin Parish, Louisiana.

The projects are thoroughly described in the attached draft "Department of the Army Permit Re-Evaluation and Revised Decision Document." A brief summary is offered here. The Nationwide No. 7 permit authorized an electric water pump and associated water intake and discharge pipe, which had been installed on the west bank of the Whiskey Bay Pilot Channel in 2001. The individual permit authorized: 1) restoration / re-construction of an approximately 1,900 foot water conveyance ditch that runs from the electric pump to the northeast end of the Fisher Bottom impound area; and 2) construction / installation of a variable crested aluminum water control structure (which replaced one of two old wooden weirs) and associated earthwork (including sidecasting of the excavated earthen material) performed in 1999.

These projects at Fisher Bottom are located within geographic boundaries designated as Unit 2 of Critical Habitat for the Louisiana black bear and the Louisiana black bear may be present in the project area. However, no evidence suggesting the presence of the Louisiana black bear has been observed on field visits to the site.

We have determined that these projects are not likely to adversely affect the Louisiana black bear and/or its designated critical habitat. Based on field investigations and consultation with biologists from the Black Bear Conservation Coalition and the Louisiana Department of Wildlife and Fisheries, we find that these projects' effects are either beneficial or insignificant. The project area contains healthy bottomland hardwood habitat with abundant soft mast and dense vegetation. The areas where spoil was broadcast are now densely vegetated with communities typical of local forested wetlands and there is little to no adverse impact to the natural contour

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elevations. The water conveyance and management system provides a needed water supply to preserve the aquatic environment of Fisher Bottom. Although there is no evidence that Louisiana black bears currently utilize the project area, the habitat at Fisher Bottom could provide food sources and cover if bears were to move into the area. Inspection of the projects and the Fisher Bottom site revealed no evidence of any activity or condition that might be detrimental to the Louisiana black bear or its critical habitat. Please see the attached draft Revised Decision Document for additional discussion regarding the effects of these projects.

By letter dated February 2, 2011, we previously sought consultation with the U.S. Fish and Wildlife Service regarding these projects. By letter dated February 28, 2011, we were notified that the U.S. Fish and Wildlife Service does not enter Section 7 consultation when applicants are seeking after-the-fact authorization for projects that have been completed. Unfortunately, the Endangered Species Act regulations, 50 CFR Part 402, do not specify such an exception to the consultation procedures. Rather, the regulations suggest that if the consultation cannot be resolved on an informal basis, formal consultation is required. See 50 CFR 402.14.

In light of our determination that the subject projects "may affect but are not likely to adversely affect" the Louisiana black bear and/or its designated critical habitat, we request your written concurrence that the proposed permits are not likely to affect the black bear or its critical habitat. In the event you do not concur with this determination, we request formal consultation and submit the attached draft Revised Decision Document as the Department of the Army's biological assessment in accordance with 50 CFR 402.14.

If you have any questions or need additional information, please contact Mike Herrmann at (504) 862-1954.

Sincerely,

Ronnie W. Duke
Chief, Western Evaluation Section

Enclosure

Cc: Delores Young



United States Department of the Interior

FISH AND WILDLIFE SERVICE
646 Cajundome Blvd.
Suite 400
Lafayette, Louisiana 70506



December 17, 2012

Mr. Ronnie Duke
Chief, Western Evaluation Section
Regulatory Branch
U.S. Army Corps of Engineers
Post Office Box 60267
New Orleans, Louisiana 70160-0267

RE: MVN-2010-1080, MVN-2010-1032

Dear Mr. Duke:

This responds to your letter of October 15, 2012, wherein you request concurrence from the Fish and Wildlife Service (Service) with your determination that impacts resulting from Mallard Basin, LLC's projects at Fisher Bottom are not likely to adversely affect the Louisiana black bear and/or its designated critical habitat.

The Service's policy is that generally we do not enter into section 7 consultation pursuant to the Endangered Species Act (ESA) when applicants are seeking "after-the-fact" authorization for projects that have already been completed or when impacts may have already occurred. Such a practice - that it is easier to apologize later than seek permission earlier - does not promote the conservation of listed species and critical habitat, an obligation for both the action agency and the Service under the ESA.

Further, the Service's policy is fully supported by the ESA and its implementing regulations. Both the ESA and the regulations are based on an underlying assumption that consultation will occur prior to any action being taken. Section 7(a)(2) of the ESA states that each Federal agency shall, in consultation with the Secretary, *insure* that any action authorized, funded, or carried out by such agency is *not likely to jeopardize* the continued existence of a listed species or result in the destruction or adverse modification of designated critical habitat. *See* 16 U.S.C. 1536(a)(2) (emphasis added). Title 50 C.F.R. 402.02 defines "jeopardize the continued existence of" as "to engage in an action that reasonably *would be expected*, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of the species in the wild by reducing the reproduction, numbers, or distribution of that species. *See* 50 C.F.R. § 402.02 (emphasis added). In the Service's opinion, the word "*insure*" and the phrases "*not likely to jeopardize*" and "*would be expected*" clearly contemplate consultation on a proposed action and not an action that has already been completed. The protections of the ESA insure against jeopardy. If the ESA and its implementing regulations contemplated after-the-fact consultation, there would be no need for the Service to consider and recommend reasonable and prudent alternatives in order to avoid the *likelihood* of jeopardy or

reasonable and prudent measures to minimize the amount or extent of *anticipated* incidental take.

When a project has been completed, as is the case with the Mallard Basin projects, it becomes part of the environmental baseline. The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in an action area, the anticipated impacts of all proposed Federal projects in an action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions that are contemporaneous with the consultation in process. See 50 C.F.R. § 402.02. Inasmuch as the Army Corps of Engineers (Corps) has not identified any new effects associated with the Mallard Basin projects, the existing environmental baseline remains unchanged, and there are no new effects warranting ESA consultation.

Notwithstanding the foregoing, we offer the following information to the Corps as technical assistance. Specifically, Mallard Basin, Inc. (MVN-2010-1080) and Scott Sebastian (MVN-2010-1032) received authorization from the Corps for work previously conducted at or near Fisher Bottom in the Atchafalaya Basin during the years 1999 and 2001 in St. Martin Parish, Louisiana. In your joint public notice dated May 24, 2010, the Corps originally stated the project (MVN-2010-1080) would not affect listed species or their critical habitats. The project entailed the installation of an electric water pump, water intake and discharge pipe and the restoration / reconstruction of a 1,900 foot water conveyance diich. Two old wooden weirs were removed and an aluminum water control structure was installed.

The Louisiana black bear was listed as a threatened subspecies in 1992. Although Louisiana black bears are primarily associated with forested wetlands, they utilize a variety of other habitat types, including scrub-shrub, marsh, spoil banks, and upland forests. Louisiana black bears, particularly pregnant females, normally den from December through April. Louisiana black bears will use almost any species of tree for a den site provided that it meets a minimum diameter and cavity presence criteria as described below (Hightower et. al. 2002, Oli et. al. 1997, Weaver and Pelton 1994). Louisiana black bears will also use ground den sites, such as in hollow logs, slash piles, shallow burrows or depressions in areas of dense cover.

To afford additional protection to denning bears, the Service (through the final listing rule published on January 7, 1992, in Volume 57, No. 4 of the Federal Register) has extended legal protection to candidate and actual den trees in breeding habitat. Candidate den trees are defined in the final rule as bald cypress (*Taxodium distichum*) and tupelo gum (*Nyssa* sp.) having a diameter at breast height of 36 inches or greater, with visible cavities, and occurring in or along rivers, lakes, streams, bayous, sloughs, or other water bodies. "Actual den tree" refers to any tree used by a denning bear during the winter and early spring seasons.

On March 10, 2009, the Service published a final rule in the Federal Register (Volume 74, No. 45) designating 1,195,821 acres of critical habitat for the Louisiana black bear (effective April 9, 2009). Critical habitat identifies geographic areas containing features that are essential to the conservation of a threatened or endangered species, and which

may require special management considerations or protection. Within the critical habitat boundary, only those areas that contain the physical and biological elements essential to support the life cycle needs of the Louisiana black bear are considered "critical habitat." Those elements are defined as breeding habitat and corridors within bottomland and upland hardwood forests and adjacent vegetated areas. Designation of critical habitat does not affect land ownership or establish a refuge or preserve, and only applies to situations where federal implementation, funding, or a federal permit is involved.

According to our database, bears (including breeding females) have not been documented within or near the project area in recent history. Bear critical habitat was designated in 2009, approximately 8 years after project construction was completed. Information provided to us by the Corps indicates that management of the project has been ongoing since construction; therefore, any project effects were considered by the Service in the baseline when we designated critical habitat for the bear.

To politely reiterate, it is the Service's policy that we do not enter into section 7 consultation for completed actions. We hope the above information is helpful. If you have any questions regarding our comments, please contact Rob Smith of this office at (337) 291-3134.

Sincerely,



Jeffrey D. Weller
Supervisor
Louisiana Ecological Services Office

Cc: LDWF, Baton Rouge, LA

Literature Cited

Hightower, D.A., R.O. Wagner, and R.M. Pace, III. 2002. Denning ecology of female American black bears in South Central Louisiana. *Ursus* 13:11-17.

Oli, M.K., H.A. Jacobson, and B.D. Leopold. 1997. Denning ecology of black bears in the White River National Wildlife Refuge, Arkansas. *J. Wildl. Manage.* 61:700-706.

Weaver, K.M., and M.R. Pelton. 1994. Denning ecology of black bears in the Tensas River Basin of Louisiana. *Int. Conf. Bear Res. And Manage.* 9:427-433.

XII

DIVISION OF STATE LANDS
ATTACHMENT XIV

Herrmann, Michael H MVN

From: Clay Carter [Clay.Carter@LA.GOV]
Sent: Friday, October 12, 2012 11:51 AM
To: Herrmann, Michael H MVN
Subject: RE: State owned lands? (Mallard Basin Project MVN-2010-01080-WLL) (UNCLASSIFIED)

The dredging and water control structure are not located on state claimed land or water bottoms. Our office has no objection to the activity.

-----Original Message-----

From: Herrmann, Michael H MVN [mailto:Michael.H.Herrmann@usace.army.mil]
Sent: Friday, October 12, 2012 11:11 AM
To: Clay Carter
Subject: State owned lands? (Mallard Basin Project MVN-2010-01080-WLL) (UNCLASSIFIED)

Classification: UNCLASSIFIED
Caveats: NONE

Water control structure is in Section 83 in T8S-R8E. If you could send me something or give me a call, I would greatly appreciate it.

Mike Herrmann Jr.
US Army Corps of Engineers
New Orleans District
Regulatory Branch OD-SW
(504) 862-1954
michael.h.herrmann@usace.army.mil

In order to assist us in improving our service to you, please complete the survey found at <http://per2.nwp.usace.army.mil/survey.html>

Classification: UNCLASSIFIED
Caveats: NONE

LOUISIANA DEPARTMENT OF ENVIRONMENTAL QUALITY

RATIONALE FOR DECISION

WATER QUALITY CERTIFICATION
(WQC 100518-03/AJ 170878/CER 20100001)MALLARD BASIN, LLC
APPROXIMATELY 8.3 MILES WEST-SOUTHWEST OF RAMAH, LA
IBERVILLE & ST. MARTIN PARISHES

The Louisiana Department of Environmental Quality, Office of Environmental Services, Water Permits Division (LDEQ), through this decision, issues a water quality certification to Mallard Basin, LLC (Mallard Basin) for the replacement of water control structures and an earthen dam to improve wildlife habitat (project), approximately 8.3 miles west-southwest of Ramah, Louisiana.

To conduct an activity that may lead to a discharge into "navigable waters"¹, a person must receive authorization via a permit issued by the U.S. Army Corps of Engineers (Corps). 33 U.S.C. §1344. A prerequisite of this federal permit is a water quality certification from the state in which the discharge originates, 33 U.S.C. §1341. Because Mallard Basin's proposal will result in a discharge into "navigable waters" it is required to obtain a federal permit from the Corps and a water quality certification from the LDEQ.

The LDEQ's issuance of a water quality certification is a determination made by it that the project proposed to the Corps will not violate Louisiana's water quality standards, the Water Quality Management Plan for the water body affected by the activity, or applicable state water laws, rules, and regulations. LAC 33:IX.1507 C.3.

FINDINGS OF FACT

I. BACKGROUND

A. Description of the Project Site

The project site is located approximately 8.3 miles west-southwest of Ramah, Louisiana and within the Atchafalaya Basin Floodway. The site can be accessed by boat from the Whisky Bay boat launch off LA Hwy. 975.

The project site consists of approximately 450-acres, and is part of an area locally known as the "Fisher Bottoms". The project implementation directly impacted 1.1-acres of "navigable waters".

¹ "navigable waters" is defined in 33 U.S.C. §1362.

B. Description of the Project

The Corps discovered that Mallard Basin had not received the appropriate permit for the project which was completed approximately ten years ago. As part of its enforcement procedures, the Corps allowed Mallard Basin to submit an after-the-fact permit application.² Because a water quality certification is a prerequisite to the federal permit, Mallard Basin submitted an application to the LDEQ for a water quality certification.

According to the permit application, the original water control structures and earthen dam have been in place at least fifty years. The project included the replacement of existing water control structures and an earthen dam (completed in 1999) and the excavation of a ditch (completed in 2001) to improve wildlife habitat.

Approximately 4,062 cubic yards of native spoil material was placed into "navigable waters" to perform this work. Additional ditch excavation was performed, however, the spoil material from the ditch was not placed in "navigable waters" and therefore a Corps permit was not required.

II. PUBLIC NOTICE AND COMMENT PERIOD

By application dated April 29, 2010, Mallard Basin, LLC, through its authorized agent, Tim Morton & Associates, Inc., applied to the Corps of Engineers for review and issuance of a permit under Section 404 the Clean Water Act (CWA). The proposed project was publicly noticed jointly by the Corps and LDEQ on May 24, 2010 with the closure of the comment period occurring 20 days from the date of the joint public notice.

The joint public notice informed the public that the application for the proposed project was on file with the LDEQ and was available for examination and copying.

LDEQ received one objection letter addressing water quality issues during the public comment period.

A "Response to Comment Summary" has been prepared for all significant comments and is attached to and made a part of this Rationale for Decision.

III. WATER QUALITY STANDARDS WILL BE PROTECTED

A. Water Quality Criteria

Criteria are elements of the water quality which set general and numerical limitations on the permissible amounts of a substance or other characteristics

² See Corps Regulatory Program Overview at <http://www.mva.usace.army.mil/cps/regulatory/00covev.asp>.

of state waters, LAC 33:IX.1113. General and numerical criteria are established to promote restoration, maintenance, and protection of state waters. A criterion for a substance represents the permissible levels for that substance at which water quality will remain sufficient to support a designated use. These criteria are found in LAC 33:IX.1109 and LAC 33:IX.Chapter 11.Table 3 (Numerical Criteria and Designated Uses).

General criteria specifically apply to human activities; they do not apply to naturally occurring conditions. LAC 33:IX.1113.B. General water quality criteria include: aesthetic considerations; color; floating, suspended or settleable solids; taste and odor; toxic substances (as described in LAC 33:IX.1113.C.6); oil and grease; foaming or frothing materials; balance of the nitrogen-phosphorus nutrient ratio; excess turbidity; alteration of flow characteristics; radioactive materials; and the maintenance and protection of the biological and aquatic community integrity.

Numerical criteria (identified in LAC 33:IX.Chapter 11.Table 3) apply to the specified water bodies, and to their tributaries, distributaries, and interconnected streams and water bodies contained in the water management subsegment. LAC 33:IX.1113.C. Numerical water quality criteria include: pH; chlorides, sulfates, and total dissolved solids; dissolved oxygen; temperature; bacteria; and toxic substances.

The numerical criteria which apply to this project, located in subsegment 010521, as listed in Table 3, are:

Chlorides:	65 mg/L
Sulfates:	70 mg/L
Dissolved Oxygen:	5.0 mg/L
pH:	6.5 to 8.5
Bacterial Criteria:	400 colonies/100 ml (May to October) 2000 colonies/100 ml (November to April)
Temperature:	33°C
Total Dissolved Solids:	150 mg/L

For Mallard Basin's project both general and numerical water quality criteria were met because the project did not cause any identifiable pollutants to enter the subsegment.

B. Antidegradation

LAC 33:IX.1109.A. provides the state's antidegradation policy as follows:

State policy is that all waters of the state, including interstate, intrastate, and coastal waters, and any portions thereof, whose existing quality exceeds the specifications of the approved water quality standards or otherwise supports an unusual abundance and diversity of fish and wildlife resources, such as waters of national and state parks and refuges, will be maintained at their existing high quality. The state may choose to allow lower water quality in waters that exceed the standards to accommodate justifiable economic and/or social development in the areas in which the waters are located, but not to the extent of violating the established water quality standards. Appropriate use attainability analyses will be required before any lowering of water quality will be allowed. No such changes, however, will be allowed if they interfere with or become injurious to the existing water uses. No lowering of water quality will be allowed in waters where standards for the designated water uses are not currently being attained.

The administrative authority will not approve any wastewater discharge or certify any activity for federal permit that would impair water quality or use of state waters. Waste discharges must comply with applicable state and federal laws for the attainment of water quality goals. Any new, existing, or expanded point source or nonpoint source discharging into state waters, including any land clearing which is the subject of a federal permit application, will be required to provide the necessary level of waste treatment to protect state waters as determined by the administrative authority. Further, the highest statutory and regulatory requirements shall be achieved for all existing point sources and best management practices (BMPs) for nonpoint sources. Additionally, no degradation shall be allowed in high-quality waters that constitute outstanding natural resources, such as waters in the Louisiana Natural and Scenic Rivers System or waters of ecological significance as designated by the department. Those water bodies presently designated as outstanding natural resources are listed in LAC 33:IX.1123.

This project is located within subsegment- 010501, Lower Atchafalaya River Basin Floodway- from the Whiskey Bay Pilot Channel to US Hwy. 90 in

Morgan City. Subsegments are hydrologic units used to define the borders of a watershed or drainage basin. Each subsegment has water quality standards unique to its location and designated uses.

The designated uses for this subsegment are: primary contact recreation (activities in which there is prolonged, full-body contact with water, such as swimming, skiing, and diving); secondary contact recreation (activities in which there is incidental, limited contact with water, such as fishing, wading and boating); fish and wildlife propagation (necessary to sustain aquatic habitat for indigenous wildlife and aquatic species); and drinking water supply (raw water source, which after conventional treatment, is suitable for human consumption and other uses).

Biennially, the LDEQ assesses whether or not water quality standards are being met for each subsegment's designated uses. The "degree of support" for each designated use is analyzed in respect to ambient water quality data, total maximum daily load (TMDL) surveys, and other peripheral information related to the subsegment. This data can be found in the Louisiana Water Quality Inventory: Integrated Report, which is also commonly known as the "305(b) report", the last of which was published in 2006. The "305(b) report" also identifies and lists suspected causes and sources of impairment to water quality standards for each subsegment. This list of subsegments within the "305(b) report" is commonly referred to as the "303(d) list".

As stated in the "303(d) list", water quality standards for all four designated uses are being met for subsegment 010501.

Because no radioactive materials or specific identifiable pollutants (as listed on LAC 33:IX, Chapter 11, Table 1) entered the subsegment as a result of this project, there was no degradation.

IV. AVOIDANCE OF ADVERSE ENVIRONMENTAL EFFECTS: The potential and real adverse environmental effects of the proposed development have been avoided to the maximum extent possible.

The project was completed ten years ago and has not disrupted sheet flow or violated water quality standards. The project did not result in any identifiable pollutants entering into the subsegment.

Mallard Basin consulted with and will follow recommendations by the Louisiana Department of Wildlife & Fisheries (LDWF) on the operation of the water control structure to enhance the habitat for aquatic, wildlife and wetland plant species. Mallard Basin will monitor and record plant and animal habitat growth in the managed area and adjust the water control structures accordingly, to maximize optimal hydrologic conditions. LDEQ concurs that

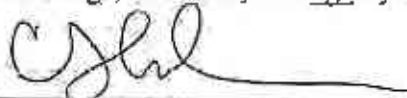
the operation of the water control structure will comply with state water quality standards.

V. CONCLUSION

Considering Mallard Basin's plan to operate the water control structure and that there have been no specific water quality-related problems associated with the site, the LDEQ concludes that adverse environmental impacts have been avoided to the maximum extent possible. Additionally, because of Mallard Basin's efforts to avoid environmental impacts, both designated uses and general and numerical water quality criteria will be maintained.

Based on a careful review and evaluation of the entire administrative record, including the public comments, the Louisiana Department of Environmental Quality, Office of Environmental Services, finds that Mallard Basin's project, as proposed in the application for a water quality certification, will not violate the water quality standards of Louisiana. Accordingly, the LDEQ issued the water quality certification.

Baton Rouge, Louisiana, this 18 day of October



Cheryl Sonnier Nolan
Assistant Secretary
Office of Environmental Services

VI. DOCUMENTATION

Corps of Engineers Permit Application, dated April 29, 2010.

Corps of Engineers and Louisiana Department of Environmental Quality Joint Public Notice, dated May 24, 2010.

Letter dated June 4, 2010, from the LDEQ to Tim Morton & Associates, Inc.

LDWF Management Plan for Fisher Bottom, July 2010.

Letter dated July 15, 2010, from Tim Morton & Associates, Inc. to the Corps.

Letter dated July 21, 2010, from Tim Morton & Associates, Inc. to the LDEQ.

Water Quality Certification for Mallard Basin, LLC, dated August 9, 2010.

Response to Comments Summary, dated August 9, 2010.

**Response to Comments Summary
Water Quality Certification
(WQC 100518-03/A1 170878/CER 20100001)
Mallard Basin, Inc.
Iberville & St. Martin Parishes**

Issuance of a water quality certification (WQC) by the Louisiana Department of Environmental Quality (LDEQ) constitutes a determination by the LDEQ that the activity as proposed by the applicant in its WQC application will not violate State Water Quality Standards and is in accordance with an approved Water Quality Management Plan, or applicable state water laws, rules, or regulations. LDEQ's approval does not authorize the applicant to perform the proposed activity; it is not a permit.

1. The project disrupts sheet flow, affects hundreds of acres of swamp, will disrupt shellfish production and exacerbate dissolved oxygen problems in the Atchafalaya Basin.

Response - The project was completed ten years ago and has not disrupted sheet flow or caused dissolved oxygen problems. According to the application, this land has been managed in a similar manner for forty years prior to the current landowner; part of the permit is to replace water control structures installed by the previous landowner. According to the current 305(b) report, which lists impaired waterbodies, this site is fully meeting water quality standards for dissolved oxygen and all of its designated uses, including fish & wildlife propagation. LDEQ maintains that the project has not disrupted sheet flow, affected hundreds of acres of swamp, disrupted shellfish production or caused dissolved oxygen problems in the Atchafalaya Basin.

2. The application does not comply with LAC 33:IX.1507.A.J.h. The application does not include the nature of the receiving water, including type, and direction of flow.

Response - It is evident from the plans that accompanied the 404 permit application that the receiving waters are freshwater swamp that flow southward.

3. The permit notice on your (the Corps of Engineers) website has this as a project in Iberville Parish when in fact it is in St. Martin Parish.

Response - The joint public notice LDEQ printed off of the Corps of Engineers website states the project is located in both St. Martin & Iberville Parishes.

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**Response to Comments Summary
Water Quality Certification
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4. Comments concerning traffic, federal permitting and enforcement criteria, National Environmental Policy Act (NEPA) compliance, carbon sequestration, Section 10 of the Rivers and Harbors Act compliance, compliance with federal Section 404(b)(1) guidelines, mitigation, endangered species, & compliance with the National Historic Preservation Act.

Response - The LDEQ recognizes these concerns; however, these comments do not present a water quality related issue. The LDEQ's authority regarding a Water Quality Certification is a determination of whether the placement of fill material will result in a violation of state water quality standards provided for in LAC 33:IX Chapter 11.

5. There should be a public hearing on this project.

Response - All issues regarding water quality have been addressed during the comment and review period. Therefore, the administrative authority has determined that a public hearing will not be held.



September 4, 2012

Tulane Environmental Law Clinic

By Email to: *Michael.H.Herrmann@usace.army.mil*

Mike Herrmann

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New Orleans District

Regulatory Branch

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Re: Comments on Behalf of Atchafalaya Basinkeeper, Louisiana Crawfish Producers Association-West, and the Louisiana Environmental Action Network in Opposition to Corps Reevaluation Decision on After-the-Fact Clean Water Act Permit No. MVN-2010-1080-WLL and Nationwide Permit Authorization Number MVN-2010-1032-WLL

Dear Mr. Herrmann:

The Atchafalaya Basinkeeper,¹ Louisiana Crawfish Producers Association – West (“LCPA”),² and the Louisiana Environmental Action Network (LEAN)³ (together “Citizen Groups”) file these comments opposing the Corps’ proposed decision affirming its issuance of after-the-fact permits for the destruction and obstruction of wetlands in the valuable Atchafalaya Basin. Because the permit, authorization, and decision-making process do not meet the requirements of the Clean Water Act, the National Environmental Policy Act, and the Endangered Species Act, the permits must be denied.

I. INTRODUCTION

The nationally-treasured Atchafalaya Basin is a precious natural resource that currently supports a uniquely beautiful ecosystem with diverse flora and fauna. Aside from serving as a natural resource for the public, it is the home of the Cajun culture. Cajuns have historically lived and thrived in the Atchafalaya Basin for generations, and to this day maintain their livelihood off of the fish, crawfish, and wildlife that make their home in the Basin.

¹ Atchafalaya Basinkeeper is a non-profit corporation whose mission is to preserve the ecosystem of the Atchafalaya Basin for present and future generations by protecting the Basin’s long-term health and sustainability.

² LCPC-West is a non-profit corporation composed of commercial crawfishermen and other members interested in its mission, which is to protect water quality in the Atchafalaya Basin in order to promote a healthy, thriving habitat for crawfish and other fish and wildlife living in the Basin and throughout Louisiana, as well as protecting and insuring public access to waters of the United States located in the Basin.

³ LEAN is a non-profit corporation organized under the laws of the state of Louisiana. LEAN serves as an umbrella organization for environmental and citizen groups. LEAN’s purpose is to preserve and protect the state’s land, air, water, and other natural resources, and to protect its members and other residents of the state from threats of pollution. LEAN has members statewide, including members who live, work, or recreate in the project area.

Projects like the one illegally installed by Mallard Basin and now bought by Atchafalaya Investments, are destroying the Basin bit by bit. Like Lost Lake and Lake Rycade before it, Fisher Lake has fallen prey to the desires of a few wealthy individuals who seek to convert it for their own private uses. Dammed off and drained with the help of ditches dug in wetlands, Fisher Lake currently serves as a duck hunting playground for the current and now proposed permittees and their wealthy friends. Special grasses attractive to ducks have been planted with the help of herbicides and a complete draining of Fisher Lake for several months of the year. This action has degraded both Fisher Lake itself and the surrounding area, as Fisher Lake is no longer hydrologically connected to the rest of the Basin. In fact, for several months of the year, there is nothing hydrologic about Fisher Lake at all, as the permittees drain it dry so they can culture it to their liking and for their private uses. In the process, they take what was formerly a public resource accessible for almost half the year and privatize it. Regardless of the time of year and amount of water in the area, the public, including the crawfishermen, can no longer access Fisher Lake. The water control structure that Mallard Basin put in and Atchafalaya Investments seeks to retain blocks access to, and navigation through, the Fisher Lake area. In ways too numerous to count, the project is bad for the Basin and not in the public interest.

Though the current permittee originally installed this project illegally, the Corps has facilitated its presence and continued use. As with Lake Rycade and Lost Lake, after citizens reported the illegal dredge and fill activity to the Corps, it blessed the illegal activity by issuing an after-the-fact permit allowing the project to remain. The Corps ordered no mitigation, no penalties, and absolutely no measures designed to discourage future illegal activity in the Basin. The Corps' approach to after-the-fact permitting in the Basin is the antithesis of everything an enforcement agency should do. If the violation at issue were a bank robbery, the Corps' actions would be tantamount to the police catching bank robbers in the act, stopping them, but rather than arresting them, walking them over to a desk and writing them out legal authorization to take the bank's money. Parties seeking to illegally dredge and fill the Basin need not fear the Corps, and can take their chances that either no one will catch them (because they call the area private property and shoot at or block "trespassers") or those who catch them will not expend the resources to sue them. This is no way to preserve the precious resources of the Atchafalaya Basin for the public and no way to exercise the authority granted it by Congress to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).

The Corps concluded, based on its recent visit to the site which was conducted and controlled by the proposed permittee and without any prior familiarity with the area, that the project has benefitted Fisher Lake and the surrounding area. These comments discuss the many ways in which this conclusion is flatly wrong, as well as arbitrary and capricious. However, a picture is worth a thousand words. Attached to these comments are two maps published by the Louisiana Geological Survey: one published in 2000 and one published in 2004.⁴ The maps demonstrate, in the most graphic way possible, that Mallard Basin's project is not good for Fisher Lake. In fact, the maps demonstrate that the project has destroyed Fisher Lake. In the map published in 2000 (which would necessarily have been based on information before 2000), Fisher Lake, which is not labeled on the map but has been circled for clarity purposes, appears as a large lake, much larger than Lake Warner to its south. This represents Fisher Lake before

⁴ Exhibits 1 and 2.

Mallard Basin's project. In the map published in 2004, *Fisher Lake is gone*. It is completely absent from the map. At this point, of course, Mallard Basin would have installed and operated its project: draining Fisher Lake dry for large parts of the year and making it a duck pond for the other parts of the year. This private duck pond is no longer on the map.

Lake Rycade, however, presents proof that Fisher Lake can be restored. If the Corps denies the permit and orders full restoration, Fisher Lake will once again be a thriving ecosystem accessible to the public. The Corps must deny this permit and put Fisher Lake back on the map.

II. PROCEDURAL HISTORY

Citizens Groups filed a lawsuit against the Corps on March 22, 2011, for issuing after-the-fact permits to Mallard Basin, Inc., thereby blessing its illegal destruction of wetlands in the Atchafalaya Basin. The lawsuit challenged the Corps' decision-making process and its failure to follow the law. Seeking to replace natural Atchafalaya Basin wetlands with a private duck pond, Mallard Basin, Inc., dug over two miles of ditch in wetlands, drained the water out of a lake, and installed a dam and metal water control devices to artificially control the flow and levels of water in over 600 acres of hardwood swamp and Fisher Lake—all without obtaining legally-required permits.⁵ These actions (referred to herein as "the Project") altered the hydrology of 600 acres or more of forested hardwood swamp and Fisher Lake in the Atchafalaya Basin in an area designated as critical habitat for the Louisiana black bear. By granting after-the-fact permits, the Corps purported to bless these actions and make them permanent.

In its Notice accompanying its Permit Re-evaluation and Revised Decision Document (hereinafter "Reevaluation"), the Corps does not dispute this history. It describes its Reevaluation as a process it "volunteered to undertake for the purposes of ending [the] litigation." Reevaluation at Explanatory Notice cover page. However, its Reevaluation decision is based on facts obtained from a visit to the site which excluded the very parties who brought the litigation which the Corps claimed to be undertaking to resolve. None of the Citizen Groups, the same parties who are Plaintiffs in the litigation to which the Corps refers, were included in the Corps' site visit. Instead, the Corps invited participants who were all either on the side of the permittees or dubiously neutral. Therefore, the facts the Corps received at the site-visit were one-sided. The Corps' reevaluation process, then, suffers from bias and failure to adequately consider important aspects of the project. As such, its Reevaluation decision is arbitrary and capricious.

When the Corps first proposed this reevaluation to the court, it stated that the Plaintiff Citizen Groups would not be harmed by it because they "will be afforded the opportunity to participate in the form of public comment should the Corps issue modified permits or reissue the permits in their entirety." Louisiana Crawfish Producers Association – West, et al. v. Lt. Gen. Robert L. Van Antwerp, et al., No. 50-1 at 9. However, in terms of effectiveness in both advocacy and fact-presentation, written comments accepted five months after the site visit pale in comparison to the ability to be present on site, in person, while the Corps decision-makers viewed the scene.

⁵ The attached images depict the project and the surrounding area. Exhibit 3, in globo.

This procedural flaw stands out even more considering the history of this project, and the multiple, repeated efforts that Citizen Groups made to inform the Corps of the facts surrounding the project and the legal issues it presented. At least a year before the Corps first took action on Mallard Basin's illegal actions dredging ditches and filling wetlands in the Basin, Atchafalaya Basinkeeper Dean Wilson called the Corps and notified it of Mallard Basin's violations.⁶ The Corps took no action. Id. On July 1, 2009, LCPA, through counsel Leigh Haynie, notified the Corps again, this time in writing, of Mallard Basin's illegal dredge and fill activities.⁷ Again, the Corps took no action. According to the record filed by the Corps in the underlying case, Louisiana Crawfish Producers Association – West, et al. v. Lt. Gen. Robert L. Van Antwerp, et al., the Corps received another notification on August 25, 2009, of the violation.⁸ Once again, it did nothing. Id. On March 30, 2010, Plaintiffs LCPA and Atchafalaya Basinkeeper filed a notice of intent to sue, stating Mallard Basin violated the Clean Water Act by dredging and filling without a permit from the Corps.⁹ Only then did the Corps issue a cease and desist letter.¹⁰ The Corps then invited Mallard Basin to apply for an after-the-fact permit. Id.

During the comment period for Mallard Basin's permit application, LCPA and the Atchafalaya Basinkeeper identified many problems with the Corps' initial analysis, like the Corps' failure to consider the project's effect on the Louisiana black bear.¹¹ They also notified the Corps that the applicant used the water control structure to drain Fisher Lake, and the negative effects that has on the Basin. The Corps issued its decision granting the permits without addressing any of these concerns.¹²

After this, Basinkeeper Dean Wilson again notified the Corps of the project's potential effects on the black bear.¹³ He also again protested that the project drains Fisher Lake completely dry. Still, the Corps took no action. It did not consult with, nor even contact, the United States Fish and Wildlife Service on the project. On December 9, 2010, Plaintiffs issued a notice of violation, under the Endangered Species Act, to the Corps.¹⁴ Only after it received this notice did the Corps contact the United States Fish and Wildlife Service (FWS) regarding the black bear.¹⁵ However, the Corps did not do a Biological Assessment and, instead, told the FWS Mallard Basin's version of the purported beneficial effects of the project on the wetlands.

On March 22, 2011, the Atchafalaya Basinkeeper, LCPA-West, and the Louisiana Environmental Action Network filed suit against the Corps for issuing the permits. They

⁶ Exhibit 4 at 13, ¶ 59 ("I called the Corps enforcement office in 2007 or 2008 to report this violation.").

⁷ Exhibit 4 at attachment G; see also Exhibit 5 at 4, ¶ 14.

⁸ No. 38-3 at 1. Citizen Groups hereby incorporate by reference the administrative record filed in the underlying case. For ease of administration, Citizen Groups will not attach this entire record to these comments as an exhibit, but ask that the Corps make them a part of the record on the reevaluation.

⁹ Exhibit 6.

¹⁰ Exhibit 7.

¹¹ Exhibit 8.

¹² Exhibit 9.

¹³ Exhibit 4.

¹⁴ Exhibit 10.

¹⁵ Exhibit 11. The FWS had not even heard of the project before this point. See Exhibit 12, in globo.

alleged, among other things, that the Corps' decision violated the Clean Water Act permitting guidelines and that the Corps had failed to even mention, much less consult on, the impact of the project on the Louisiana black bear and its critical habitat. On December 13, 2011, more than two years after first being made aware of Mallard Basin's project, and facing judicial review and the likelihood of the Court ruling that it acted illegally, the Corps filed its request to stay the case while it redoes its decision. Though it argued that its reevaluation would solve the illegalities alleged by the plaintiffs, thereby admitting legal deficiencies in its decision, it asked the court to keep the illegally-issued permits in place while it conducted its now nine-month long reevaluation. The Corps represented to the court that its request was not merely an attempt to shore up a weak decision, but was necessitated by Scott Sebastien's sale of the property, and the Mallard Basin corporation, to a new party: Dr. Schumacher. The Corps told the court that Dr. Schumacher's "newly proposed activities" required it to reevaluate the project. These "new" activities were: recreational duck and deer hunting, alligator hunting, frogging, crawfishing, fishing, and "general wildlife enjoyment."

The court granted the Corps' request after Dr. Schumacher and Scott Sebastien "agreed" not to drain Fisher Lake and spray herbicides for four months or through the end of June 2012. As it turns out, the permittees did not typically begin draining the lake anyway until August, so their "concession" to the court was disingenuous, and was actually no concession at all.¹⁶ In the beginning of August, the permittees began draining Fisher Lake dry to spray herbicides and plant duck grass.

III. THE CORPS' DECISION IS INFECTED WITH BIAS THAT RESULTS IN ARBITRARY, CAPRICIOUS, AND ERRONEOUS CONCLUSIONS.

The Corps' March 2012 site visit, wherein it was supposed to objectively reexamine the project and reconsider the conclusions it reached when it issued the original permits to Scott Sebastien and Mallard Basin, was an enterprise wholly under the control of the current permittee and the proposed transferee, Dr. Schumacher and Atchafalaya Investments, Inc. These parties directed the date and time of the visit and conducted the visit, leading the Corps and the LDWF personnel around to the areas they wished the Corps to see, pointing out features they wanted the Corps to observe, giving the Corps contemporaneous information they wanted the Corps to hear, and literally controlling the Corps' access to the site. The Corps even rode in the proposed transferee, Dr. Schumacher's, ATV and boat during the site visit.¹⁷ The Corps either arranged the site visit in this manner, or acquiesced in this self-serving arrangement by the proposed transferee, but regardless, the Corps' entire basis for its reevaluation decision is infused with bias. The Corps' reevaluation conclusions are, by definition, arbitrary and capricious.

Reviewing the Corps' conclusions and gleaned facts from the site visit report allows Citizen Groups to point out several ways in which this bias resulted, and several conclusions which were wrong, but Citizen Groups can never be fully aware of all the ways in which this permittee-directed tour, which excluded any representatives of Citizen Groups, harmed the Corps' ability to be objective and led to factual findings on which the Corps based its decision.

¹⁶ Reevaluation at 2 states that "Mallard Basin usually drained water from Fisher Bottom in early August...."

¹⁷ Exhibit 13 ("Transportation by boat and ATV to and from the site and within Fisher Bottoms will be provided by Mr. Schumacher/Mallard Basin.").

A. The Manner In Which the Corps Obtained Information For Its Reevaluation Led to Its Decision Being Biased, As Well As Arbitrary and Capricious.

In both its original 2010 investigation and in its 2012 reevaluation, the Corps received important information about the project exclusively from the parties who sought the permits, thereby ensuring that it received the most useful information from only one side of the controversy. In March 2010, in response to a complaint about the illegal dredge and fill activity that Scott Sebastien engaged in, two Corps personnel went to the Fisher Lake project area to investigate the violation.¹⁸ One, Randall Firmin, was an investigator, and one, Gary Courret, was a botanist. When they went to the site, the Corps officials were accompanied by Scott Sebastien, the violator, and Tim Morton, Sebastien's hired consultant.

In March 2012, during its reevaluation which was supposedly being conducted in order to end the litigation with Citizen Groups, the Corps did not include the Citizen Groups in the site visit. Instead, the Corps included no less than six representatives of the permittee and the proposed permittee.¹⁹ In fact, there were 3 times as many representatives of the permittees as there were Corps personnel present on the site visit; only two individuals from the Corps were present. The Corps then allowed the permittees to take them around in boats and ATVs and show them the areas that the permittees wanted them to see. During the tour, the permittees were providing factual information (or misinformation) and pointing out features they wished the Corps to observe.²⁰ There is no indication in the Corps' report of the site visit that the Corps had, or attempted to exert, control over the areas it observed.²¹ No member of the Citizen Groups was present to discuss and point out features that they wanted the Corps to see or to correct misinformation and misunderstandings disseminated by the permittees.²²

Thus, in the most important fact-gathering aspect of the reevaluation, the site visit, the Corps gathered facts for its reevaluation from only one side to the controversy. It allowed that side to direct it, to point things at the site out to it, and to provide information to it

¹⁸ See Exhibit 14. Though the report refers to the August 2009 complaint as "anonymous," the complaint was not anonymous. Atchafalaya Basinkeeper Dean Wilson called in the complaint and identified himself when he called. See Exhibit 4. The Corps did not ask any of the parties who reported the violation, - Dean Wilson, Mike Bienvenu, or their attorney, Leigh Haynie, to accompany them to the site nor did it even contact them to get follow-up information before or after its site visit.

¹⁹ These were: the original permittee, Scott Sebastien, and permit applicant, William Schumacher; their hired consultant Tim Morton (who handled the original permit proceedings for Scott Sebastien); their attorney Nadia De La Houssaye; a Schumacher associate, Mike Didier; and a Schumacher employee, Curtis Robin. See Exhibit 15.

²⁰ One can assume the permittees were also in a position to fail to point out to the Corps features they did not want the Corps to observe.

²¹ In fact, to the contrary, it appears that Dr. Schumacher viewed the Corps' site visit as within his control, despite the fact that he was requesting a permit transfer that the Corps represents it has discretion over. Exhibit 16.

²² The Corps represented to the court that one of the attendants, Curtis Robin, is a "member of Louisiana Crawfish Producers Association [LCPA]." However, Curtis Robin did not represent LCPA or its interests at that site visit. See Exhibit 17. As the Corps acknowledged, Mr. Robin works for the permit transfer applicant, Dr. Schumacher, so the Corps was fully aware that Mr. Robin was biased in favor of the proposed permittee.

simultaneously with viewing of the area.²³ Conversely, the other side to the controversy, Citizen Groups, was unable to participate in the most effective means to presenting information to the Corps. This significant failure infects the Corps' decision with fatal bias such that its final decision cannot be anything but arbitrary and capricious.

This failure is exacerbated by the absence on the site visit of the only two Corps personnel who had visited the site previously: Gary Couret (Corps botanist), and Randall Firmin (Corps investigator). These two Corps individuals went to the site in March 2010.²⁴ None of the governmental representatives on the 2012 site visit had ever been to the site before. Their absence is particularly curious because the Corps represented to both the court and the proposed permittee that one of the reasons it needed to reevaluate its permitting decision was "the agency's absence of knowledge about the present condition of the property, in particular the permittee's activities and water management practices since we issued these permits more than a year ago."²⁵ The best way for the Corps to evaluate the effectiveness of the permittee's activities and the effects of it since "more than a year ago" would be to include the Corps individuals who saw the property before in the site visit. Instead, the Corps relied exclusively on the permittee, the proposed permittee, and their numerous representatives to relate information on the past condition of the property.

The Corps will likely respond to this comment by saying that it met with Citizen Groups' representatives and allowed them to discuss facts with them, and it will likely say that Citizen Groups' ability to present these written comments provides them the opportunity to present views to the Corps. However, neither process comes anywhere close to equaling the access to the decision-maker that Dr. Schumacher and Scott Sebastien had. Dr. Schumacher, the proposed permittee, not only participated in the site visit, but actually led the site visit, accompanied by his lawyer, his consultant, his associate, and his employee.

The Corps may also respond to this comment by stating that the presence and participation of Louisiana Department of Wildlife and Fisheries (LDWF) personnel in the site visit mitigated the bias inherent in allowing the permit applicant and permittee to conduct the tour. However, the presence of LDWF representatives did not help remove the inherent bias for several reasons. First, the history of this project reveals that the LDWF officials demonstrated either ignorance of or apathy toward the Clean Water Act's permitting requirements for dredge and fill activity in the wetlands. The Corps has stressed repeatedly that the permittee, Scott Sebastien (via his corporation, Mallard Basin, Inc.), supposedly built the pump and dam/water control structure, and dug the ditches upon the advice and recommendation of the LDWF.²⁶ Aside from calling into question LDWF's neutrality, this fact raises an obvious but significant issue. If LDWF was integral in the planning of this work, then it would have to have known that the work was illegal without a Corps permit. Yet, Scott Sebastien did not apply for or receive a permit from the Corps before digging up over 4000 cubic yards of land, building over one-third a

²³ Citizen Groups also note that the proposed transferee conditioned his acquiescence to the site visit on "limited access" to the site. Exhibit 16 at 1.

²⁴ Exhibit 14.

²⁵ Exhibit 18. See also Louisiana Crawfish Producers Association - West, et al. v. Lt. Gen. Robert L. Van Antwerp, et al., No. 50-2.

²⁶ Reevaluation, Attachment I (Declaration of Scott Sebastien) at 2 and Attachment IV; Louisiana Crawfish Producers Association - West, et al. v. Lt. Gen. Robert L. Van Antwerp, et al., No. 73 at 7, 9.

mile of ditches, and damming up Bayou Cane and Fisher Lake.²⁷ Therefore, either one of several things is true about the LDWF personnel. Either they are not well informed about the requirements of the Clean Water Act, in which case their opinion should have little bearing on this Clean Water Act permit decision; or they knew the work required a Corps permit and did not inform Mr. Sebastien of that, in which case their motives are suspect; or they informed Mr. Sebastien that he needed a permit, but turned a blind eye to his failure to apply for one.

Second, two of the three LDWF personnel present at the site visit are waterfowl specialists. Their expertise, and statements about the merits of the project, are therefore limited to its benefits for waterfowl.²⁸ Citizen Groups do not disagree that the project works great for the permittees to attract mallards and other ducks that migrate to Louisiana in the late fall and winter. However, the rest of the project's impacts on the ecosystem and human environment are negative.

Third, though the Corps also brought a LDWF black bear biologist to the March 2012 site visit, both the Corps and the LDWF have known for years that the area was designated under the Endangered Species Act as critical habitat for the black bear.²⁹ Yet, despite the LDWF's apparent early involvement with the project, the administrative record that the Corps filed with the court in the ongoing litigation reflects not one word from it or the LDWF about the need to examine the impacts of the project on the black bear.³⁰

Thus, the Corps' bias cannot be removed after-the-fact. The biased site visit led the Corps to the conclusions it reached, many of which are flatly erroneous. In fact, the Corps did

²⁷ See *Louisiana Crawfish Producers Association - West, et al. v. Lt. Gen. Robert L. Van Antwerp, et al.*, No. 38-30 at 143.

²⁸ The LDWF's guidance to the Mr. Sebastien focused on making the property conducive for duck hunting. In a letter to the Corps responding to comments on its permit application, Mallard Basin's representative stated: "The applicant purchased this land solely to provide recreation by family and friends. Everything that has been done on this land was done to enhance that recreational experience. The applicant sought advice from the Louisiana Department of Wildlife and Fisheries and Ducks Unlimited to ensure that the recreational opportunities available on this property were maximized." *Louisiana Crawfish Producers Association - West, et al. v. Lt. Gen. Robert L. Van Antwerp, et al.*, No. 38-23 at 108 (attached as Exhibit 19).

²⁹ The Corps also invited Paul Davidson, who it identified as a biologist and chairman of the Louisiana Black Bear Conservation Coalition ("the BBCC"). Mr. Davidson's neutrality is questionable, and his organization has exhibited hostility toward federal protections for the black bear. The BBCC went on record twice opposing designation of critical habitat for the black bear, which the LCRA-West sued for. See Exhibits 20 and 21. Until recently, when it closed its website, the BBCC's website stated that "[t]he BBCC is a long-standing partner of the timber and the oil and gas industries, and large- and small-scale private landowners." *Black Bear Conservation Coalition Corporate Partnership Program*, BLACK BEAR CONSERVATION COAL., <http://www.bbcc.org/corp-donors/default.aspx> (as visited May 4, 2012). Much of BBCC's board consists of timber and landowner interests. In fact, the American Forest and Paper Association plugged the BBCC's work when submitting its comment opposing the black bear critical habitat designation. Exhibit 22. Further, there is no evidence in the record that Mr. Davidson has knowledge of the Fisher Lake site or its history.

³⁰ In fact, no LDWF documentation reflects any consideration of the effects of the project on the black bear until after the remand and the Corps' invitation to the site visit. Counsel for Citizen Groups filed a Public Records Request with the LDWF in December 2010 asking for all material related to this project. The responsive material, included as Exhibit 23 (in globo) to these comments, contains no indication that LDWF considered the black bear when it provided advice to Mr. Sebastien or when it drew up the July 2010 Management Plan.

not even properly characterize the action it was supposed to be analyzing in its decision document. In its reevaluation, the Corps defines the action it is analyzing as "the work undertaken by Mallard Basin during the present century, and excludes the pre-existing original earthen embankment and water conveyance ditch."³¹ However, the water conveyance ditch is part of the project Mallard Basin illegally put in and which the Corps permitted. The Corps' original public notice, its original decision document, and its permit demonstrate that Mallard Basin dug the water conveyance ditch.³² Though the permittees may have tried to rewrite history when they discussed the project during the site visit, the record is clear.³³

B. The Corps' Policy of Refusing to Accompany Citizens to Investigate Violations in the Atchafalaya Basin But Instead Accompanying Violators On Its Investigations Infects Its Decisions on After-the-Fact Permits With Bias and Renders These Decisions Arbitrary and Capricious.

As stated above, both times that the Corps visited the site of the Mallard Basin project, it allowed the entity seeking the permit to lead the site visit, take the Corps to the areas it viewed, and point out various features while giving information to explain those features. In March 2010, the Corps went with Scott Sebastien, likely in his boat, though the Corps issued a cease and desist order to him that same day for having engaged in illegal activity. And, as also stated above, the Corps accompanied Mr. Sebastien and Dr. Schumacher on the March 2012 site visit. On that occasion, the Corps documents that it travelled in Dr. Schumacher's boats and ATVs.³⁴

Yet, as documented in a letter to the Corps on behalf of Atchafalaya Basinkeeper Dean Wilson, the Corps has now ensured that this pattern of one-sided input on violations of the Clean Water Act in the Basin will continue indefinitely.³⁵ The Corps now refuses to accompany citizens, like Dean Wilson, to investigate violations of the Clean Water Act which they report.³⁶ Given that the Enforcement Division of the New Orleans District of the Corps has no boats to investigate violations, it is unclear how the Corps will enforce violations of Section 404 of the Clean Water Act. The Corps may choose to continue its prior longstanding practice, followed in this case, of allowing the alleged violators to direct it to the area where they are allegedly breaking the law. Thus, with respect to any after-the-fact permit the Corps issues, including this one, the Corps' policy ensures that its permitting decision will be either biased, or arbitrary and capricious.

³¹ Reevaluation at 6.

³² Exhibits 24 (describing character of work as "Conduct dredging operations to construct 1,978 linear feet of new ditch and to maintain 9,019 feet of existing ditch used to convey water from the Atchafalaya River . . ."); 9 (describing purpose of the project as to "conduct excavation activities to remove 4,062 cubic yards of native material, placed and spread along 387 feet of maintained access trail so as to construct 1,878 linear feet of new ditch . . ."); and 25 (which describes the project as: "Excavate a water conveyance ditch, clean out an existing ditch and replace/upgrade existing water control structures . . .").

³³ Even if the ditch had existed previously in some shallower or narrower form, Mallard Basin dredged the wetlands to create the ditch that is currently there. It illegally dredged, the relevant activity under the Clean Water Act.

³⁴ Exhibit 15.

³⁵ Exhibit 26.

³⁶ Though the Corps announced this policy to Dean Wilson on March 1, 2012, less than a month later it felt there was no problem in it accompanying Dr. Schumacher in his boat and ATV.

In addition to being arbitrary and capricious and biased, this policy of the New Orleans District of the Corps contradicts the Corps' own regulations. At 33 C.F.R. § 326.3(a), the regulations state: "To detect unauthorized activities requiring permits, district engineers should make the best use of all available resources."

IV. THE CORPS' REEVALUATION DECISION AND AFTER-THE-FACT PERMITTING PROGRAM IN THE BASIN VIOLATES THE ENDANGERED SPECIES ACT.

A. The Corps' Reevaluation Decision, Like Its Original Permitting Decision, Violates the Endangered Species Act.

In its original evaluation of Mallard Basin's after-the-fact permit application, the Corps did not once mention the Louisiana black bear despite the Basinkeeper's reminding the Corps of its lack of compliance with its obligations to do so under the Endangered Species Act.³⁷ Its Reevaluation discusses the black bear, because Citizen Groups had sued it over this issue, among others, and the reason it conducted the reevaluation was to avoid a judicial finding that it blatantly violated the law when it ignored the black bear when evaluating a project in its critical habitat.

Nevertheless, the Corps' Reevaluation once again violates the Endangered Species Act ("the Act"). Section 7(a)(2) of the Act requires that permitting agencies "in consultation with and with the assistance of the Secretary [of the Interior], insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species . . ." 16 U.S.C. § 1536(a)(2). In its Reevaluation decision, the Corps both failed to consult with the USFWS (the representative agency for the Secretary of the Interior) and failed to insure that the project "is not likely to result in the destruction or adverse modification of critical habitat. Further, the Corps' conclusion that the project "is not likely to adversely affect [] the Louisiana black bear" is arbitrary and capricious.

In reaching its conclusion, the Corps did not consult with the USFWS. The USFWS' policy, expressed in writing to the Corps in connection with this project, is that "the Service does not enter into section 7 consultations on permit applications when applicants are seeking "after-the-fact" authorizations for projects or portions of projects that have already been completed."³⁸ The USFWS believes that "completed projects effectively limit any options for formulation or implementation of reasonable and prudent alternatives" and that "[t]he consultation process is intended to address the impacts of 'proposed' actions rather than past, ongoing, or future effects of completed projects." This opinion finds support in Section 7(d) of the Act where Congress

³⁷ Exhibit 9. Though in its Reevaluation the Corps says that it "anticipated receiving comments about potential project effects on the Louisiana black bear from the USFWS, after we posted a request for public comment on May 24, 2010," in fact, the record from the Corps' original decision belies this representation. Instead, the record reveals that the Corps, consistent with its regular permitting practices, ignored the black bear, and made no effort to contact the United States Fish and Wildlife Service (USFWS). See Exhibit 9 (Despite Leigh Haynie comment about the black bear, Corps stated: "During the Corps 20 day public notice comment period, there were no comments received concerning threatened or endangered species.").

³⁸ Reevaluation at Attachment VII.

provided that, after initiation of consultation, "the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources . . ." 16 U.S.C. § 1536(d).

Because compliance with the Endangered Species Act requires consultation with the USFWS, the Corps' decision violates the Endangered Species Act.

B. The Corps' Arbitrary and Capricious Assessment of the Impacts of the Project on the Black Bear Violated the Endangered Species Act Requirement That It Insure That Any Action It Authorizes Will Not Jeopardize the Black Bear Or Destroy or Adversely Modify Its Critical Habitat.

In its Reevaluation and original decision, the Corps failed to insure that the Mallard Basin project did not jeopardize the black bear or result in the destruction or adverse modification of its critical habitat. Its conclusion that the project is not likely to adversely affect the black bear, despite general support for that opinion from two parties invited to the site visit, is arbitrary and capricious. This is due both to the site visit issues discussed above and to the Corps' reliance on insufficient evidence, as discussed below.

The Corps' determination that the project is not likely to adversely affect the black bear was made with absolutely no firsthand knowledge of the Fisher Lake site before the project was illegally put in sometime around 1999. Nor has either of the site visit attendees who opined about the project's effects on the black bear ever visited the Fisher Lake area before March of 2012. Further, Maria Davidson of the LDWF, upon whom the Corps relies and the only official present at the site visit as Corps-invited black bear expert, provided not an iota of detail in her one-sentence conclusion that the project would not impact the black bear.³⁹ Therefore, the Corps' decision that the project itself and the changes it caused in that area of the Basin not likely to affect the black bear is necessarily arbitrary and capricious.⁴⁰

Additionally, the Corps' assessment did not have the concurrence of the USFWS and, therefore, does not satisfy the Corps' duties under the Act. Likewise, the Corps did not consult with the USFWS on the potential effects of the project on the Ivory-billed woodpecker or the Florida panther, in violation of the Act.

C. The Corps' After-the-Fact Permitting Program in the Basin Violates the Endangered Species Act.

³⁹ Reevaluation at Attach. X. Of note also is the fact that the Corps specifically asked Ms. Davidson her opinion on the effect of terminating the project and removing the Mallard Basin-installed structures on the black bear. Reevaluation at Attach. III. She provided no response to this question. Likewise, Mr. Kyle Balkum of the LDWF Habitat section, who did not attend the site visit, issued a one-sentence opinion that he had no objection to the management plan. Reevaluation at Attach. VIII. He did not mention the black bear.

⁴⁰ Paul Davidson (who suffers from significant bias, as discussed above) stated that berries and other soft mast exists on the site which the black bear can eat. Citizen Groups note that Paul Davidson, and the other site visit attendees, visited the site when berries were in bloom and Fisher Lake was full of water. The Corps, and its "experts" should address what the bears will eat when the berries are gone and the lake is drained dry.

As noted above, the USFWS' policy is not to consult on any after-the-fact permits because these permits approve activity that has already (and illegally) been put in place, sometimes years prior to the permitting. Therefore, according to the USFWS, it is not possible to conform with the Endangered Species Act's requirements. Because of this, the Corps' after-the-fact permitting program, established at 33 C.F.R. § 326.3(e), as applied in the Basin and particularly as applied in critical habitat of the black bear, violates the Endangered Species Act.

**D. The Corps Has No Program For the Conservation
of the Black Bear in Conjunction With Its Authority to Permit.**

Section 7(a)(1) of the Endangered Species Act requires that all federal agencies, in consultation with the USFWS, shall "utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species . . ." 16 U.S.C. § 1536(a)(1). The Corps permits dredge and fill activities in the wetlands as part of its authority, yet it has no program for the conservation of the black bear (or likely any other threatened or endangered species) in conjunction with its permitting authority. The Corps has easements and other programs of some benefit to the black bear, but none of these programs relate at all to its permitting function. The Corps, therefore, is in violation of this requirement of the Act.

**V. THE CORPS FAILED TO CONSIDER THE CUMULATIVE IMPACTS OF
ITS PERMITTING PROJECTS IN THE BASIN AND ITS AFTER-THE-FACT
PERMITTING PROGRAM IN PARTICULAR.**

Under both the 404(b)(1) Guidelines and the Corps regulations, the Corps is required to consider the cumulative impacts of the proposed project in conjunction with other projects in the wetland area.⁴¹ The Corps conducted a cumulative impacts assessment, but failed entirely in this assessment to consider the effects of its permitting program. The Corps' cumulative impacts assessment in its reevaluation considered the cumulative impacts of negative changes that various major projects like construction of the Whiskey Bay Pilot Channel have had on accretion and lack of water flow in the Basin.⁴² It then concludes that the project helps counteract these changes by bringing water to Fisher Lake.

The Corps never considers the overall negative effect that its permitting of individual projects like the Fisher Lake project have on the Basin. The Corps is well aware of the problem in the Basin of individuals and corporations damming off, impounding, obstructing, or otherwise blocking parts of the Basin. The potential of these types of projects to cumulatively impact the Basin in a negative way is huge. In 2005, work very similar to Mallard Basin's was started illegally in Lost Lake and was stopped by a Basinkeeper lawsuit.⁴³ In 2006, a landowner completely drained Lake Rycade, and after LCPA and the Basinkeeper complained to the Corps,

⁴¹ 40 C.F.R. § 230.11(g); 33 C.F.R. § 320.4(a)(1).

⁴² Reevaluation at 21.

⁴³ Exhibit 27. The Lost Lake situation also demonstrates how the Corps has sent a clear message to violators in the Basin that they can violate Section 404 of the Clean Water Act with no repercussions. In Lost Lake the work was done illegally, the Corps accepted an after-the-fact permit application, and publicly noticed its intent to issue the permit.

it made them restore the site. These inland lakes, like Fisher Lake, are critical to the ecology of the entire Basin, and we may lose them forever if projects like this are authorized. Likewise, the Corps must consider the impact of logging operations in the Basin, where the same cypress which the Corps extols the virtue of in the Fisher Lake area are being cut down.

Last, the Corps must consider the cumulative impact of its after-the-fact permitting program in the Basin. The program sends the message to would-be violators in the Basin that no negative consequences will result from destroying wetlands without a permit. If they happen to be caught, they can just apply for an after-the-fact permit. This program cumulatively causes much destruction of wetlands in the Basin.

VI. THE CORPS' REEVALUATION DECISION VIOLATES THE 404(B)(1) GUIDELINES.

The Corps' permitting authority under Section 404 of the Clean Water Act is subject to EPA guidelines, known as "404(b)(1) guidelines." 33 U.S.C. § 1344(b)(1). *See also* 40 C.F.R. § 230.2(a), and 33 C.F.R. §§ 320.4(a)(1) ("a permit will be denied if the discharge . . . would not comply with the [EPA]'s 404(b)(1) guidelines") & 323.6(a). The Corps' Reevaluation decision to reissue the permits violates the 404(b)(1) guidelines ("Guidelines").

A. The Corps Erroneously Decided Against the "No Action" Alternative.

The Guidelines 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, so long as the alternative does not have other significant adverse environmental consequences." 40 C.F.R. § 230.10(a). Further, they provide: "[W]here a discharge is proposed for a special aquatic site [*i.e.*, wetlands], all practicable alternatives to the proposed discharge which do not involve a discharge into a special aquatic site are presumed to have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise." 40 C.F.R. § 230.10(a)(3).

The project area is in wetlands, so the presumption applies that the "no action" discharge would have less of an adverse impact on the aquatic ecosystem, and the Corps must clearly demonstrate otherwise to avoid the prohibition contained in this portion of the Guidelines. The Corps, however, has not demonstrated that the "no action" alternative has less of an impact. In fact, the "no action" alternative is the least damaging one.

In this portion of its analysis, the Corps errs significantly in several ways. To begin with, the Corps' entire rationale is internally inconsistent and defies logic and reason. When rejecting the "no action" alternative, which would require restoring the area to pre-project conditions, the Corps concludes: "On the basis of this evidence we conclude that the No Action Alternative, requiring removal of key features of the property's water conveyance system, would end a hydrological management regime that has prevailed at Fisher Bottom in various forms for over 50 years and was designed to sustain a high-quality forested wetland environment."⁴⁴ This is impossible. How could removing something which was installed in 1999/2000 possibly end

⁴⁴ Reevaluation at 7.

something that has existed for 50 years? Even if the Corps was right that Fisher Lake has been managed this same way for the last 50 years (which it is not), the project was installed in the last thirteen years. If the "regime" existed for 50 years, long before Mallard Basin came along, then it will remain after Mallard Basin leaves, taking its project with it. The Corps' rationale simply makes no sense.

The second way in which the Corps errs in this discussion is where the Corps finds that: "[i]mplementation of the no action plan would substantially diminish Fisher Bottom's water retention capacity" and that without the project "Fisher Bottom would hold less water throughout the year and would tend to dry out more quickly when flood waters annually recede, leaving the site significantly drier than it has been in recent decades."⁴⁵ However, under the management plan which the current and proposed permittee manage the property, **Fisher Lake is drained dry for several months of the year.**⁴⁶ Thus it is difficult to understand what logic the Corps applies when it finds that Fisher Lake would dry out more quickly without the project. A dry lake benefits none of the wildlife that are in the area. Fish cannot migrate in and out of the lake during the spring floods. Alligators have to abandon their nests and baby alligators die of predation or starvation. Teals cannot use the lake any longer. Bald eagles and ospreys have no place to fish. Whistling ducks, wood ducks, coots, gallinules, marsh hens, common moor hens, ibis, wood storks, and roseate spoonbills are some of the birds that depend on lakes like Fisher Lake this time of the year. Otters and mink do not have fish to eat and will lose their habitat for three months.

Further, even if the Corps were correct that the project helps Fisher Lake stay wetter and improves its habitat, the Corps did not consider the effect of the dam/water control structure on the rest of the area. All of these other effects are negative. With regard to water flow, with the possible exception of the period when the permittee is actively draining the lake (which it does at a slow rate), the dam prevents water from Fisher Lake from flowing south into Bayou Cane. More generally, it prevents the natural hydrologic flow of water into and out of Fisher Lake, Bayou Cane, and Lake Warner. Thus, even if the project did keep water in Fisher Lake, it is at the expense of Bayou Cane and the area south of Fisher Lake. Thus, the Corps appears to choose the benefit of the couple of individuals who claim to own Fisher Lake (and their friends) and who prevent the public from accessing it over the benefit of the fish and other aquatic life, as well as the public, who are not currently being prevented from accessing the area south of the lake, Bayou Cane. With regard to fish and other aquatic life, when the lake is drained dry, fish cannot live in it. Because of the dam, fish cannot spawn in Fisher Lake and cannot access the lake from Bayou Cane or vice versa. With respect to the black bear, the Corps cannot know whether the dam negatively affected it or not because the Corps cannot know whether the site as it existed before the project was installed represented better conditions than it presently does for the black bear. The Corps did not adequately analyze alternatives with respect to their impacts on the black bear, including the no action alternative.

⁴⁵ Reevaluation at 6. Of note, the Corps' finding about what the site was like in recent decades is not based on its own knowledge, as there is no evidence in either this decision or the administrative record of the prior one that the Corps ever visited the Fisher Lake area in recent decades, or any time other than the two times it visited the site in March 2010 and March 2012.

⁴⁶ Reevaluation at Attach. II.

The Corps explicitly recognizes that its analysis of the benefits of the project is exclusively from the perspective of the permittees when it discusses the extent of the public and private need for the proposed work: "The project would provide private landowners recreational opportunities through the management of approximately 600 acres of forested swamp and bottomland hardwoods."⁴⁷ Again, when discussing alternatives, the Corps only discusses them from the perspective of the permittees: "We conclude that this [the No Action alternative] would likely lead to a decline in the quality and health of the property's inundated wetland habitat that supports recreational fishing and hunting opportunities for the landowners and their invitees . . ."⁴⁸ Immediately after this latter language, however, the Corps adds another completely illogical, unsupported, and false statement, perhaps because it recognizes the problem with finding that the project only benefits the permittees. In full, the Corps here states: "We conclude that this would likely lead to a decline in the quality and health of the property's inundated wetland habitat that supports recreational fishing and hunting opportunities for the landowners and their invitees, as well as for local crawfishermen who ply neighboring waters, because water impoundment would diminish, shrinking the aquatic footprint and decreasing food sources at Fisher Bottom, pressuring fish and wildlife communities now established at the site." (Emphasis added).

How can any benefit that occurs at Fisher Bottom (Fisher Lake) possibly enure to the benefit of local crawfishermen? Local crawfishermen can no longer access Fisher Lake because of the dam that Mallard Basin installed.⁴⁹ As for plying neighboring waters, this is a curious remark on the Corps' part. Which neighboring waters is the Corps admitting that crawfishermen ply? Elsewhere in its decision the Corps finds that the density of trees and the dryness of the area south of the lake (in Bayou Cane) prevents access by boat to Fisher Lake from the south.⁵⁰

In fact, the crawfishermen do access the area south of Fisher Lake, which older maps label as Bayou Cane, and Lake Warner. However, the water control structure at the south end of Fisher Lake provides no benefit to the Bayou Cane and Lake Warner areas. Therefore, the Corps' finding of the benefits of the "no action" alternative, even if correct, are findings of benefit to only the individuals who claim ownership of Fisher Lake: Dr. Schumacher and his invitees.

B. The Corps Did Not Adequately Evaluate Other Alternatives.

Again, the Guidelines provide that: "where a discharge is proposed for a special aquatic site (i.e., wetlands), all practicable alternatives to the proposed discharge which do not involve a discharge into a special aquatic site are presumed to have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise." 40 C.F.R. § 230.10(a)(3).

In its discussion of alternatives, the Corps again errs. First, it never considers allowing the pump and ditches north of the lake to remain, but requiring removal of the dam and water

⁴⁷ Reevaluation at 28.

⁴⁸ Reevaluation at 7.

⁴⁹ Additionally, the Corps is well aware of the fact that Scott Sebastien, his brother who claims title to the adjoining property, and Mallard Basin, Inc., consider any entry by the public into the Fisher Lake area as trespass. In fact, just south of Fisher Lake, in Lake Warner, crawfishermen were arrested for setting their traps in the lake.

⁵⁰ Reevaluation at 18, 26. A discussion on the falsity of these findings is included later in these comments.

control structure south of the lake. Similarly, it never considers allowing the pump and ditches north of the lake to remain, but requiring an alternative water control structure which would hold water in Fisher Lake during dry periods yet allow the public (including crawfishermen and fishermen) access to the lake during the Spring and other high water periods. Additionally, it limits its analysis to a discussion of whether alternatives would offer the same benefits to Fisher Lake as the current project, without examining whether alternatives to the project would provide less negative impacts to the rest of the area.

Much as Scott Sebastien and the Corps attempt to redefine the project's purpose, the record is clear that the project, when illegally put in in 1999-2001, had one purpose in mind: maximization of Fisher Lake as a duck hunting site.⁵¹ That was the reason Scott Sebastien got the advice of the LDWF waterfowl personnel. No botanists or large carnivore experts were asked their opinions. In fact, the letter from Tony Vidrine of the LDWF, which the Corps attached to its reevaluation, makes this very clear. He first states that the landowner invited him and Robert Helm of the LDWF "to give recommendations for improving waterfowl habitat." He then explains the basis of his advice about the water control structure: "Many undesirable plant species were invading this area and without repairs to the old structure this area would be lost as desirable waterfowl habitat in the future. With the ability to control water levels on this site, more desirable waterfowl plants [sic] foods would be able to thrive on this site."⁵² The record, then, supports a finding that this was, and remains, the purpose of the project and its benefit, a benefit which enures only to the permittees.

To the extent that Fisher Lake requires additional water, the two alternatives discussed above would both continue to serve this purpose. Indeed, **only the pump and ditch north of Fisher Lake actually add water to the site.** The dam/water control structure only serves to allow the draining of the lake. Though the Corps may state that the structure also serves to hold water in the lake once it is pumped in, a structure of that size is unnecessary for this purpose.⁵³ The small wooden dams that the permittees argued were in place before also served to hold water in the lake. However, they did not allow draining of the lake until dry.

Draining the lake until dry is only necessary for one purpose: to facilitate the permittees' duck hunting enterprises. Draining the lake allows them to spray herbicides on the vegetation in Fisher Lake so that they can plant grasses that attract ducks. Again, the record is clear that this is the purpose of draining the lake. (Though the Corps states that draining the lake alone (without herbicides) helps clear out invasive vegetation like Black willow and Chinese tallow, the Corps is wrong. In the attached letter from Gary Schaffer, Professor of Biological Sciences at Southeastern Louisiana University specializing in Wetland Ecology, Professor Shaffer corrects that drying the lake actually encourages, not discourages, the growth of invasive species like Black willow, Chinese tallow, cattail, and Japanese privet.⁵⁴

⁵¹ See Exhibit 18; see also Permit Application, attached as Exhibit 28.

⁵² Reevaluation at Attach. IV.

⁵³ Citizen Groups also note that the water which the structure holds in the lake is water pumped into the lake from the Whiskey Bay Pilot Channel, because this is now the only source of water to the lake as it is cut off from the rest of the Basin by the water control structure. The Pilot Channel water is laden with sediment, so pumping this water in actually increases the sediment accretion problem, not only in Fisher Lake, but in areas south of Fisher Lake that receive the Fisher Lake water once it is drained out.

⁵⁴ Exhibit 29.

Further, the alternative of keeping the pump but requiring removal of the water control structure benefits the public because they will be able to access Fisher Lake. It benefits the Basin because the natural flow of water would be restored. It benefits fish because they can freely travel between Fisher Lake and Bayou Cane/Lake Warner and can travel up Bayou Cane to Fisher Lake to spawn.

The Corps likewise failed to adequately consider alternative sites because it only considered the benefits of the project to the permittees. While the Corps repeatedly extols the virtue of the project for Fisher Lake (and has no basis of knowledge for how many of these benefits existed in the area before the project was put in place), it fails to demonstrate how any of this benefits anyone else. By definition, impounding water such that a particular area is ensured a constant level means that the areas that lose the impounded water end up drier and lose the same benefits that the favored area gains. The Corps fails to consider whether allowing Fisher Lake to impound the natural Basin water is at the expense of the areas south of Fisher Lake, which the Corps itself describes as drier (without realizing the direct connection between the dryness of those areas and the impounded water in Fisher Lake).

Further, the permittees could buy or create artificial ponds, crawfish ponds, or rice fields in non-wetlands and do the same kind of management for ducks. Instead, the Corps wants to allow them to destroy and prohibit access to one of the most productive and important wetlands in North America, merely for their own private enjoyment. And this despite the fact that the permittee destroyed the wetlands initially without applying for the proper permits.

C. The Corps Inadequately Evaluated Other Guidelines.

The Corps' evaluation of the other 404(b)(1) guidelines suffers from the same bias and concomitant false and arbitrary and capricious conclusions as the rest of its analysis because it looks at costs and benefits exclusively from the position of the permittees. Thus, for example, when discussing floodwater circulation patterns, the Corps says these are not disturbed because at 18 feet or higher water levels, the structures are submerged. The Corps itself admits elsewhere that the levels only reach this high every five years or so. The Corps says that the project will not impact regional flood control functions, but the dam completely blocks the water, so this conclusion defies logic. When discussing navigation impacts, the Corps summarily dismisses multiple crawfishermen's sworn statements that they regularly navigated in and out of Fisher Lake in favor of what it was told by Sebastien, Schumacher, and their people at the site visit, and what Schumacher and Sebastien deigned to show the Corps when controlling its access. Though Dean Wilson had offered to take the Corps with him and navigate through Bayou Cane to the Fisher Lake area during high water periods, which would directly prove to the Corps how wrong it was, the Corps refused. This paradigm of arbitrary and capricious behavior is like trying to prove to someone that it is raining by offering to simply open the blinds on the windows and have that person refuse to look. And in perhaps the most obvious example of the Corps' bias, it completely dismisses economic and food production issues, so vital to the Cajun crawfishermen, by towing the Mallard Basin/Atchafalaya Investments' (and their attorneys') company line:

"[L]egal entry by commercial crawfishermen may require permission from the property's owners."⁵⁵

The 404(b)(1) guidelines prohibit permits for projects that will degrade the waters. They provide that "no discharge of dredged or fill material shall be permitted which will cause or contribute to significant degradation of the waters of the United States." 40 C.F.R. § 230.10(c). The guidelines provide that "effects contributing to significant degradation [] include . . . [s]ignificantly adverse effects of the discharge of pollutants on aquatic ecosystem diversity, productivity, and stability. Such effects may include, but are not limited to, loss of fish and wildlife habitat or loss of the capacity of a wetland to assimilate nutrients, purify water, or reduce wave energy. . . ." *Id.* at § 230.10(c)(3). Effects contributing to degradation also include "[s]ignificantly adverse effects of discharge of pollutants on recreational, aesthetic, and economic values." *Id.* at § 230.10(c)(4).

The Corps did not assess these factors. It did not assess the fact that Fisher Lake is lost as habitat when the lake is drained, and that the project decreases diversity and productivity of Fisher Lake. The Corps did not consider the effect of the project on public recreation or the effect of the project on the public's aesthetic appreciation. It did not consider the economic harm to the Cajun crawfishermen, who cannot fish in Fisher Lake.

Additionally, the Corps has a duty to independently analyze the effect of the project on water quality. Here the Corps relied on a water quality certification issued by the Louisiana Department of Environmental Quality, but this is insufficient, particularly as the LDEQ did not ever visit the site. Hence, its assessment of the effect of the project on water quality is arbitrary and capricious.

The 404(b)(1) guidelines also provide that "no discharge of dredged or fill material shall be permitted unless appropriate and practical steps have been taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystem." 40 C.F.R. § 230.10(d). Such steps include "[d]esigning the discharge to avoid a disruption of periodic water inundation patterns" and "[d]esigning the discharge of dredged or fill material to minimize or prevent the creation of standing bodies of water in areas of normally fluctuating water levels, and minimize or prevent the drainage of areas subject to such fluctuations." 40 C.F.R. § 230.70(b) & (f). The Corps did not address the fact that the project creates all of these negative impacts.

The 404(b)(1) guidelines additionally provide: "No discharge of dredged or fill material shall be permitted if it . . . jeopardizes the continued existence of species listed as endangered or threatened under the Endangered Species Act of 1973, as amended, or results in likelihood of the destruction or adverse modification of a habitat which is determined . . . to be a critical habitat." 40 C.F.R. § 230.10(b)(3). As discussed above, the Corps cannot assure that this guideline has been met.

Finally, the Guidelines require consideration of secondary impacts. 40 C.F.R. § 230.11(h). Specifically mentioned are fluctuating water levels in an impoundment and downstream from an impoundment associated with the operation of a dam. *Id.* at (h)(2). These

⁵⁵ Reevaluation at 19.

are precisely the negative impacts discussed repeatedly in these comments, yet the Corps does not address them.

VII. THE CORPS' DECISION VIOLATES THE NATIONAL ENVIRONMENTAL POLICY ACT.

The National Environmental Policy Act (NEPA) requires that "all agencies of the Federal Government . . . include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official" on the environmental impacts of and alternatives to the proposed action. 42 U.S.C. § 4332(C). NEPA likewise requires an analysis of the cumulative impacts of the proposed action. 40 C.F.R. § 1508.25(c).

Thus, the Corps' failure to adequately analyze alternatives to the permittees' project, failure to adequately identify and consider its environmental impacts, and failure to consider its cumulative impacts, discussed above, not only constitute a violation of EPA and Corps regulations, it also constitutes a violation of NEPA.

VIII. THE CORPS' CONCLUSION THAT TRANSFER OF THE PERMITS IS NOT CONTRARY TO THE PUBLIC INTEREST IS PATENTLY INCORRECT.

The Corps' Regulations require its decision on issuance of a 404 permit to be based on an evaluation of whether the permit is in the public interest. 33 C.F.R. § 320.4(a)(1). Among the public interest factors the Corps must consider are the extent of the public and private need for the work and the extent of detrimental effect the work would have on public uses of the area. *Id.* at § 320.4(a)(2)(i), (iii). Navigation and "the needs and welfare of the people" are public interest factors that the Corps must take into account. *Id.* at 320.4(a)(1).

Plainly put, a project that blocks public access to a previously-accessible area, including access by crawfishermen and fishermen who previously used the area for their livelihood, cannot be in the public interest. Fishermen are losing hundreds of acres of fishing grounds, yet the Corps did not consider this. The loss of revenue and the loss of the Cajun way of life is a significant interest the Corps failed to take into account. Even assuming that every benefit the Corps assigns to this project were correct, and the Fisher Lake area north of the water control structure is, in fact, a paradise on earth, the project would still only benefit a handful of private individuals. And it would do this at the expense of the rest of the public.

The Corps' reevaluation decision is replete with language that extols the benefit of the project for the permittees. However, the Corps fails to acknowledge the significant detriment that the project poses for everyone else. It does this by grossly misrepresenting or misunderstanding crucial facts, and many of these errors result from the fact that it allowed only the current and proposed permittees to participate in the site visit.

A. The Corps' Conclusion That No Significant Impediment to Navigation on Public Waters Will Be Caused By Continued Operation of the Project's Water Management Infrastructure

Is Arbitrary and Capricious and An Abuse of Discretion.

In two places in its decision, the Corps concludes that the project does not obstruct navigation.⁵⁶ It essentially concludes that with or without the water control structure, navigation into and out of Fisher Lake is not possible. It gives three reasons for this uninformed, misinformed, or intentionally-false finding. First, it states that "during multiple site visits to Fisher Bottom the District's biologists observed a wooded floodplain below the water control structure, where a shallow ephemeral channel diffuses into a forested area. Navigation across this water discharge area would be impossible even by the shallowest of watercraft during most of the year."⁵⁷

The Corps likely based its conclusion in part on information given it by the current permittee, the proposed permittee, and the proposed permittee's employee.⁵⁸ They told the Corps that the Atchafalaya River must reach 18 feet for the Fisher Lake area to be accessible by boat, and that this only occurs approximately every five years.⁵⁹ This statement, and the Corps' implication that the channel, which is Bayou Cane, is not navigable, it is flatly wrong. Numerous crawfishermen testified via declarations and affidavits that they accessed Fisher Lake from the south via this "shallow ephemeral channel" (Bayou Cane) before Mallard Basin's water control structure blocked their access.⁶⁰ The only reason that Fisher Lake is **now** only accessible when the river is at 18 feet is because of the project's large water control structure.

It is not particularly surprising that the Corps got this essential fact wrong. Viewing the Corps' report of its site visit, **it appears that no Corps personnel on the March 30, 2012, site visit actually viewed the area south of the water control structure which serves as the public's access to Fisher Lake.** This despite the Basinkeeper's pleas to let him take them to the bridge in Bayou Cane by boat. In its report of its visit to the site, the Corps lists the parties who travelled south of the water control structure as Link, Olszack, and M. Davidson (LDWF employees), P. Davidson (BBCC), and Sebastien (permittee).⁶¹ Thus, as to the most controversial and least-supported conclusion the Corps makes in its reevaluation – that no one can access Fisher Lake under normal conditions – the Corps had absolutely no direct or first-hand

⁵⁶ Reevaluation at 18, 26.

⁵⁷ Reevaluation at 18. When describing Bayou Cane as a "narrow" and "ephemeral," the Corps also fails to consider that because the project dams Fisher Lake, it blocks the north-south flow of water from Fisher Lake into Bayou Cane.

⁵⁸ Reevaluation at 18.

⁵⁹ Exhibit 15 at 2. It is interesting that the Corps and the permittees are now adopting this position with regard to the navigability of the area. In the original permit application process, the Corps, after reviewing the comments of LCPA-West and the Basinkeeper, asked Mallard Basin to refute the statements in these comments that the project obstructed navigation. In its response, rather than giving the current explanation, the permittee merely stated that "applicant notes that the property discussed is private land and may only be accessed by the Commenter through acts of trespass." Exhibit 30, in globo.

⁶⁰ Exhibit 31, in globo.

⁶¹ Exhibit 15 at 2. The Corps described this separate contingent of the site visit attendees as having "[driven] in an ATV to the end of the dredged ditch where the ditch fades out at a ridge. **This is the site where access is naturally restricted and the Atchafalaya River must reach 18+ flood stage for vessels to access the site.**" Emphasis added.

knowledge to support its conclusion.⁶² It appears the Corps relied exclusively on the statements of Curtis Robin, employee of Dr. Schumacher, and Scott Sebastien, the permittee, to support its conclusion about the lack of accessibility and navigability of the Fisher Lake area. Of course, the Corps never saw this bayou before the structure was in place, when the crawfishermen and other members of the public regularly accessed it in the spring.

Notably, though, the Corps appears to hedge its bets on this critical point. Despite it repeating the permittees' statement that the area is only accessible when the river is at 18 feet, it actually only states that navigation would be impossible on this channel for "most of the year." So the Corps seems to leave open the possibility, which is actually the reality, that the channel, Bayou Cane, is navigable for part of the year.⁶³

The second reason why the Corps erroneously concluded that the project does not impede navigation into Fisher Lake is itself erroneous. The Corps found that "after multiple field investigations of the project site, [] the shallow watercourse below Fisher Bottom's water control structure discharges into a forested floodplain whose mature trees are too tightly distributed to allow access by watercraft, except during extreme flood stages when the Atchafalaya River reaches 17 feet or higher at the Butte LaRose gauge."⁶⁴ This statement is proven false by a number of factors, and the Corps' conclusion appears not only to be based on observation but also to be based on the information it got from the Mr. Sebastien, Dr. Schumacher, and Mr. Robin. Proof of the falsity of this statement is even contained in the Corps' own documentation.

As an initial matter, the Corps' "multiple" field investigations of the site number exactly two. The Corps visited the site on March 17, 2010, and March 30, 2012. There is no indication anywhere in either the record on the original decision or in the reevaluation record that the Corps has been to the site more than twice.

In fact, a plethora of evidence is available to the Corps proving that the Fisher Lake area, in the absence of the illegally-placed structures, is navigable and accessible from Bayou Cane, to the south of the lake. First, as stated earlier, a number of crawfishermen swore that they accessed Fisher Lake through this watercourse, and the crawfishermen know this area far better than the Corps, Dr. Schumacher, or Mr. Sebastien.

Second, Citizen Groups have proven that the waterway is navigable through the trees. Dean Wilson of Atchafalaya Basinkeeper and Mr. Jody Meche of the LCPA-West took a small boat through this waterway and up to a bridge just south of the water control structure as recently as March 10, 2010.⁶⁵ They had no difficulty navigating through the trees, and the water level at

⁶² Additionally, none of the governmental parties who did view that area were focused on the access issue. Link and Olszack are waterbird specialists, and M. Davidson and P. Davidson were there to observe black bear issues.

⁶³ Notably, the same court presiding over Citizen Groups' challenge against these permits has ruled, based on Fifth Circuit precedent, that the fact that a waterbody is only navigable for part of the year does not mean it is nonnavigable as a matter of law. Exhibit 32 at 4.

⁶⁴ Reevaluation at 26.

⁶⁵ The bridge (which was itself illegally built) is approximately 400 feet southwest of the water control structure (as the crow flies) and 500 feet southwest of the structure travelling Bayou Cane.

the time at the Butte La Rose gauge measured 12.6 feet.⁶⁶ Mr. Wilson took photographs as they progressed up the waterway, and has entered those photographs into the public comment record.⁶⁷ Additionally, Butte La Rose gauge readings indicate that the river reaches 12.6 feet generally for about five months of the year every year.⁶⁸ During the original permit proceedings, Mr. Wilson offered to take Mr. Pete Serio of the Corps through this same area, but the offer was not accepted. Mr. Wilson reiterates his standing offer to take Corps decision-makers by boat through this same area during the high water periods in the Basin.⁶⁹

Third, the Corps' own documentation proves that, in fact, the trees are easily spaced far enough apart to allow navigation through them. In conjunction with its 2010 investigation of Mallard Basin's illegal project, the Corps also investigated illegal dredge and fill activities performed by Mr. Sebastien's brother, under the name of his corporation Whiskey Bay Island, L.L.C. Whiskey Bay Island had dug an approximately mile-long ditch (which it alleged was an existing ditch) in wetlands immediately south of the Mallard Basin project site.⁷⁰ This is the same area where Bayou Cane runs through and the same area the Corps discusses as so dense with trees that a narrow boat cannot pass through. Tim Morton, consultant for Whiskey Bay Island, sent a letter to the Corps in conjunction with the Corps investigation.⁷¹ In the letter, when discussing the illegal work that was performed, he stated that no trees needed to be felled for the work because: "This is mainly due to the open canopy found in this area. Random measurements taken along the ditch indicate that spacing between trees varies from 6 to 50 feet." In another Corps document, the Corps itself confirms the spacing between the trees in this area. When discussing Whiskey Bay Island's plan to restore the illegally-dredged area rather than applying for an after-the-fact permit, Mr. Firmin of the Corps stated: "It is our understanding that the trees spacing will allow passage of the equipment without mechanized land clearing."⁷²

In sum, the Corps must reconsider its conclusion that the project site is not accessible to the public, including members of LCPA-West, the Atchafalaya Basinkeeper, and LEAN. The evidence conclusively proves the Corps wrong on this key point. The Fisher Lake area is navigable and accessible to the public during the wet months via Bayou Cane from Lake Warner, and Fisher Lake itself would be accessible to the public were it not for Mallard Basin's water control structure. By permitting this project (via transfer of the permits) the Corps is blocking commerce, navigation, recreation, and other public use and enjoyment of this area of the Basin.

B. The Corps Did Not Actually Consider the Public Interest At All.

⁶⁶ Exhibit 33, in globo.

⁶⁷ A CD containing these pictures was provided to the Corps by hand on August 27, 2012, and are attached to these comments as Exhibit 34.

⁶⁸ See Exhibit 33 in globo.

⁶⁹ Had Mr. Wilson or any other Citizen Group representative been included in the March 2012 site visit, they would have been in a position to take the Corps, the LDWF personnel, the permittees' representatives, and anyone else who was interested through Bayou Cane, and disproved the permittees' and the Corps' misinterpretation/misrepresentation. Now, at the time of the comment period in late summer, the water is not high enough in the area to allow this demonstration.

⁷⁰ Exhibit 35, in globo.

⁷¹ This is the same Tim Morton who served as Scott Sebastien's after-the-fact permit consultant and who accompanied the Corps on the 2012 and 2010 site visits.

⁷² Exhibit 35. Citizen Groups note that it is unclear whether this illegal work was restored properly, and it is possible Whiskey Bay Island, LLC, "restored" the ditch in a way to make the area more difficult to navigate.

All of the benefits which the Corps attributes to the project, even if they are, in fact, changes which are attributable to the project, benefit only the permittees. The project blocks the water from flowing into Bayou Cane for much of the year, including the spring season, physically blocks public access to the Fisher Lake area, and blocks fish and other aquatic life from travel between Fisher Lake and Bayou Cane/Lake Warner. There is no public interest in the project.

IX. THE EARTHEN EMBANKMENT AND OLD WOODEN WEIRS ON THE SITE ARE IRRELEVANT TO THE CORPS' DECISION.

In its reevaluation decision, the Corps finds that "the embankment [along the southeastern end of Fisher Lake] and related infrastructure- the original weirs and the water conveyance ditch- were most likely constructed before 1960 and before enactment of the modern Clean Water Act in 1972."⁷³ From this fact the Corps concludes that "[t]his historical activity" is grandfathered in under the Clean Water Act.

It is unclear what the Corps is trying to do here. However, Citizen Groups have several responses to this argument. First, the existence of the old wooden dams/weirs and earthen embankment are essentially irrelevant to the discussion.⁷⁴ Neither the embankment nor the old weirs presented any problem for the area; they did not impede access to Fisher Lake, they did not block the flow of water to and from Fisher Lake and Bayou Cane/Lake Warner, and they did not operate to allow the previous land manager to drain Fisher Lake completely dry.

This is the point that Citizen Groups have been trying to impress upon the Corps since they discovered the illegal structures and dredging at issue. Mallard Basin's project; that is, the water control structure, the dredged ditches, and the pump; do not continue "a hydrological management regime that has prevailed at Fisher Bottom in various forms for over 50 years and was designed to sustain a high-quality forested wetland environment."⁷⁵ Mallard Basin's (and Dr. Schumacher's) project operates in ways wholly different than any water management activity conducted before, and causes negative impacts which did not result from the prior management. Where before the area was navigable and accessible, now it is not. Where before the area was hydrologically connected with the rest of the Basin through Bayou Cane and Lake Warner, now it is not. Where before Fisher Lake maintained water year-round, now it is drained dry for several months of the year.⁷⁶ Where before fish and other aquatic life could travel freely between Fisher Lake and Bayou Cane/Lake Warner, now they cannot.⁷⁷ Where before Fisher

⁷³ Reevaluation at 4.

⁷⁴ Likewise, the age of the tree on the embankment is irrelevant to the discussion. Citizens Groups do not take issue with the embankment, which may well have been there for decades. Its intended use at the time is unclear, likely to dry out the wetlands, but it did not function as Mallard Basin's does.

⁷⁵ Reevaluation at 7.

⁷⁶ Fisher Lake did dry out somewhat during the summer months prior to Mallard Basin's project, but, as it is on higher ground, even during the summer it maintained enough water to sustain a healthy community of fish and other aquatic life.

⁷⁷ In his letter, BBCC director Paul Davidson says that the outflow of water from the site was "attracting a lot of activity from fish." Reevaluation at Attachment IX. If by this statement he was trying to imply that the

Lake had enough water year-round to preclude spraying of herbicides, now the permittees drain the lake dry so they can spray herbicides.⁷⁸

The Corps has no basis of knowledge as to what Fisher Lake looked like before Scott Sebastien illegally installed his project and no basis of knowledge as to how the Fisher Lake area was managed before Scott Sebastien came along. On the other hand, Citizen Groups' members, particularly the crawfishermen, have firsthand knowledge and experience with Fisher Lake and the entire Basin. In fact, though the Corps has relied exclusively on Scott Sebastien, Dr. Schumacher, and their representatives for faulty information on how the area appeared and was managed before, the crawfishermen and Dean Wilson are the only ones with a true basis of knowledge about the Fisher Lake area and how it was managed before. They have attested to the changes Mallard Basin's project wrought to this area of the Basin and the negative impacts it has had.

However, the Corps does not have to take Citizen Groups' word for the fact that the project is not the same as what existed before. Gary Couret, from the Corps' own Enforcement Division, after going to the site to investigate the violation, stated that the previously-existing wooden weir "has undergone a major upgrade."⁷⁹

Additionally, Dean Wilson has provided the Corps with a perfect example of how Fisher Lake used to be before the project. The example demonstrates that Mallard Basin's (and now Atchafalaya Investments') project continues a trend in the Basin of private individuals making drastic changes to the natural properties of an area so that they can personally benefit, to the detriment of the area, the Basin, and the public. Lake Rycade, an upland lake near and very similar to Fisher Lake, was itself the subject of a project just like Mallard Basin's. In 2006, LCPA and the Atchafalaya Basinkeeper discovered that individuals with control of Lake Rycade set up a dam and dredged ditches that allowed them to drain Lake Rycade. Like Mallard Basin, they performed the work without a permit. As with Fisher Lake, the illegal activity was discovered not by the Corps, but by crawfishermen and fishermen from Citizen Groups. Ultimately, Lake Rycade was restored to its original condition. Dean Wilson and Jody Meche travelled to Lake Rycade recently by boat and filmed the area.⁸⁰ The film demonstrates that Lake Rycade is a vibrant, diverse, and healthy ecosystem without the draining and water control interventions that were illegally put in. This is the way Fisher Lake would look if the Corps made the permittees remove the water control structures that allow them to create a private duck pond.

On this point, Citizen Groups also point out that if the Corps is trying to suggest that Mallard Basin/Atchafalaya Investments' project is somehow "grandfathered in," the provisions

project is good for fish, it is misleading. It is not surprising that fish would be gathered near an outflow of water from a dam that they cannot swim past.

⁷⁸ Though Scott Sebastien stated in his declaration that herbicides are regularly used in the area, numerous publicized materials document the danger of herbicides to aquatic and other life. See Exhibit 36, in globo.

⁷⁹ Exhibit 37.

⁸⁰ Dean Wilson showed the film to Corps regulatory personnel on August 27, 2012, and submitted it on a DVD to be included as a public comment. Corps personnel were invited to accompany Mr. Wilson and Mr. Meche but declined the invitation. See Exhibit 38. Dr. Schumacher, through his attorney, also declined the invitation, as well as a more general invitation from Mr. Wilson to talk, with or without attorneys present. Exhibit 39.

XVI
of the regulation it cites for this proposition preclude this application. The grandfathering provision the Corps cites states that it applies to old activities "unless they were modified." 33 C.F.R. § 330.3. Further, the first paragraph only applies to old activities outside the limits of navigable waters, which Fisher Lake is and most certainly was decades ago. The second paragraph only applies if there is no interference with navigation. That is not the case here.

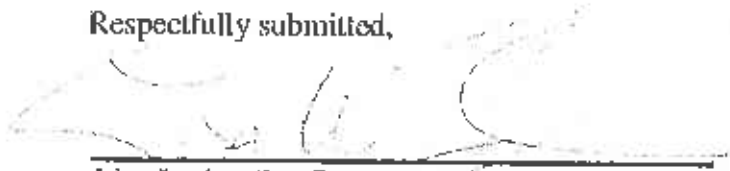
X. CONCLUSION

In sum, the Corps' significantly skewed picture of the reality of Fisher Lake, obtained because its site visit was exclusive to the permittees and not Citizen Groups, has led to a biased and misinformed proposed decision. Mallard Basin's project does not continue a water management regime that had been ongoing for 50 years. Mallard Basin's project significantly alters both the water management and the access formerly existing in the Fisher Lake area. The old wooden dams served to keep water in Fisher Lake during low water periods, but was low enough and small enough to allow both water flow and navigation in the spring. Now, both Fisher Lake and the surrounding area suffer. Fisher Lake suffers as habitat for all fish and wildlife except ducks because the permittees drain it dry for several months of the year. The surrounding area, like Bayou Cane, suffer because aquatic life no longer travel from Fisher Lake to these area and Bayou Cane no longer receives the north-south Basin flow for most of the year, including the important spring season. Most importantly, people suffer because of Mallard Basin's project. Fishermen can no longer access Fisher Lake from Bayou Cane and earn their livelihood there. The public can no longer access Fisher Lake.

The Corps' decision to transfer the permits to Atchafalaya Investments benefits the few individuals who now claim Fisher Lake as their own. Their predecessors illegally converted this public resource into a duck pond for their own private interests, and the Corps blessed it after-the-fact. Given a second chance by the court to get it right, the Corps again chose to reward private parties with the exclusive use of a public resource, to the detriment of not only the public, but the Basin at large.

For the foregoing reasons, the Atchafalaya Basinkeeper, LCPA, and LEAN request that the Corps deny Atchafalaya Investments application to transfer two after-the-fact permits for dredging and filling in wetlands of Louisiana.

Respectfully submitted,



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October 5, 2012

United States Army Corps of Engineers
Regulatory Branch
P.O. Box 60267
New Orleans, Louisiana 70160-0267

Attention: Michael Herrmann

Re: Permittee's Response to Tulane Environmental Law Clinic's Objection and
Comments in Opposition to the Department of the Army Permit Re-evaluation
Document Granting Permits MVN-2010-1080-WLL and MVN-2010-1032-WLL

Dear Mr. Herrmann,

In response to your letter dated September 11, 2012, the following provides Archafalaya Investments, LLC's ("Permittee's") response to the defaming accusations and baseless objections/comments submitted by Tulane Environmental Law Clinic on behalf of numerous citizen groups (collectively referred to as "Plaintiffs") in response to the Department of the Army, Corps of Engineers' ("Corps") Permit Re-evaluation and Revised Decision Document ("Permit Re-evaluation").

Plaintiffs' submission is nothing more than a snide toned work of fiction, filled with unfounded accusations of bias and guesswork in place of a fact-based analysis. Rather than focus on the well supported administrative record, Plaintiffs succumb to desperate measures by calling the Corps a crook and its re-evaluation a sham. Though shocking to read, the tone of Plaintiffs' submission was expected, as Plaintiffs have consistently attacked every decision maker in this litigation, including the Judge.

That being said, Permittee will not waste the Corps time with a point-by-point refutation of Plaintiffs' accusations, as set forth in their 26-page submission (with 35 exhibits totaling more than 360 pages). Permittee elects to rely on the Corps' administrative record, which provides ample evidence supporting the well-reasoned analysis and conclusions set forth in the Permit Re-evaluation. Permittee trusts that the Corps will not be bullied into abandoning its role as a neutral arbiter of compliance with the Clean Water Act, the National Environmental Protection Act, and the Endangered Species Act because of Plaintiffs' outrageous threats. Accordingly, Permittee limits its response to address a few of the material misrepresentations woven throughout Plaintiffs' submission, as follows:

JONES, WALKER, WAECHTER, POITEVENT, CARRERE & DENÈGRE L.L.P.

1. The Corps' March 30, 2012 site visit was not "an enterprise wholly under the control of the current permittee and the proposed transferee, Dr. Schumacher and Atchafalaya Investments, Inc." and did not result in "arbitrary, capricious and erroneous conclusions."¹
2. Fisher Bottom is not a lake and no evidence suggests that it was ever a lake. Plaintiffs' reference to Fisher Bottom as "Fisher Lake" is emblematic of the crux of the problem – that Plaintiffs' evidence and argument cannot be trusted.
3. Navigation and access issues are completely irrelevant. This case involves a challenge to a permit, not a challenge to the property's susceptibility to private ownership. The Corps cannot – and should not – weigh in on the issue.
4. Mallard Basin's water control structure is not "drying up" Fisher Bottom. Rather, it helps keep water in the swamp for as long as possible during a given year. Without the water control structure, the marshy swamp/wetlands would dry up more often and for much larger periods of time, causing uncontrolled growth of wooded vegetation that will kill the swamp/wetlands.

1. **The Corps of Engineers Conducted a Thorough, Independent and Unbiased Site Inspection of Mallard Basin on March 30, 2012.**

Plaintiffs' allege throughout their submission that the proposed Permit Re-evaluation contains bias and "arbitrary and capricious" conclusions because the Corps "excluded" Plaintiffs from participating "in the most important fact-finding aspect of the re-evaluation, the site visit."² In truth, no party was "excluded" from the site visit. The Corps made it well known in related judicial proceedings that it was going to conduct a site inspection in early 2012 and that it was coordinating the inspection with Permittee. Plaintiffs never asked to participate in or attend the site inspection, in pleadings or otherwise. Had Plaintiffs asked to attend or participate in the inspection, they would certainly have been allowed to do so.

As evidenced by the record, the Corps fully disclosed to Plaintiffs and the Court its intent to conduct a site inspection, when it moved the Court to stay the pending litigation in December of 2011. The Corps delineated the re-evaluation process and identified the "field site investigation" as its first task.³ The Corps further notified the Court and Plaintiffs that the site

¹ Plaintiffs submission, page 5.

² Plaintiffs submission, page 6.

³ See Memorandum in Support of Federal Defendants' Motion for Voluntary Remand and Temporary Stay of the Litigation, pages 1-2.

investigation would be coordinated with Dr. Schumacher and would include members of the Corps regulatory team, experienced Corps wildlife biologists, as well as biologists from the Louisiana Department of Wildlife and Fisheries ("LDWF").⁴ Despite clear disclosure of the process, Plaintiffs never questioned it or asked to participate.

Moreover, the follow-up site inspection occurred in accordance with the Corps' proposed plan of action, as disclosed to Plaintiffs and the Court, and did not result in "bias" "bad faith" and "arbitrary and capricious" behavior. In fact, the follow-up inspection process was relatively uneventful in that the members of the Corps and LDWF spent most the day time taking notes and photographs with little discussion.

As set forth in Dr. Schumacher's affidavit,⁵ on March 12, 2012, Dr. Schumacher received a letter from Mike Herrmann, the project manager, setting forth the time, place and purpose of the site visit.⁶ Mr. Herrmann asked if Dr. Schumacher would provide transportation by boat and ATV to and from the site and within Fisher Bottom, to which he agreed. During the March 30, 2012 site visit, the Corps and members of LDWF directed the inspection and conducted an independent review of the site. As requested by the Corps, Dr. Schumacher and his employees took the attendees via two boats and three ATV's to whatever area of the property the Corps and/or LDWF wanted to inspect. The government had complete access to all of the property and had complete control over the inspection.

To the extent Dr. Schumacher communicated with the Corps and LDWF, the communications related to Dr. Schumacher's intended and current use of the property. Mr. Sebastien participated to answer questions regarding the property's history and the water management plan, which LDWF designed. Undersigned counsel had no substantive discussions with either Corps or LDWF members and attended the inspection to obtain a visual image of the areas referenced in pleadings. Neither Dr. Schumacher nor any of his employees "controlled" or "directed" or "influenced" the government's independent evaluation of the site.⁷

Furthermore, Plaintiffs met separately with the Corps on August 1, 2012, without Permittee's knowledge or participation, and the Corps entertained Plaintiffs' (and Dean Wilson's) "evidence" and argument. Permittee understands that the Corps is considering all this

⁴ See Exhibit "A", the November 10, 2011, letter from the Corps notifying Permittee that the Corps intended to conduct a field investigation of the property. This letter was attached as Exhibit "A" to Federal Defendants' Motion.

⁵ See Exhibit "B", the Affidavit of Dr. Schumacher.

⁶ See Exhibit "C", the March 12, 2012 letter from Mike Herrmann setting forth the details of the site inspection.

⁷ See Exhibit "D", the Affidavit of Nadia de la Houssaye.

newly acquired information. Permittee certainly has not felt the Corps' lengthy re-evaluation process provided it with any degree of comfort, nor has it seen any favoritism.

2. Plaintiffs' Reference to Fisher Bottom as "Fisher Lake" is Emblematic of the Crux of the Problem—That Plaintiffs' Evidence and Argument Cannot be Trusted.

Fisher Bottom is not a lake and no evidence suggests that it was ever a lake.⁸ As set forth in Scott Sebastian's affidavit, there is no "Fisher Lake" on the property. What Plaintiffs refer to as "Fisher Lake" is properly identified as Fisher Bottom. Unlike a lake, Fisher Bottom is a marshy wetland/swampland, a shallow body of water that even during the rainy season when it reaches full pool, is only 2'-3 1/2' deep in the middle and gets progressively shallower as you move toward the perimeter. Fisher Bottom has been referred to as swampland since the federal government surveyed the property over 100 years ago at the time it gifted the property to the State of Louisiana. See Exhibit "E"

Plaintiffs' reference to Fisher Bottom as "Fisher Lake" is emblematic of the crux of the problem – that Plaintiffs will stop at nothing to support their baseless accusations – even renaming the area at issue to embellish their erroneous premise that Fisher Bottom is analogous to Lake Rycade, a lake rather than swampland. Comparing Fisher Bottom to Lake Rycade is equivalent to comparing a pig to a horse.

Additionally, Plaintiffs discuss at length the "illegal" activity discovered by the "crawfishermen and fishermen from Citizen Groups" around Lake Rycade in 2006, and how Lake Rycade has been subsequently restored to its original condition, thanks to Plaintiffs. What transpired at Lake Rycade in 2006 has nothing to do with the issuance of permits for Mallard Basin. Lake Rycade is not owned by Permittee and any "illegal" activity that occurred at Lake Rycade in 2006 occurred after the completion of work performed on Mallard Basin. Accordingly, Plaintiffs references to Lake Rycade and the "film" Dean Wilson submitted to the Corps in August should be disregarded.

Further, Plaintiffs' significantly overstate their evidence – for example, claiming that the crawfisherman and Dean Wilson "are the only ones with a true basis of knowledge about the Fisher [Bottom] area and how it was managed" and that "Dean Wilson has provided the Corps with a perfect example of how Fisher [Bottom] used to be before the project."⁹ In truth, Dean Wilson has only been Basinkeeper since 2004 -- after all of the work at Mallard Basin was completed. Plaintiffs use very carefully-drawn affidavits and declarations to suggest that there has been a lot of crawfishing on the property on an ongoing basis, which is simply not true.

⁸ See Exhibit "E", the Affidavit of Scott Sebastian.

⁹ Plaintiffs' Submission, page 24.

Furthermore, the maps submitted by Plaintiffs as Exhibits 1 and 2, that, according to them, “speak a thousand words” don’t say anything.¹⁰ The two maps identified as Exhibits 1 and 2 are not to the same scale 1:100,00 in 2000, and 1:160,000 in 2004, and do not identify the same landmarks. To the extent that Exhibit 2 is used to suggest that Fisher Bottom disappeared in 2004, the photographs in Plaintiffs’ Exhibit 3 claim that Fisher Bottom appears in photographs taken that same year. Exhibit 3 is also unreliable, as it contains aerial photographs with markings (e.g., “Fisher Lake”) made by persons unknown to us. What the maps illustrate in terms of geomorphology is purely speculative.¹¹

Lastly, because Plaintiffs do not know anything about the Mallard Basin property, they make inconsistent arguments. For example, Plaintiffs sometimes argue that harm is being created because the levee prevents water from escaping south (i.e., it interferes with sheeting water flowing south). At other times, Plaintiffs complain that the weir allows the owners to drain the “lake”, implying that the lake should be protected by the existing levee. Also, Plaintiffs contend the subject permits are not good for “Fisher Lake”, but they do not address what effect a Whiskey Bay Pilot Channel had on water levels in that area.¹² Plaintiffs’ lack of information (and their decision to ignore the evidence in the record) is clear.

3. Navigation and access issues are completely irrelevant. This case involves a challenge to a permit, not a challenge to the property’s susceptibility to private ownership. The Corps cannot – and should not – weigh in on the issue.

Though Plaintiffs argue navigation and access issues as a basis for the Corps denial of the Permit Re-evaluation, navigation and access are irrelevant to the permit evaluation. As the United States Supreme Court noted in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), the Corps’ assertion of regulatory jurisdiction (or the navigation servitude) over an area does not mandate public access.

Further, the Plaintiffs are not advocating for access to the property – they are advocating against private ownership. This is evident because the Louisiana Crawfisher Producers Association-West (“LPCA”) refused to accept the prior landowners’ offer in 2010 to negotiate a

¹⁰ Plaintiffs Submission at 2, as follows: “a picture is worth a thousand words. Attached to these comments are two maps published by the Louisiana Geological Survey: one published in 2000 and one published in 2004. (Exhibits 1 and 2). The maps demonstrate, in the most graphic way possible, that Mallard Basin’s project is not good for Fisher Lake. In fact, the maps demonstrate that the project has destroyed Fisher Lake, which is not labeled on the map but has been circled for clarity purposes, appears as a large lake, much larger than Lake Warner to its south. This represents Fisher Lake before Mallard Basin’s project. In the map published in 2004, Fisher lake is gone.”

¹¹ See Exhibit “F”, a reliable visual of the Fisher Bottom landmark for the Corps’ convenience.

¹² See Exhibit “G”, Statement of Scott Sebastian date March 7, 2012 (Doc. 65-1., CA 6:10-cv-01085).

"no cost" access agreement. In exchange for access, the prior landowners merely asked the LPCA to discard their trash, refrain from significant or permanent alteration of the property, identify their traps, and provide notice of use and a list of the current members of the LPCA. This further supports the private landowners' argument that they are not engaging in "illegal" activity and have nothing to hide.

4. Mallard Basin's Water Control Structure is not "Drying Up" Fisher Bottom and the Landowners do not "empty" Fisher Bottom for Months at a Time.

Plaintiffs' argument that Fisher Bottom is being dried up as a result of the Mallard Basin water control structure could not be more erroneous. The primary reason for the water control management plan, designed by Jason Olszak at LDWF, is to keep water in the swamp for as long as possible during a given year. If the water control structure was removed, marshy wetland/swamp land would dry up much more often and for much larger periods of time, causing uncontrolled growth of wooded vegetation that would kill the swamp/wetlands.

Additionally, the landowners do not "empty" Fisher Bottom for months at a time. When the water management plan reference the word "drain", it simply means to "draw down" – not to empty. Drawing down the water in Fisher Bottom for small periods of time benefits the wetlands because it dries up humus that has formed over the years from invasive foreign plant species brought into the U.S. years ago. The buildup of humus causes the swamp to grow up in undesirable plant species and be taken over by wooded vegetation therefore closing up the swamp. Additionally, when water is drawn down in late summer, desirable vegetation such as duck potatoes, sprangletop, flatsedges, and millets are favored.

To the extent Plaintiffs argue that the water management plan is biased toward water fowl and may harm other species, the Corps' independent finding that "[b]irds, mammals, reptiles and amphibians benefit from the projects" belies this allegation. Furthermore, the "purpose and need" for a project is to be provided by the permit applicant, under 33 C.F.R. 325.1(d), not a project opponent. In these circumstances, the Permittee's preferences are paramount. If the management plan indirectly supports one recreational activity or another, there is no legal reason to change that. In our view, however, there is no detriment to any species from the site's management.

Other issues raised by Plaintiffs, including NEPA, alternatives, 404(b)(1) guidelines, and the Endangered Species Act seem to fall more within the discretion of the Corps to evaluate further to the extent necessary. Otherwise, many attachments to Plaintiffs' submission relate to redundant, dated or irrelevant administrative or judicial proceedings. Plaintiffs are attempting to flood the administrative record with way too much needless material in our view.

Conclusion

Plaintiffs contend the Corps' Re-Evaluation Decision is "flatly wrong" and "arbitrary and capricious by definition".¹³ Plaintiffs' contention is outrageous. Arbitrary and capricious, as defined by Black's Law Dictionary, is "a willful and unreasonable action without consideration or in disregard of facts or law or without determining principle." The administrative record is devoid of any evidence of "willful and unreasonable action" by the Corps "without consideration or in disregard of facts or law or without determining principle." The administrative record contains substantial evidence of the Corps' fact-based and thought-through reasons for ruling in accordance with the law and the public's best interest. Conversely, the Plaintiffs' lack of information -- and their decision to ignore evidence in the record in drawing their conclusions is very clear.

For these reasons, Permittee respectfully requests that the Corps grant the proposed Permit Re-evaluation, to transfer DA Permit No. MVN-2010-1080-WLL to the new owner of Fisher Bottom, Atchafalaya Investments, LLC, and to recognize Atchafalaya Investments, LLC as a qualified permittee under National Permit No. 7, with respect to its continued use of the Whiskey Bay Pilot Channel intake and outfall pipe and water pump, as presently operated.

Sincerely,



Nadia de la Houssaye

NMD/cml
Enclosures

¹³ Plaintiffs' submission, page 2.



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
NEW ORLEANS DISTRICT, CORPS OF ENGINEERS
P. O. BOX 80267
NEW ORLEANS, LOUISIANA 701600267

NOV 10 2011

BY CERTIFIED MAIL

Dr. William C. Schumacher
Atchafalaya Investments LLC
131 Woodsboro Drive
Lafayette, La 70508

RE: Request to transfer two Dept. of the Army permits to a successor permittee:
Nationwide Permit No. 7, MVN-2010-1032-WLL, and Individual DA Permit MVN-
2010-1080-WLL, issued to Mallard Basin, Inc.

Dear Dr. Schumacher:

We are in receipt of your request to transfer the referenced permits from the original permittee, Mallard Basin, Inc., into the name of Atchafalaya Investments LLC. We understand that you are the purchaser of the approximately 700 acres known as Fisher Bottoms, including the intake and outfall pipe, water pump, conveyance channel and water control structures authorized by the named permits.

Under Nationwide Permit No. 7 (MVN-2010-1032-WLL) we approved Mallard Basin's request to operate an intake pipe in the Whiskey Bay Pilot Channel, a pump, and an outfall pipe to transfer water from the Pilot Channel into a borrow canal connected to a conveyance ditch carrying water to Fisher Bottoms. Under individual Permit MVN-2010-1080-WLL we authorized use of the conveyance ditch and use of a variable-crested water control structure and related earthen containment dikes to facilitate maintenance of an aquatic environment within Fisher Bottoms, in accordance with the permittee's annual water management plan.

The activities authorized by these permits occur within the defined habitat of the Louisiana black bear, named under the Endangered Species Act (16 USC 1531-1544) as a threatened species. See 50 CFR § 17.11(h), "List of Endangered and Threatened Wildlife." As part of our evaluation of your predecessor's after-the-fact permit applications, we prepared an Environmental Assessment ("EA") to analyze the project's environmental impacts. In March of this year the Louisiana Crawfish Producers' Association-West and two environmental groups brought suit against the agency to challenge the sufficiency of our findings in the EA, among other allegations. See *Louisiana Crawfish Producers Assoc.-West, et al. v. U.S. Army Corps of Engineers*, Civ. No. 6:11-cv-461 (March 22, 2011, W.D. La.).

In light of (i) the alleged violations of environmental law advanced by the plaintiffs in the litigation mentioned above, (ii) the new ownership of Fisher Bottoms and the potential for



new project uses, and (iii) the agency's absence of knowledge about the present condition of the property, in particular the permittee's activities and water management practices since we issued these permits more than a year ago, we believe a reevaluation of permit conditions is appropriate before we respond to your transfer request.

A reevaluation will allow the District to obtain sufficient information to review our original findings, including the findings related to the project's impacts to threatened or endangered species and their habitat, and to modify those findings, if warranted. We undertake this reevaluation by authority of 33 C.F.R. § 325.7 ("Modification, suspension or revocation of permits"), which allows us to consider, from the perspective of the public interest, such factors as the extent we believe your proposed use and management of the property would comply with the permits' terms and conditions, whether circumstances relating to the authorized activity have changed since the permits were issued, and any significant objections to the authorized activities which were not previously considered. At the conclusion of our reevaluation we will advise you whether we will require modification of any permit terms prior to transfer. We may also require suspension of the permits pending your acceptance of any modifications, or we may revoke the permits, as we conclude best in the public interest. See 33 C.F.R. § 325.7.

The reevaluation process will require the following steps:

- a) We will request permission to return to the property for a new site visit. A Regulatory team, including experienced wildlife biologists, would meet you or your representative at the property to survey its present condition, looking particularly at the intake pump and water conveyance channel, Fisher Bottoms and its weir, and the surrounding habitat. We would ask you to provide information about your intended use and your water management plan. We would look for evidence of the Louisiana black bear, significant black bear habitat features, and other threatened or endangered species. We would document the investigation with photographs.
- b) On the basis of evidence gathered during this field investigation we would prepare a biological assessment addendum to the existing EA, analyzing the new field evidence and the proposed usage information provided by you to assess the project's present and prospective impacts on the black bear, its habitat, and any other threatened or endangered species and their habitat, as well as project-related wetlands impacts.
- c) If we believe the public interest requires a modification of the present permits, we will conclude our permit reevaluation by advising you of the modifications we find necessary. If you agree to accept these modifications, we would post the proposed revised permits for a 20-day period of public notice and comment. If you do not accept our proposed modifications, we would suspend the permits, pending further discussion with you and an attempt at resolution.
- d) In the event we conclude the public interest requires suspension or eventual revocation of the present permits, you may invoke the administrative remedies detailed in 33 C.F.R. § 325.7, including the right to a meeting with the District Engineer.

- e) If the permits do not need modification, or if you agree to any modifications to permit terms we impose, we would authorize a transfer of the permits into the name of the transferee you have requested.

We expect the permit reevaluation period could require between 90 – 120 days, depending upon the date we return to the project site, the amount of time our biologists will need to draft a revised biological assessment, the need for any public comment period, and our response to those comments.

Should you choose to proceed with your request for a transfer of these permits, we propose to begin the reevaluation process as soon as possible. Please contact our office at your convenience to confirm a date to inspect the property. If you have questions or comments about the permit reevaluation steps enumerated in this letter, please call project manager Mike Herrmann at (504) 862-1954.

Sincerely,



Pete Serio
Chief, Regulatory Branch

AFFIDAVIT

STATE OF LOUISIANA

PARISH OF LAFAYETTE

BEFORE ME, the undersigned notary public, personally came and appeared DR. WILLIAM SCHUMACHER, who upon first being duly sworn, did depose and say the following:

1. I am the managing member of Atchafalaya Investments, LLC, the recent purchaser of approximately 700 acres known as Fisher Bottom.
2. On November 11, 2011, I received a letter from Pete Serio, Chief, Regulatory Branch of the Army Corps of Engineers, advising that the Corps wanted to conduct a re-evaluation of the my permit transfer request in light of: 1) the alleged violations of environmental law advocated by plaintiffs in the pending litigation, 2) the new ownership of Fisher Bottom and the potential for new project uses, and 3) the agency's absence of knowledge about the present condition of the property, in particular the permittee's activities and water management practices since the Corps issued the permits over a year ago.
3. The letter from Mr. Serio set forth the manner in which the re-evaluation process would occur and outlined the evaluation process in steps. The first step stated that the Corp would request permission to return to the property for a new site visit. A Regulatory team, including experienced wildlife biologists, would meet me or one of my representatives at the property to survey its present condition, looking particularly at the intake pump and water conveyance channel, Fisher Bottom and its weir, and the surrounding habitat.
4. At the site inspection, the Corps specifically asked me to provide information about my intended use of the property and my water management plan. The Corps also indicated that it would look for evidence of the Louisiana black bear, significant black bear habitat features, and other threatened or endangered species and would document the investigations with photographs. I was asked to contact the Corps office at my earliest convenience to confirm a date to inspect the property. (A copy of the November 10, 2011, is attached to my affidavit).
5. In compliance with the re-evaluation process, a representative of mine contacted the Corps and arranged for a site inspection.
6. It is my understanding that the site inspection was discussed with the court. Plaintiffs had knowledge that a site inspection would occur in December 2011, as it was one of the primary reasons the Corps asked the Court to stay the litigation for a four month period, a



period that would give the Corps sufficient time to conduct the site inspection and decide on whether to grant the transfer of the permits.

7. To my knowledge, Plaintiffs did not ask to attend the inspection and expressed no interest in attending the inspection to the Court.
8. On March 12, 2012, I received a letter from Mike Herrmann, the project manager, setting forth the time, place and purpose of the site visit.
9. In Mr. Herrmann's March 12, 2012 letter, I was asked to provide transportation by boat and ATV to and from the site and within Fisher Bottom, to which I agreed.
10. On March 30, 2012, the Corps' site inspection occurred in accordance with the Corps' schedule. I recall at least six members of the Corps and Louisiana Wildlife & Fisheries in attendance. I also asked two of my employees, Mike Didier and Curtis Robin (who also happens to be a commercial fisherman and a member of the Louisiana Crawfish Producers Association, a plaintiff in the pending litigation). Additionally, I asked Scott Sebastian, the previous property owner to attend in the event the Corps asked me questions that I did not have the history and knowledge to answer. Tim Morton, consultant, and Nadia de la Houssaye, my attorney, also attended.
11. During the March 30, 2012 site visit, the Corps and members of Wildlife & Fisheries directed the inspection and conducted an independent review of the site. My employees and I took the attendees via two boats and three ATV's to whatever area of the property the Corps and/or Wildlife & Fisheries wanted to inspect. The government had complete access to all of my property and control over their inspection, and I exerted no influence over the areas inspected.
12. Tulane's accusation in its comments that I "directed the date and time of the visit and conducted the visit, leading the Corps and the LDWF personnel around to the areas [I] wished the Corps to see, pointing out features [I] wanted the Corps to observe, giving the Corps contemporaneous information [I] wanted the Corps to hear, and literally controlling the Corps' access to the site" is absolutely untrue, unfounded and insulting.
13. I answered specific questions regarding my intended use of the property to Corps personnel, and Mr. Sebastian answered specific questions regarding the history of the property and the water management plan, which was drafted by Louisiana Wildlife and Fishery. I in no way "controlled" or "directed" or "influenced" the government's independent evaluation of the site.
14. Tulane's repeated allegations that I am engaging in illegal activity analogous to robbing a bank is outrageous, defamatory and must be stopped. Contrary to Tulane's apparent deliberate misrepresentations, I love the Atchafalaya Basin and am doing everything I can to preserve the wetlands and the environment. As a private individual, I am expending significant resources and time protecting the environment and its species. I would never knowingly take action adverse to the wetlands and have been repeatedly advised that in fact I am saving the wetlands by implementing the water management program specifically created for the area at issue.

WITNESSES:

Britni Marks
Printed Name: Britni Marks

Dr. William Schumacher
DR. WILLIAM SCHUMACHER

Bethany Stuart
Printed Name: Bethany Stuart

SWORN TO AND SUBSCRIBED before me, on this 3rd day of October, 2012, at

Lafayette, Louisiana.

Bonnie Pauline

Notary Public:

Commissioned in and for Lafayette Parish, LA.

Commission Expires: At death

LA. Notary No. 52795



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
NEW ORLEANS DISTRICT, CORPS OF ENGINEERS
P. O. BOX 60267
NEW ORLEANS, LOUISIANA 701600267

NOV 10 2011

BY CERTIFIED MAIL

Dr. William C. Schumacher
Atchafalaya Investments LLC
131 Woodsboro Drive
Lafayette, La 70508

RE: Request to transfer two Dept. of the Army permits to a successor permittee;
Nationwide Permit No. 7, MVN-2010-1032-WLL, and Individual DA Permit MVN-
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In light of (i) the alleged violations of environmental law advanced by the plaintiffs in the litigation mentioned above, (ii) the new ownership of Fisher Bottoms and the potential for

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A reevaluation will allow the District to obtain sufficient information to review our original findings, including the findings related to the project's impacts to threatened or endangered species and their habitat, and to modify those findings, if warranted. We undertake this reevaluation by authority of 33 C.F.R. § 325.7 ("Modification, suspension or revocation of permits"), which allows us to consider, from the perspective of the public interest, such factors as the extent we believe your proposed use and management of the property would comply with the permits' terms and conditions, whether circumstances relating to the authorized activity have changed since the permits were issued, and any significant objections to the authorized activities which were not previously considered. At the conclusion of our reevaluation we will advise you whether we will require modification of any permit terms prior to transfer. We may also require suspension of the permits pending your acceptance of any modifications, or we may revoke the permits, as we conclude best in the public interest. See 33 C.F.R. § 325.7.

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Sincerely,

A handwritten signature in black ink, appearing to read "Pete Serio", written in a cursive style.Handwritten initials "PS" in black ink, located to the left of the typed name.

Pete Serio
Chief, Regulatory Branch



REPLY TO
ATTENTION OF:

DEPARTMENT OF THE ARMY
NEW ORLEANS DISTRICT, CORPS OF ENGINEERS
P. O. BOX 60267
NEW ORLEANS, LOUISIANA 701690267

NOV 10 2011

BY CERTIFIED MAIL

Dr. William C. Schumacher
Atchafalaya Investments LLC
131 Woodsboro Drive
Lafayette, La 70508

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EXHIBIT

A

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A reevaluation will allow the District to obtain sufficient information to review our original findings, including the findings related to the project's impacts to threatened or endangered species and their habitat, and to modify those findings, if warranted. We undertake this reevaluation by authority of 33 C.F.R. § 325.7 ("Modification, suspension or revocation of permits"), which allows us to consider, from the perspective of the public interest, such factors as the extent we believe your proposed use and management of the property would comply with the permits' terms and conditions, whether circumstances relating to the authorized activity have changed since the permits were issued, and any significant objections to the authorized activities which were not previously considered. At the conclusion of our reevaluation we will advise you whether we will require modification of any permit terms prior to transfer. We may also require suspension of the permits pending your acceptance of any modifications, or we may revoke the permits, as we conclude best in the public interest. *See* 33 C.F.R. § 325.7.

The reevaluation process will require the following steps:

- a) We will request permission to return to the property for a new site visit. A Regulatory team, including experienced wildlife biologists, would meet you or your representative at the property to survey its present condition, looking particularly at the intake pump and water conveyance channel, Fisher Bottoms and its weir, and the surrounding habitat. We would ask you to provide information about your intended use and your water management plan. We would look for evidence of the Louisiana black bear, significant black bear habitat features, and other threatened or endangered species. We would document the investigation with photographs.
- b) On the basis of evidence gathered during this field investigation we would prepare a biological assessment addendum to the existing EA, analyzing the new field evidence and the proposed usage information provided by you to assess the project's present and prospective impacts on the black bear, its habitat, and any other threatened or endangered species and their habitat, as well as project-related wetlands impacts.
- c) If we believe the public interest requires a modification of the present permits, we will conclude our permit reevaluation by advising you of the modifications we find necessary. If you agree to accept these modifications, we would post the proposed revised permits for a 20-day period of public notice and comment. If you do not accept our proposed modifications, we would suspend the permits, pending further discussion with you and an attempt at resolution.
- d) In the event we conclude the public interest requires suspension or eventual revocation of the present permits, you may invoke the administrative remedies detailed in 33 C.F.R. § 325.7, including the right to a meeting with the District Engineer.

- e) If the permits do not need modification, or if you agree to any modifications to permit terms we impose, we would authorize a transfer of the permits into the name of the transferee you have requested.

We expect the permit reevaluation period could require between 90 – 120 days, depending upon the date we return to the project site, the amount of time our biologists will need to draft a revised biological assessment, the need for any public comment period, and our response to those comments.

Should you choose to proceed with your request for a transfer of these permits, we propose to begin the reevaluation process as soon as possible. Please contact our office at your convenience to confirm a date to inspect the property. If you have questions or comments about the permit reevaluation steps enumerated in this letter, please call project manager Mike Herrmann at (504) 862-1954.

Sincerely,



Pete Serio
Chief, Regulatory Branch

AFFIDAVIT

STATE OF LOUISIANA

PARISH OF LAFAYETTE

BEFORE ME, the undersigned notary public, personally came and appeared DR. WILLIAM SCHUMACHER, who upon first being duly sworn, did depose and say the following:

1. I am the managing member of Atchafalaya Investments, LLC, the recent purchaser of approximately 700 acres known as Fisher Bottom.
2. On November 11, 2011, I received a letter from Pete Serio, Chief, Regulatory Branch of the Army Corps of Engineers, advising that the Corps wanted to conduct a re-evaluation of the my permit transfer request in light of: 1) the alleged violations of environmental law advocated by plaintiffs in the pending litigation, 2) the new ownership of Fisher Bottom and the potential for new project uses, and 3) the agency's absence of knowledge about the present condition of the property, in particular the permittee's activities and water management practices since the Corps issued the permits over a year ago.
3. The letter from Mr. Serio set forth the manner in which the re-evaluation process would occur and outlined the evaluation process in steps. The first step stated that the Corp would request permission to return to the property for a new site visit. A Regulatory team, including experienced wildlife biologists, would meet me or one of my representatives at the property to survey its present condition, looking particularly at the intake pump and water conveyance channel, Fisher Bottom and its weir, and the surrounding habitat.
4. At the site inspection, the Corps specifically asked me to provide information about my intended use of the property and my water management plan. The Corps also indicated that it would look for evidence of the Louisiana black bear, significant black bear habitat features, and other threatened or endangered species and would document the investigations with photographs. I was asked to contact the Corps office at my earliest convenience to confirm a date to inspect the property. (A copy of the November 10, 2011, is attached to my affidavit).
5. In compliance with the re-evaluation process, a representative of mine contacted the Corps and arranged for a site inspection.
6. It is my understanding that the site inspection was discussed with the court. Plaintiffs had knowledge that a site inspection would occur in December 2011, as it was one of the primary reasons the Corps asked the Court to stay the litigation for a four month period, a



period that would give the Corps sufficient time to conduct the site inspection and decide on whether to grant the transfer of the permits.

7. To my knowledge, Plaintiffs did not ask to attend the inspection and expressed no interest in attending the inspection to the Court.
8. On March 12, 2012, I received a letter from Mike Herrmann, the project manager, setting forth the time, place and purpose of the site visit.
9. In Mr. Herrmann's March 12, 2012 letter, I was asked to provide transportation by boat and ATV to and from the site and within Fisher Bottom, to which I agreed.
10. On March 30, 2012, the Corps' site inspection occurred in accordance with the Corps' schedule. I recall at least six members of the Corps and Louisiana Wildlife & Fisheries in attendance. I also asked two of my employees, Mike Didier and Curtis Robin (who also happens to be a commercial fisherman and a member of the Louisiana Crawfish Producers Association, a plaintiff in the pending litigation). Additionally, I asked Scott Sebastian, the previous property owner to attend in the event the Corps asked me questions that I did not have the history and knowledge to answer. Tim Morton, consultant, and Nadia de la Houssaye, my attorney, also attended.
11. During the March 30, 2012 site visit, the Corps and members of Wildlife & Fisheries directed the inspection and conducted an independent review of the site. My employees and I took the attendees via two boats and three ATV's to whatever area of the property the Corps and/or Wildlife & Fisheries wanted to inspect. The government had complete access to all of my property and control over their inspection, and I exerted no influence over the areas inspected.
12. Tulane's accusation in its comments that I "directed the date and time of the visit and conducted the visit, leading the Corps and the LDWF personnel around to the areas [I] wished the Corps to see, pointing out features [I] wanted the Corps to observe, giving the Corps contemporaneous information [I] wanted the Corps to hear, and literally controlling the Corps' access to the site" is absolutely untrue, unfounded and insulting.
13. I answered specific questions regarding my intended use of the property to Corps personnel, and Mr. Sebastian answered specific questions regarding the history of the property and the water management plan, which was drafted by Louisiana Wildlife and Fishery. I in no way "controlled" or "directed" or "influenced" the government's independent evaluation of the site.
14. Tulane's repeated allegations that I am engaging in illegal activity analogous to robbing a bank is outrageous, defamatory and must be stopped. Contrary to Tulane's apparent deliberate misrepresentations, I love the Atchafalaya Basin and am doing everything I can to preserve the wetlands and the environment. As a private individual, I am expending significant resources and time protecting the environment and its species. I would never knowingly take action adverse to the wetlands and have been repeatedly advised that in fact I am saving the wetlands by implementing the water management program specifically created for the area at issue.

WITNESSES:

Britni Marks
Printed Name: Britni Marks

Bethany Stuart
Printed Name: Bethany Stuart

Dr. William Schumacher
DR. WILLIAM SCHUMACHER

SWORN TO AND SUBSCRIBED before me, on this 3rd day of October, 2012, at

Lafayette, Louisiana.

Bonnie Buller

Notary Public:

Commissioned in and for Lafayette Parish, LA.

Commission Expires: At death

LA. Notary No. 52795



DEPARTMENT OF THE ARMY
NEW ORLEANS DISTRICT, CORPS OF ENGINEERS
P. O. BOX 60267
NEW ORLEANS, LOUISIANA 701600267

REPLY TO
ATTENTION OF:

NOV 10 2011

BY CERTIFIED MAIL

Dr. William C. Schumacher
Atchafalaya Investments LLC
131 Woodsboro Drive
Lafayette, La 70508

RE: Request to transfer two Dept. of the Army permits to a successor permittee:
Nationwide Permit No. 7, MVN-2010-1032-WLL, and Individual DA Permit MVN-
2010-1080-WLL, issued to Mallard Basin, Inc.

Dear Dr. Schumacher:

We are in receipt of your request to transfer the referenced permits from the original permittee, Mallard Basin, Inc., into the name of Atchafalaya Investments LLC. We understand that you are the purchaser of the approximately 700 acres known as Fisher Bottoms, including the intake and outfall pipe, water pump, conveyance channel and water control structures authorized by the named permits.

Under Nationwide Permit No. 7 (MVN-2010-1032-WLL) we approved Mallard Basin's request to operate an intake pipe in the Whiskey Bay Pilot Channel, a pump, and an outfall pipe to transfer water from the Pilot Channel into a borrow canal connected to a conveyance ditch carrying water to Fisher Bottoms. Under individual Permit MVN-2010-1080-WLL we authorized use of the conveyance ditch and use of a variable-crested water control structure and related earthen containment dikes to facilitate maintenance of an aquatic environment within Fisher Bottoms, in accordance with the permittee's annual water management plan.

The activities authorized by these permits occur within the defined habitat of the Louisiana black bear, named under the Endangered Species Act (16 USC 1531-1544) as a threatened species. See 50 CFR § 17.11(h), "List of Endangered and Threatened Wildlife." As part of our evaluation of your predecessor's after-the-fact permit applications, we prepared an Environmental Assessment ("EA") to analyze the project's environmental impacts. In March of this year the Louisiana Crawfish Producers' Association-West and two environmental groups brought suit against the agency to challenge the sufficiency of our findings in the EA, among other allegations. See *Louisiana Crawfish Producers Assoc.-West, et al. v. U.S. Army Corps of Engineers*, Civ. No. 6:11-cv-461 (March 22, 2011, W.D. La.).

In light of (i) the alleged violations of environmental law advanced by the plaintiffs in the litigation mentioned above, (ii) the new ownership of Fisher Bottoms and the potential for

new project uses, and (iii) the agency's absence of knowledge about the present condition of the property, in particular the permittee's activities and water management practices since we issued these permits more than a year ago, we believe a reevaluation of permit conditions is appropriate before we respond to your transfer request.

A reevaluation will allow the District to obtain sufficient information to review our original findings, including the findings related to the project's impacts to threatened or endangered species and their habitat, and to modify those findings, if warranted. We undertake this reevaluation by authority of 33 C.F.R. § 325.7 ("Modification, suspension or revocation of permits"), which allows us to consider, from the perspective of the public interest, such factors as the extent we believe your proposed use and management of the property would comply with the permits' terms and conditions, whether circumstances relating to the authorized activity have changed since the permits were issued, and any significant objections to the authorized activities which were not previously considered. At the conclusion of our reevaluation we will advise you whether we will require modification of any permit terms prior to transfer. We may also require suspension of the permits pending your acceptance of any modifications, or we may revoke the permits, as we conclude best in the public interest. *See* 33 C.F.R. § 325.7.

The reevaluation process will require the following steps:

- a) We will request permission to return to the property for a new site visit. A Regulatory team, including experienced wildlife biologists, would meet you or your representative at the property to survey its present condition, looking particularly at the intake pump and water conveyance channel, Fisher Bottoms and its weir, and the surrounding habitat. We would ask you to provide information about your intended use and your water management plan. We would look for evidence of the Louisiana black bear, significant black bear habitat features, and other threatened or endangered species. We would document the investigation with photographs.
- b) On the basis of evidence gathered during this field investigation we would prepare a biological assessment addendum to the existing EA, analyzing the new field evidence and the proposed usage information provided by you to assess the project's present and prospective impacts on the black bear, its habitat, and any other threatened or endangered species and their habitat, as well as project-related wetlands impacts.
- c) If we believe the public interest requires a modification of the present permits, we will conclude our permit reevaluation by advising you of the modifications we find necessary. If you agree to accept these modifications, we would post the proposed revised permits for a 20-day period of public notice and comment. If you do not accept our proposed modifications, we would suspend the permits, pending further discussion with you and an attempt at resolution.
- d) In the event we conclude the public interest requires suspension or eventual revocation of the present permits, you may invoke the administrative remedies detailed in 33 C.F.R. § 325.7, including the right to a meeting with the District Engineer.

- e) If the permits do not need modification, or if you agree to any modifications to permit terms we impose, we would authorize a transfer of the permits into the name of the transferee you have requested.

We expect the permit reevaluation period could require between 90 – 120 days, depending upon the date we return to the project site, the amount of time our biologists will need to draft a revised biological assessment, the need for any public comment period, and our response to those comments.

Should you choose to proceed with your request for a transfer of these permits, we propose to begin the reevaluation process as soon as possible. Please contact our office at your convenience to confirm a date to inspect the property. If you have questions or comments about the permit reevaluation steps enumerated in this letter, please call project manager Mike Herrmann at (504) 862-1954.

Sincerely,



Pete Serio
Chief, Regulatory Branch



DEPARTMENT OF THE ARMY

NEW ORLEANS DISTRICT CORPS OF ENGINEERS

P O BOX 60267

NEW ORLEANS LOUISIANA 70160 0267

REPLY TO
ATTENTION OF
CEMVN-OD-SW

March 12, 2012

MEMORANDUM FOR: Site visit participants on 3-30-2012

FROM: PROJECT MANAGER Mike Herrmann X1954

SUBJECT: Field site visit to Mallard Basin Project in Atchafalaya Basin

APPLICANT: Mallard Basin Inc.

APPLICATION No: MVN-2010-1080-WLL

Everyone,

As you all know, we are approaching our March 30th field site visit to the Basin and I wanted to provide an itinerary to help us coordinate a successful inspection. So far we have email confirmation from the following personnel to attend:

William Schumacher/ owner
Scott Sebastien/ former owner
Maria Davidson/ Louisiana Wildlife and Fisheries
Steve Robertson/ Corps
Ronnie Duke/ Corps
Mike Herrmann/Corps

Our mission at this inspection is to observe the site, its features and infrastructure, paying particular attention to the quality of the habitat and any possible effects the structures or their implementation may have on the local aquatic ecosystem, whether positive or negative. We will observe the project structures and their effects on navigation. We will also evaluate and determine what impacts (positive and/or negative) the project and/ or its features are having on the Louisiana Black Bear and its habitat. We will compile the information gathered at the inspection and prepare individual assessments of the project, its infrastructure, its habitat quality and its effects on local wildlife, aquatic resources, surrounding habitat and any effects on the Louisiana Black Bear and its critical habitat. Once I receive the individual assessments, I will compile the information in a final supplemental review document.

WHERE: Everyone is scheduled to meet at the Whiskey Bay Exit off Interstate 10 near Ramah, LA. Going west on I-10 take the Whiskey Bay exit, turn right or north at the stop sign. Go about 100 yards to the asphalt and gravel road convergence and take a left towards the river thru the gate that says private property. The landing is about 100 yards ahead. Mr. Schumacher will meet us at the boat landing.

TIME: We will meet at 9:30 AM at the boat landing. Those of us leaving from the New Orleans District will depart at 7:15 AM. Once we arrive at the meet location, we will proceed with the site visit.

TRANSPORTATION: Will be provided for those leaving from NOD via official Corps



vehicle (Dodge Durango). All others have agreed to drive to the meeting site via their own conveyance. Transportation by boat and ATV to and from the site and within Fisher Bottoms will be provided by Mr. Schumacher/ Mallard Basin.

OTHER EQUIPMENT: Most of the site will be accessible by boat and ATV; however, attendees are expected to bring rubber boots for various on-foot inspections. Please watch the weather forecast for the 30th and dress accordingly. I recommend long sleeves for protection against biting insects. I will have a camera for photos and site maps, showing project features, for all to review and follow along on-site.

Thank You for participating. Your help will be critical in the evaluation and the outcome of this project.

Please do not hesitate to call me if you have any questions about anything. My phone numbers are: (504)-256-7226 cell. And (504)-862-1954 office , or my email michael.h.herrmann@usace.army.mil

Sincerely,

Mike H. Herrmann Jr.
Project Manager

AFFIDAVIT

STATE OF LOUISIANA

PARISH OF LAFAYETTE

BEFORE ME, the undersigned notary public, personally came and appeared NADIA DE LA HOUSSAYE, who upon first being duly sworn, did depose and say the following:

1. I am an attorney and Partner at Jones, Walker, Waechter, Poitevent, Carrere & Denegre, L.L.P law firm.
2. I have thoroughly reviewed the comments of Tulane University on behalf of Atchafalaya Basinkeeper, LA Crawfish Producers Association-West and the LA Environmental Action Network in Opposition to Corps Reevaluation Decision on After-the-Fact Clean Water Act Permit No.: MVA-2010-1080-WLL and Nationwide Permit Authorization No. MVA-2010-1032-WLL and want to attest to what I witnessed during the March 30, 2012 site inspection of Mallard Basin.
3. I attended the March 30, 2012, Corps of Engineers' scheduled site visit to the Mallard Basin project site, as Dr. Schumacher's attorney, because I had never seen the property and wanted to have a visual image of the areas referenced in briefs.
4. During this inspection, I had no discussion with any governmental participant regarding past or current property conditions and did not assist in any way in directing or gathering field data. Additionally, I witnessed very limited interaction between non-governmental and governmental participant.
5. The government asked a few questions, and as I remember, the questions were answered Dr. Schumacher and/or Scott Sebastian.
6. I witnessed for the most part governmental participants taking notes and photographs. The site inspection was uneventful and very little conversation occurred between anyone.



WITNESSES:

Carol Raymond

Printed Name: Carol Raymond

Nadia de la Houssaye
NADIA DE LA HOUSSAYE

Clarissa Long

Printed Name: Clarissa Long

SWORN TO AND SUBSCRIBED before me, on this 4th day of October, 2012, at

Lafayette, Louisiana.

Charlene W. Frederick

Notary Public: Charlene Frederick

Commissioned in and for Lafayette Parish, LA.

Commission Expires: At death

LA. Notary No. 35276

AFFIDAVIT

STATE OF LOUISIANA

PARISH OF LAFAYETTE

BEFORE ME, the undersigned notary public, personally came and appeared **SCOTT SEBASTIEN**, who upon first being duly sworn, did depose and say the following:

1. I am a former owner of approximately 700 acres of land in the Atchafalaya Basin, land that includes the Mallard Basin and Fisher Bottom property at issue in this litigation, which I purchased with a number of other investors in 1999.
2. I have significant personal knowledge of the Mallard Basin and Fisher Bottom property, the water control structure and the preservation of wetlands after years of studying the property and working with experts, including Jason Olszak at the Louisiana Department of Wildlife and Fisheries, who developed a water control management plan for Fisher Bottom in July 2010, to assist the owners in their effort to preserve the specific swamp/wetlands near and around the property.
3. I have thoroughly reviewed the comments of Tulane University on behalf of Atchafalaya Basinkeeper, LA Crawfish Producers Association-West and the LA Environmental Action Network in Opposition to Corps Reevaluation Decision on After-the-Fact Clean Water Act Permit No.: MVA-2010-1080-WLL and Nationwide Permit Authorization No. MVA-2010-1032-WLL and disagree with close to every argument Tulane makes in its submission. I will limit my affidavit to a few issues that are completely false and erroneous, as follows.
4. First, there is no "Fisher Lake" on the property. Rather, what Tulane refers to as "Fisher Lake" is properly identified as Fisher Bottom. The property has been referenced as swampland since the federal government surveyed the property well over 100 years ago, prior to gifting it to the State of Louisiana and prior to the State of Louisiana selling the property to individual owners.
5. Second, Fisher Bottom is not a lake. The Oxford Dictionary's defines "lake" as "a large area of water surrounded by land" Rather, as recognized by the federal government over 50 years ago and still today, Fisher Bottom is a marshy wetland/swamp land, a shallow body of water that even during the rainy season when it reaches full pool, is only 2'-3 1/2' deep in the middle and gets progressively shallower as you move toward the perimeter.
6. Regarding the water control structure, Tulane argues that Fisher Bottom is being dried up as a result of the structure. Tulane's argument could not be more erroneous. In Truth, the primary reason for the Management Plan for Fisher Bottom which discusses the water control structure is to keep water **in the swamp** for as long as possible during a given year. If the water control structure was removed, marshy wetland/swamp land would dry up much more often and for much larger periods of time, causing uncontrolled growth of wooded vegetation that would kill the swamp/wetlands.



7. The landowners do not completely drain Fisher Bottom for months at a time, as alleged by Tulane. When the water management plan reference the word "drain", it simply means to "draw down" – not to empty. More importantly, one of the reasons the water management plan advises us to draw down the water for very small periods of time is to try to dry up humus that has formed over the years from invasive foreign plant species brought into the U.S. years ago. The buildup of humus would cause the swamp to grow up in undesirable plant species and be taken over by wooded vegetation therefor closing up the swamp.
8. Pursuant to the water control provision within the Management Plan for Fisher Bottom, climatic and soil conditions in South Louisiana promote the rapid colonization of bare ground for lush, fast growing plants. If left alone, succession to a woody stage is hastened. Woody species such as black willow and buttonbush can sprout and grow quite tall during a single summer. Additionally, when water is drawn down in late summer, desirable vegetation such as duck potatoes, sprangletop, flatsedges, and millets are favored.
9. The past and current owners of Fisher Bottom are following the Management Plan for Fisher Bottom, as prepared by Jason Olszak, Wetland Bird Biologist with the Louisiana Department of Wildlife and Fisheries, so as to preserve and enrich the wetlands. The methods that these wetland specialists are advising us can be found in thousands of volumes of wetland research that wetland professionals have published over the years.
10. Though Tulane argues that the Corps' issuance of the permits at issue will cause the "destruction" of wetlands in the valuable Atchafalaya Basin, in truth, denial of the permits would cause the "destruction" of wetlands.
11. I have no financial interest in the outcome of this permit re-evaluation and am submitting this affidavit because I love the environment and want to see the wetlands preserved.

WITNESSES:

Printed Name: Justin Desormeaux

Scott Sebastian
SCOTT SEBASTIEN

Printed Name: Faith A. Richard

SWORN TO AND SUBSCRIBED before me, on this 4th day of October, 2012, at

Lafayette, Louisiana.

Notary Public:

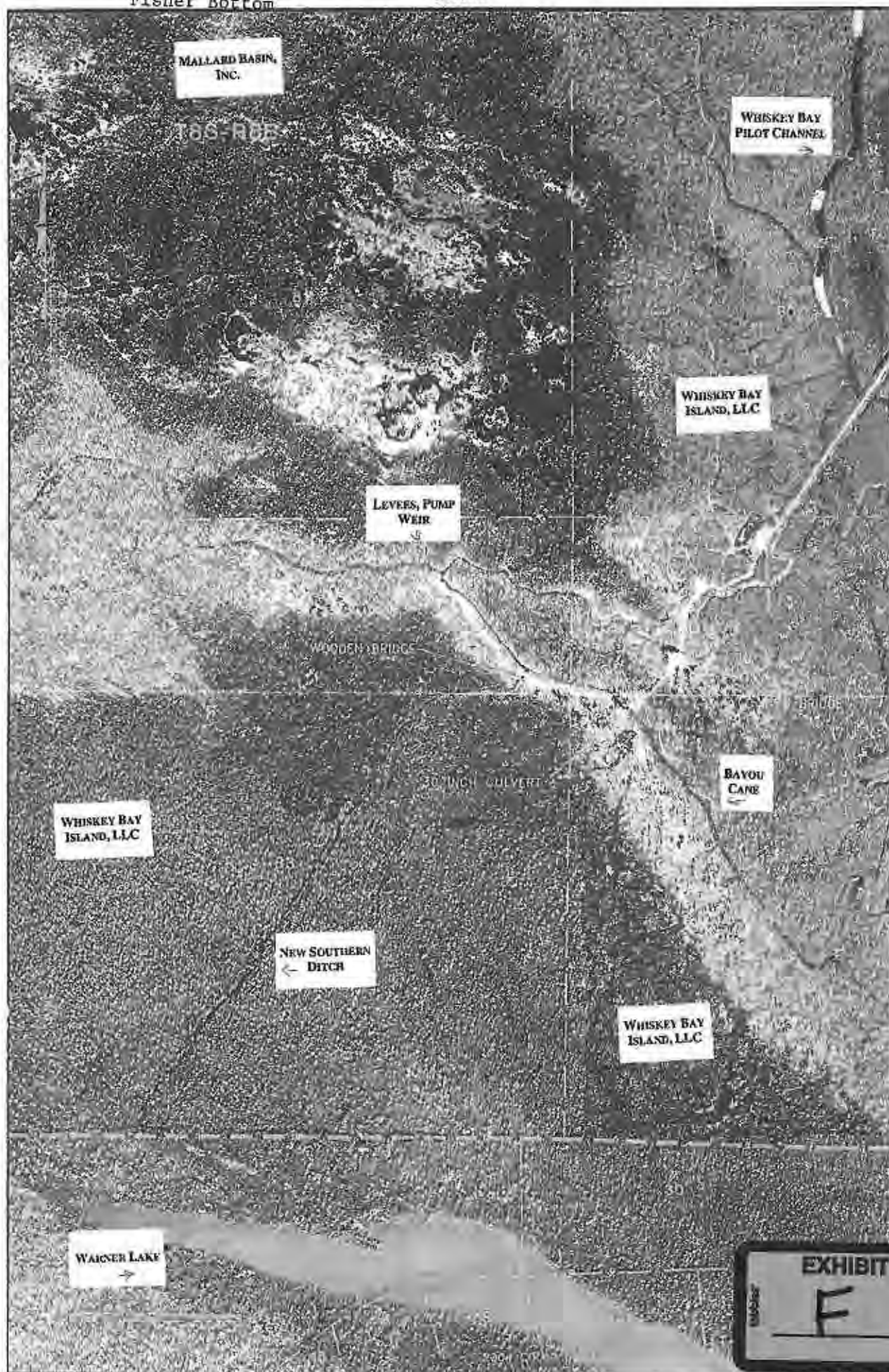
Commissioned in and for St. Charles Parish, L.A.

Commission Expires: At death

L.A. Notary No. 22573

Fisher Bottom

NORTH



EXHIBIT

F

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA

LOUISIANA CRAWFISH PRODUCERS
ASSOCIATION-WEST, ET AL.,

Plaintiffs,

v.

MALLARD BASIN, INC., ET AL..

Defendants,

LOUISIANA CRAWFISH PRODUCERS
ASSOCIATION-WEST, ET AL.,

Plaintiffs

v.

LIEUTENANT GENERAL ROBERT L.
VAN ANTWERP, ET AL.,

Defendants.

) No. 6:10-cv-01085-RFD-PJH (Lead)

) No. 6:11-cv-00461-RFD-PJH (Member)

) JUDGE REBECCA F. DOHERTY

) MAGISTRATE JUDGE PATRICK J.

) HANNA

Statement of SCOTT SEBASTIEN, prior owner of Fisher Bottom,
to the U.S. Army Corps of Engineers, New Orleans District
March 7, 2012

In April 1999 my partners and I purchased several tracts of forested wetland and upland in the Atchafalaya Basin near Interstate 10, including a 700 acre parcel known as "Fisher Bottom," which is shown in the attached aerial photographs. We acquired the property in the name of Mallard Basin, Inc. for the purpose of wildlife enjoyment and hunting. The previous owners had established a management program to reduce invasive aquatic species and maintain healthy biodiversity. We sought to continue their approach to managing Fisher Bottom, with regular input from state experts.



We contacted the Louisiana Department of Wildlife & Fisheries and invited an experienced biologist named Robert Helm to the property to give us professional guidance in aquatic wildlife and habitat management. He visited the property several times after we completed the purchase to help us refine a successful wetland stewardship program based upon the expertise of the Department of Wildlife & Fisheries.

Fisher Bottom is a shallow water body. Even during the rainy season when Fisher Bottom reaches full pool, the water is only 2' – 2 ½' deep in the middle and progressively shallower as you move toward the perimeter. It's more of a marshy wetland than a lake. We learned from Wildlife & Fisheries that the shallow water is susceptible to rapidly growing invasive aquatic species like water hyacinth, salvinia, alligator weed and cutgrass. Without active management these plants would cover the surface of the water with floating vegetation, crowding out native aquatic species and eliminating places for waterfowl to land or feed. If left unmanaged, the submerged bottom would accumulate a muck, or humus, of decomposing hyacinth and salvinia that would sharply reduce available dissolved oxygen in the water. Some of this muck would float up under the surface foliage, forming a floating mat of vegetation commonly called "floton." Floton can slowly strangle an otherwise healthy waterbody.

Controlling these invasive species would allow more light to reach the water, preserve higher dissolved oxygen levels (important for fish, frogs and other aquatic animals) and give opportunities for native perennials like sedges, wild millets, and smart weed to take root. These native seed-bearing species in turn attract waterfowl and other migratory birds as well as turkey, deer and nutria. The presence of a range of herbivores attracts carnivores like alligators, owls, foxes and hawks. Our goal was to create a healthier ecosystem with more open water to ensure a variety of animal life so that the property could provide us hunting and recreational enjoyment.

We followed the water management guidance of Wildlife & Fisheries during the 13 years we owned the property. Wildlife & Fisheries recommended an annual draw-down of water to dry-out invasive aquatic plants and accumulated bottom muck, thereby controlling these unwanted invasives and exposing the subsoil so that native plants could germinate and take hold. The state's experts advised us that without active intervention under a long-term management plan, invasive species would slowly cover Fisher Bottom with a spongy expanse of floton, making the area undesirable to most animal species and ruining its character as a healthy marsh.

At the south-east end of Fisher Bottom, where the land is lowest, an old embankment had been put up, we believe more than 50 years ago. A wooden weir or water control structure in the middle of the berm governed the outflow of water from Fisher Bottom. On the advice of Wildlife & Fisheries we replaced the old wooden weir with more easily adjustable aluminum water control structure. By removing successive panels from the improved weir we could gradually lower the water level in Fisher Bottom at the right time each year in order to combat undesirable aquatic species. We also installed a water pump in uplands we own on a separate parcel along the Whiskey Bay Pilot Channel to bring water from the Pilot Channel through several thousand feet of watercourses and ditches into Fisher Bottom at its north-east side. With this system in place we were able to raise water levels during periods of drought and we could quickly replace water after the annual draw-down.

In practice we drained Fisher Bottom less often than once a year – about 9 times during the 13 years of our ownership. After six weeks or so the water would largely subside in Fisher Bottom, except for several deeper channels in the bottom contour which always retained water. Fish, frogs and alligators used these lower pools until we restored the water level. Occasionally we treated particularly heavy patches of invasive species with a herbicide like Round-Up or 2-4-

D after the annual draw-down, on the recommendation of Wildlife & Fisheries, which regularly uses these herbicides in sections of the Atchafalaya Basin under its management. But herbicides are expensive. To the best of my memory we used them only four to six times over the thirteen years we owned the property.

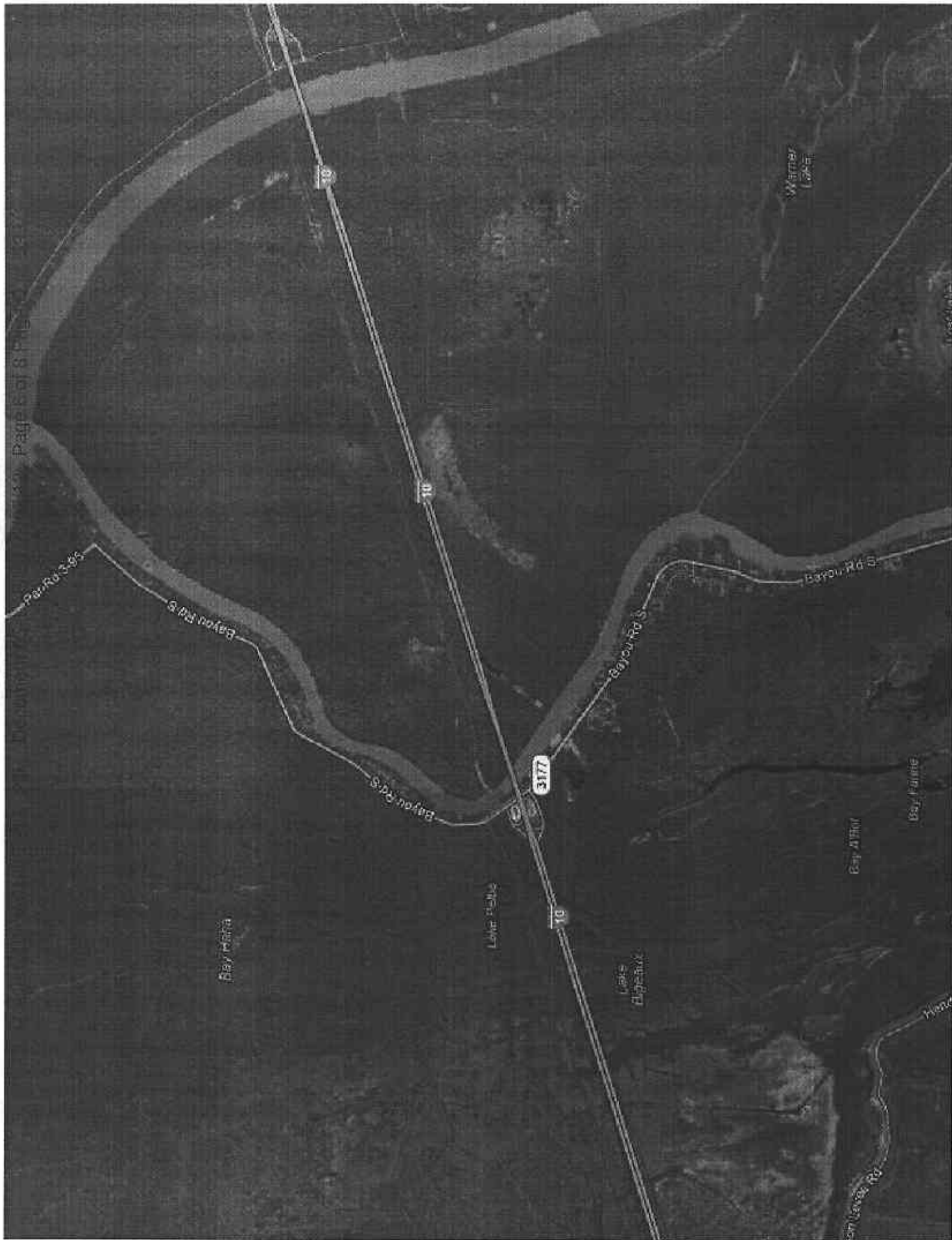
In summary our objective at Fisher Bottom was to build on the practice of the prior owners by using water management to combat invasive species and to encourage sufficient biodiversity among native species to attract and support a healthy animal population. We achieved some success in this endeavor and are now working with the new owner to share the habitat management techniques we learned. We also put the buyer in touch with Tony Vidrine, a biologist with the Department of Wildlife & Fisheries who worked with us after Robert Helm died, and I understand they will continue to consult with Mr. Vidrine on proper environmental management.

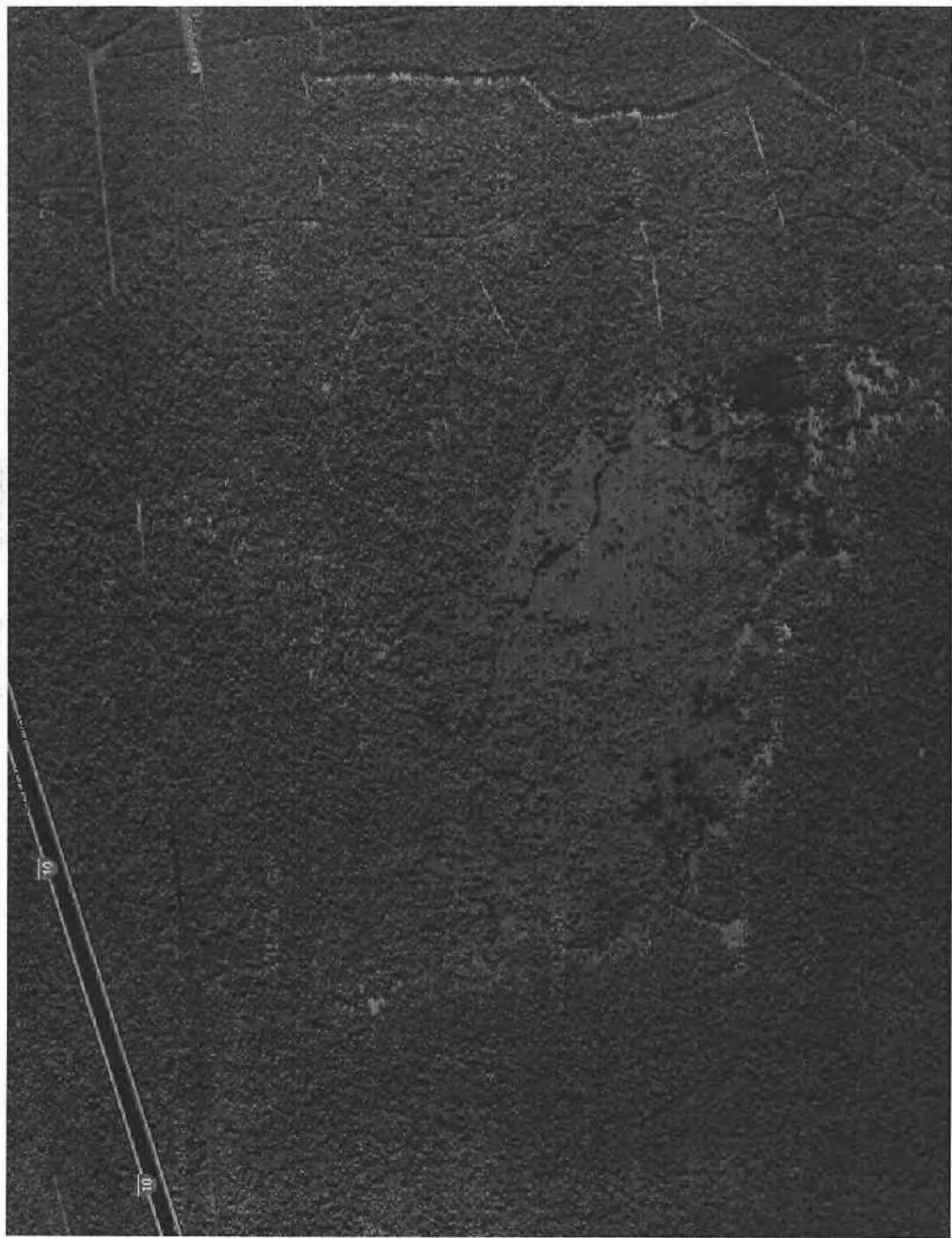
I, Scott Sebastien, declare that the foregoing is true and correct.

Executed on March 7, 2012.

/s/
Scott Sebastien¹

¹ Mr. Sebastien will provide a signed copy of the declaration, which Federal Defendants will then file as a substitute.







Herrmann, Michael H MVN

From: Tamara Mick [Mick.Tamara@epamail.epa.gov]
Sent: Wednesday, August 22, 2012 10:47 AM
To: Herrmann, Michael H MVN
Subject: CEMVN-OD-SW Mallard Basin EA

Mike,

EPA has reviewed the Decision Document (EA) to solicit public comments in the special case of Individual Permit MVN-2010-1080-W11 issued In October 2010 and NPW 7 issued July 2010. When the original IP/NWP was advertised, EPA had no comment/objection to the application. Upon review, we still maintain that view.

Thanks for the opportunity to review and comment on the EA. If you have any questions or would like to discuss, please don't hesitate to call.

Tamara Mick
US EPA Region 6
Wetlands Section
Dallas TX 75202
214-665-7134