



TULANE LAW SCHOOL
TULANE ENVIRONMENTAL LAW CLINIC

April 17, 2018

BY EMAIL TO: kara.vick@usace.army.mil

Kara Vick, Project Manager
U.S. Army Corps of Engineers
New Orleans District

BY EMAIL TO: elizabeth.hill@la.gov

Elizabeth Hill, Project Manager
Louisiana Department of Environmental Quality
Water Quality Certifications

Re: Objection to Permit Application No. MVN 2018-00215-EV (WQC 180314-01) of
Allstate Financial Application to Construct a
Multipurpose Development in St. Tammany Parish, Louisiana.

Ms. Vick and Ms. Hill:

Ms. Hazel (Sinclair) Piazza, Loretto O'Reilly, the Gulf Restoration Network, the Louisiana Audubon Council, and the Sierra Club, Delta Chapter (collectively "Citizens"), represented by the Tulane Environmental Law Clinic, strongly object to the permit application in the name of Allstate Financial Company for a Clean Water Act Section 404 permit and 401 water quality certification to fill 24 acres of wetlands in St. Tammany Parish to create a multipurpose development. Citizens request that the United States Army Corps of Engineers ("Corps") and Louisiana Department of Environmental Quality (LDEQ) complete an Environmental Impact Statement (EIS) on the significant effect of this filling of 24 acres of wetlands, particularly when considered in light of the past, present, and reasonably foreseeable future impacts of similar development in this area. The Corps must conduct a cumulative impacts analysis and the Corps must make that analysis available for public comment if the public is to meaningfully participate in these proceedings. Similarly, if the Corps does not perform an EIS, it must make its Environmental Assessment (EA) and its Finding of No Significant Impact (FONSI) available for public comment.

Barring a full EIS in compliance with the National Environmental Policy Act (NEPA), the Corps and DEQ must deny this application, as they cannot demonstrate that they have adequately considered the environmental impacts of this project. Similarly, no publicly available information has been provided demonstrating that the applicant has satisfied its burden to show there are no alternative sites with less adverse impacts, including non-wetland sites and sites not in the floodplain, and has otherwise complied with the Clean Water Act 404(b)(1) Guidelines ("Guidelines"). The Corps must make the alternative sites analysis available for public comment.

Tulane Environmental Law Clinic

6329 Freret St., Ste. 130, New Orleans, LA 70118-6248 tel/504.865.5789 fax 504.862.8721 www.tulane.edu/~telc

Indeed, the Eastern District of Louisiana and the U.S. Court of Appeals for the Fifth Circuit enjoined the Corps from proceeding with a permit for the Timber Branch II development. *O'Reilly v. U.S. Army Corps of Engineers*, No. Civ.A 04-940, 2004 WL 1794531 (E.D. La. 2004); *O'Reilly v. U.S. Army Corps of Engineers*, 477 F.3d 225 (5th Cir. 2007). The Fifth Circuit instructed that it: “enjoin[s] the Corps from issuing a § 404 permit herein until further orders of the district court consistent with this opinion[.]” *Id.* at 240. Apparently, neither the Corps nor the Intervenor sought further direction from the district court, so those orders have yet to be issued and this project cannot proceed.

Citizens reserve the right to rely on any and all comments made by the public or organizations on this application, as well as any comments of other state or federal agencies. Citizens incorporate by reference the separate comments of the Gulf Restoration Network submitted on April 16, 2018. We also request that the Corps send a written response and notice of decision to undersigned counsel rather than simply publishing the decision and associated documents on its website at some later date. Further, we request that the Corps send its undersigned counsel a copy of any comment responses which the applicant provides the Corps as soon as the Corps receives it. We greatly appreciate your review of our comments and anticipate your responses.

RELEVANT FACTS

This proposed fill project is in unincorporated St. Tammany Parish, just south of the city of Covington. Exhibit A. To the immediate northwest of the project area is the Terra Bella subdivision and to the immediate southeast of the property is the Flowers Estates subdivision. *See* March 19, 2018, Joint Public Notice (“Public Notice”), Vicinity Map. Commenter Hazel Sinclair Piazza lives on Bricker Road, approximately half a mile east of the proposed area. To the immediate south of the wetland area to be filled is the Timber Branch. *See* Vicinity Map. The Tchefuncte River runs to the immediate east of the project area; this section of the Tchefuncte is known locally as the Little Tchefuncte River. It is designated by the state of Louisiana as a Scenic Stream and an Outstanding Natural Resource Water, as is the Timber Branch as a tributary to the Tchefuncte.

As is well known and also testified to in the attached affidavits, this area flooded badly in 2016, when heavy rainfall caused the Little Tchefuncte River to overflow. Exhibits B and C (Affidavits of Hazel Piazza and Arnold Kirschman). A portion of the area proposed for development is designated by FEMA as flood zone AE, a high risk repetitive flood zone area. This project would fill 24 acres of wetlands in this floodplain with impermeable materials; the total project acreage according to the Corps is 69.19 acres.

A larger portion of this same tract was proposed to be filled and developed into residences in 1999-2001. Exhibit D (map of 1999-2001 proposed development); *see also* Exhibit E (vicinity map from public notice). Like this one, the proposed development was named Timber Branch II. The Corps issued a Section 404 permit for this development, and a lawsuit was filed challenging the issuance of the permit in the Eastern District of Louisiana. *O'Reilly v. U.S. Army*

Ms. Kara Vick and Ms. Elizabeth Hill

April 17, 2018

Page 3 of 16

Corps of Engineers, 04-0940 (E.D. La). The court found that the Corps illegally issued the permit and enjoined the project until the Corps completed an EIS addressed the cumulative flooding impacts of the project. *O'Reilly v. U.S. Army Corps of Engineers*, No. Civ.A 04-940, 2004 WL 1794531 at *6 (E.D. La. 2004) (“The Corps also abused its discretion in failing to give an in depth analysis to the cumulative effects of the project In light of the long-term and irreversible environmental impacts associated with this project, the Corp's action is wholly at odds with NEPA.”). The Court also ordered the Corps to complete an EIS on the project; this portion of the court’s decision was reversed by the Fifth Circuit. *O'Reilly v. U.S. Army Corps of Engineers*, 477 F.3d 225 (5th Cir. 2007). However, the Fifth Circuit affirmed the district court’s reversal of the Corps decision and the issuance of an injunction, stating that it “enjoin[s] the Corps from issuing a § 404 permit herein until further orders of the district court consistent with this opinion[.]”¹ Exhibit F (5th Circuit opinion).

Significantly, though the project currently being applied for involves a smaller portion of this tract of wetlands, the developer has expressed his plan to develop the full 200-acre tract, including the portion of the tract to be developed in the 1999-2001 application. *See* Exhibits B and C (Affidavits of Hazel Piazza and Arnold Kirschman); *see also* Exhibit B1 (showing Bruce Wainer as the representative of Allstate Financial). Further, the St. Tammany Parish Master Plan designates nearly the entire tract as zoned for development. Exhibit G (A2-A4 = single family residential; NC4 = neighborhood institutional; A6 = multiple family residential).²

I. THE CORPS MUST INITIATE A NEW NOTICE AND COMMENT PERIOD DUE TO THE LACK OF SUFFICIENT AND ACCURATE INFORMATION.

The Corps’ public notice does not include sufficient information for public comment. The Corps must make the following information available for public comment: 1) its EA (unless the Corps recognizes its duty to perform an EIS on this project, which will require its own public process); 2) a cumulative impacts analysis, 3) details on the proposed mitigation, 4) the name of the developer, who is the actual applicant, and 5) accurate details on the paving impacts.

This information is particularly critical for the public to have available for comment due to the enjoined nature of the project.

II. THE DEVELOPMENT WILL CONTRIBUTE TO FLOODING IN AN ALREADY FLOOD PRONE AREA AND WILL EXACERBATE EROSION IN NEARBY RIVERS AND STREAMS.

The Clean Water Act states that “the degradation or destruction of special aquatic sites, such as filling operations in wetlands, is considered to be among the most severe environmental impacts covered by these Guidelines. The guiding principle should be that degradation or

¹ A review of the district court’s docket indicates that the court has yet to issue that follow-up opinion. Therefore, Citizens’ position is that the Corps may not issue this permit until the matter has been brought back before the district court.

² Originally, as a result of its New Directions 2025 Initiative master planning process, St. Tammany Parish zoned this tract as “Conservation,” no doubt recognizing the critical nature of keeping this particular area undeveloped. *See* Exhibit H.

destruction of special sites may represent an irreversible loss of valuable aquatic resources.” *See* 40 C.F.R. § 230.1(d). Nevertheless, Section 404 of the Clean Water Act authorizes the Corps to issue permits for the discharge of dredged or fill material into the navigable of the United States, including wetlands, if such an application otherwise complies with the Clean Water Act. EPA promulgated Guidelines to determine whether an application complies with the Clean Water Act (“Guidelines”). At 40 CFR 230.10(c), the Guidelines state, in relevant part, that the Corps must deny the application if the activity “will cause or contribute to significant degradation of the waters of the United States.” 40 C.F.R. § 230.10(c). The Corps must consider several factors, individually and collectively, to make a finding of significant degradation, including:

- (3) Significantly 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; or
- (4) Significantly adverse effects of discharge of pollutants on recreational, aesthetic, and economic values.

Id.

These factors clearly apply to the proposed development. The impacts to the wetlands in the proposed development would in turn impact the Timber Branch and the Little Tchefuncte River by increasing the flow and energy of the waterways during storm events. The strain on the Timber Branch would in turn significantly affect the aesthetic value of the Timber Branch through increased scouring and the direct discharge of storm runoff into the water body. The Clean Water Act itself states that “[d]ischarging fill material in wetlands as part of municipal, industrial or recreational development may modify the capacity of wetlands to retain and store floodwaters and to serve as a buffer zone shielding upland areas from wave actions, storm damage and erosion.” *See* 40 C.F.R. § 230.41(b).

Much of the proposed development is currently comprised of pine flatwood and savannah wetlands. The Timber Branch of the Little Tchefuncte River, a natural and scenic river, runs immediately south of the proposed development. For perspective, see Public Notice Vicinity Map. While the wetlands currently covering most of the area of the proposed development help to absorb runoff during storm events, the proposed development seeks to cover what is largely permeable wetlands with impermeable concrete.³ This will inevitably lead to faster runoff during storm events, an increased risk of flooding in the area, and ultimately the untimely erosion and scouring of the Timber Branch and the Little Tchefuncte River.

The threat of flooding cannot be overstated in this area, and yet the public notice materials for the proposed development do not address the increased risk of flooding that will

³ The public notice drawings suggest that the paving impacts total about 15 acres, but this is misleading and inaccurate information because the applicant did not show the paving from the homes and apartment themselves – slab on grade – and from the commercial development. It only showed paving impacts of sidewalks, parking lots, and walkways. The undepicted concrete constitutes a large portion of the remaining area.

Ms. Kara Vick and Ms. Elizabeth Hill

April 17, 2018

Page 5 of 16

result from the development and its irreversible effect on wetlands in the area. The proposed development sits within the 100-year floodplain in the Little Tchefuncte watershed and a portion of it is classified as a Special Flood Hazard Area. The area of the proposed development has been identified by FEMA as being particularly non-resilient to flood events within that watershed in a recent study. There are nearly one thousand repetitive flood loss properties in unincorporated St. Tammany Parish, and many of those properties are in the area surrounding the proposed development. *See* Exhibit J, a FEMA report on the Liberty Bayou-Tchefuncte watershed, especially at pages 10-15, which contain maps and charts relating to resilience and flood loss properties in St. Tammany Parish.

Nor will the retention ponds depicted in the Public Notice drawings remove or even significantly lessen the flood risk. Though the public notice contains almost no information on these ponds, the ponds are clearly designed exclusively for the benefit of the residents in the Timber Branch II development, to allow the floodwaters to drain away from their properties. There is no indication that the ponds are designed to or will provide any protection to surrounding residents from the increased flood risk that the development will pose (nor is there information sufficient to conclude that the ponds will be enough to protect the Timber Branch residents themselves).

Further, given the existing flooding risk and the extent to which the development will exacerbate it, the Corps must consider the loss of property values to all residents in the path of this potential flooding.

III. THE CORPS' PROPOSAL DOES NOT ADDRESS THE CUMULATIVE IMPACTS TO THE ST. TAMMANY PARISH AREA THAT THE DEVELOPMENT WILL CAUSE, PARTICULARLY WITH RESPECT TO THE NUMBER OF 404 PERMITS ISSUED IN THE IMMEDIATE AREA SINCE 2000.

The public notice notes that the project will “require permanent impacts to 24.66 acres of mix bottomland hardwood and pine savannah wetlands.” The National Environmental Policy Act (“NEPA”) is designed to force federal agencies to consider the environmental impacts of their actions, in this case, issuance of a § 404 permit allowing the proposed development. NEPA states that federal agencies involved in the undertaking of Federal actions significantly affecting the quality of the natural and human environment must prepare an environmental impact statement. *See generally* 39 C.F.R. § 775.

The proposed development is a major Federal action subject to NEPA, and there will surely be significant environmental impacts resulting from the proposed development. In order to determine whether this proposal is sufficiently major to trigger the preparation of a more extensive Environmental Impact Statement (EIS), the Corps must evaluate not only the direct and indirect impacts on the human environment that the proposal itself will cause, but the cumulative effects of past, present, and reasonably foreseeable future activities in the area.

The proposed development would have significant direct impacts on human environment, as it proposes to significantly alter the landscape of the area, including the fill of over twenty-four acres of wetlands. In the past five years, dozens of dredge and fill permits have been issued

Ms. Kara Vick and Ms. Elizabeth Hill

April 17, 2018

Page 6 of 16

in St. Tammany Parish, which cumulatively eliminate hundreds of acres of flood absorbing wetlands and replace them with impermeable concrete. *See* Exhibit K (summary of wetland impacts of Corps permits in Liberty Bayou – Tchefuncte watershed from Sept. 2013 to April 2018). *See also* interactive map program prepared and developed by the Gulf Restoration Network, which plots permits granted by the Corps in St. Tammany Parish, available at https://gulfwetlandsmatmap.carto.com/viz/ab253415-83f0-42af-9267-c0de260a7bf0/embed_map. The proposed development is one of many recent developments in the area, all of which contribute to an increased flood risk. The proposed development would have significant direct impacts on the Timber Branch and the Little Tchefuncte River watershed, including an increase in flooding, harm to the habitats of several listed species, and the degradation of scenic waterways. The proposed development would also have significant indirect impacts on the area, resulting in increased vehicular traffic, noise pollution, light pollution, and a degradation of air quality.

The proposed development would also be a major federal action based on the cumulative effects of the development. NEPA defines cumulative impact as “the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.” *See* 40 C.F.R. § 1508.7. Although the Corps may consider the effects and impacts of this particular application to be minor, they must be viewed both in conjunction with the high number of 404 permits that have been issued in the immediate area since 2000, as well as the likelihood that tracts adjacent to the proposed development will apply for similar permits in the near future.

A. The Corps Has Issued a High Number of 404 Permits in Recent Years in Areas Immediately Surrounding the Proposed Development.

In its 2004 opinion concerning the prior version of the proposed Timber Branch II development on the same land as the current proposed development, Judge Zainey of the Eastern District of Louisiana noted that the Corps had by that time issued a total of eighty-seven permits within a three-mile radius of the proposed development. *O’Reilly v. U.S. Army Corps of Engineers*, No. Civ.A 04-940, 2004 WL 1794531, *2 (E.D. La. 2004). Since 2004, even more permits have been granted in St. Tammany Parish, and local analyses of the permitting process indicate a continued high concentration of permits granted in the area immediately surrounding the proposed development. The interactive map of permits which the Corps has granted in St. Tammany Parish since 2013 shows how many permits have been granted in the immediate area and how many acres of wetlands have been impacted by the Corps 404 permitting process. https://gulfwetlandsmatmap.carto.com/viz/ab253415-83f0-42af-9267-c0de260a7bf0/embed_map. It is also important to note and consider that the area immediately surrounding the proposed development contains two existing subdivisions, Terra Bella and Flowers Estates. *See* Public Notice Vicinity Map.

B. The Corps’ Cumulative Impacts Analysis Must Consider Reasonably Foreseeable Future Projects.

The Corps must consider the proposed development in the light of the developer's plans to be developed the rest of the tract. Similar to the 1999-2001 application which did not present the full development plans, the current proposed development is just the first stage in a larger cohesive tract of development, as attested to by Hazel Piazza and Arnold Kirschman in their affidavits. *See* Exhibits B and C. Plans to develop an area as large as the proposed development have existed for nearly twenty years and form the basis for the current proposed development. Exhibit L, the original 1999 plans for area development. Perhaps most importantly, the entire tract is zoned for development. *See* Exhibit G (St. Tammany Parish zoning for tract). Therefore, even if the current developer chooses not to pursue a larger scope of development per the 1999 plans or sells the land, it is clearly foreseeable that the larger area will be developed, since it is currently zoned for development. Further evidence for the imminent and foreseeable future development of the larger area can be found in the recent public notice issued for the current development. The plans for the proposed development do not indicate any sort of buffer zone on the north side of the proposed development, an area that is currently wetlands. Since there is no buffer between the proposed development and the existing wetlands, one can reach no conclusion other than that there are concrete plans to develop an area larger than the proposed development. *See* Public Notice, Master Plan drawing (showing that Master Plan appears to be an excerpt of a larger map showing the rest of the planned development, as even the road separating the commercial development from the multifamily residential development ends abruptly).

In order to fully understand the environmental impacts of the instant development, the Corps must look at the effects of the current proposed development, past developments in the area, and the future foreseeable developments. There have been numerous 404 permits granted in the immediate area, the proposed development itself would have a significant impact on the local environment, and future development is clearly foreseeable. Taken in conjunction, these developments have had significant effects and would exacerbate the risks of flooding in the area, strain local wildlife populations and habitats, and impair local air and water quality. Future development can be seen in this instance not as a separate, stand-alone project, but as a later stage of a larger, cohesive development in St. Tammany Parish. The cumulative impacts must be considered.

IV. THE APPLICANT MUST DEMONSTRATE HOW ITS PROPOSED MITIGATION WILL REPLACE WETLAND FUNCTIONS LOST IN THE PROPOSAL AREA.

The public notice indicates: "The applicant proposes to purchase credits from a mitigation bank to offset any unavoidable losses to wetland functions caused by project implementation." First, the Corps' inclusion of a reference to the applicant's plan for mitigation is improper, as the Corps must ensure that the project meets the Guidelines before proceeding to analyze mitigation.

More importantly, the applicant must demonstrate that any proposed mitigation will offset the losses of wetland function which its project will cause in the proposed location. Also, because the loss of wetlands in this area will likely cause significant flooding impacts, the Corps must perform an EIS unless it or the applicant demonstrates how the mitigation will reduce the effects of the proposal to insignificance.

Presently, no mitigation banks exist in the Bayou Liberty-Tchefuncte watershed, where the current proposal is located. *See* GRN interactive map, available at https://gulfwetlandsmatmap.carto.com/viz/ab253415-83f0-42af-9267-c0de260a7bf0/embed_map. Wetland mitigation outside of this watershed cannot replace the flood storage functions served by the wetlands which the applicant proposes to fill. *See* Exhibit I (Declaration of Dr. Koob). Therefore, if the applicant plans to purchase credits outside the watershed, the Corps must perform an EIS.

Even if a mitigation bank is established inside this watershed and the applicant purchases credits in such a bank, the Corps or the applicant must demonstrate how the mitigation replaces or mitigates the lost wetland functions at the site and must demonstrate how the mitigation reduces the impacts of the lost wetland acreage to insignificance to avoid the need for an EIS.⁴

Further, the Corps' current method for calculating the amount and type of mitigation required for Section 404 permits – the LRAM – is flawed, both procedurally and substantively. Procedurally, while the Corps has twice publicly noticed the LRAM for comment, it has never published a final determination or response to comments on this method of determining mitigation requirements. To date, over two years from when the Corps first began using the LRAM, the Corps has yet to publish any information about the effectiveness of this method, which began as an “interim” method but has never been finalized. Substantively, and as commented on by the Gulf Restoration Network and others, the LRAM is flawed because it does not consider cumulative impacts of wetland losses. *See* Exhibit M at 4 (Nov. 30, 2015, comments on LRAM). Therefore, any required mitigation calculated using this method will necessarily be insufficient.

Additionally, it is well known that numerous mitigation areas do not succeed. For example, when the Ohio EPA reviewed mitigation banks in Ohio, it found that 25% of the “wetlands were not wetlands at all, and of the remaining 75%, 25% were “poor,” 58% were “fair,” and only 18% were “good.” *Ecological Assessment of Ohio Mitigation Banks: Vegetation, Amphibians, Hydrology, Soils*, Ohio EPA Technical Report WET/2006-1, p. viii. Similarly, Indiana's Wetland Compensatory Mitigation program has also shown a 71% failure rate for its forested wetland mitigation areas. *Wetland Compensatory Mitigation Study*, Indiana Department of Environmental Management.

Finally, the way mitigation banks are run and monitored leaves their efficacy in serious doubt. Private mitigation banks are often operated by developers themselves, and Citizens question the legal processes to ensure that the wetlands preserved in mitigation banks stay in place in perpetuity. Situations exist where mitigation banks have themselves been developed, entirely removing the existence of mitigation. Few regulators are in place to enforce the permanency of mitigation banks, particularly private ones. Procedures should be put in place to ensure accountability to the public.

⁴ There is apparently a proposed mitigation bank in Cane Bayou.

V. THE APPLICATION FAILS TO REBUT THE PRESUMPTION THAT ALTERNATIVE, NON-WETLAND SITES ARE AVAILABLE.

Under the 404(b)(1) Guidelines, the Corps must deny the application if there is a practicable alternative which would have less adverse impact on the aquatic ecosystem, unless that alternative has other significant adverse consequences. 40 C.F.R. § 230.10(a). Further, when the proposed location is in wetlands, as this one is, and unless the proposed activity is water dependent, which this one is not, the Guidelines require the Corps to presume that a practicable alternative site is available which has less adverse impacts. According to the 404(b)(1) Guidelines at 40 C.F.R. § 230.10(a)(3):

Where the activity associated with a discharge which is proposed for a special aquatic site [defined in subpart E to include wetlands] does not require access or proximity to or siting within the special aquatic site in question to fulfill its basic purpose (i.e., is not “water dependent”), practicable alternatives that do not involve special aquatic sites are presumed to be available, unless clearly demonstrated otherwise. In addition, where a discharge is proposed for a special aquatic site, all practicable alternatives to the proposed discharge which do not involve a discharge into a special aquatic site are presumed to have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise. (see 40 C.F.R. § 230.10(a)(3))

Special aquatic sites are defined to include wetlands under 40 C.F.R § 230.41.⁵ Therefore, the Corps must deny the Timber Branch permit application unless the applicant overcomes the legal presumption that a practicable alternative exists to its proposed wetland location or proves that its proposed project is “water dependent.”⁶ The applicant has presented no publicly-noticed evidence of an alternatives analysis.⁷

VI. THE DEVELOPMENT WILL REDUCE WATER QUALITY IN THE AREA AS A RESULT OF POLLUTION AND SEDIMENT DISCHARGES FROM CONSTRUCTION.

Both the Corps and the LDEQ must consider the temporary and permanent impacts of filling this 24 acres of wetlands on water quality in the waters of the proposed location. Thus, the Corps and LDEQ must consider the impact of the construction of the development and the permanent existence of 24 acres of impervious surfaces on the quality of the remaining wetlands, the Timber Branch, and the Little Tchefuncte River.

⁵ The Guidelines at 40 C.F.R. § 230.3(q-1) define special aquatic sites as “those sites identified in subpart E.” Wetlands are listed in subpart E. See 40 C.F.R. § 230.41.

⁶ Even if the applicant could show that its project is water dependent, which is highly unlikely, that simply means the presumption is removed. The existence of practicable alternatives which would have less impact on the aquatic ecosystem would still preclude granting of the permit.

⁷ Should the applicant present any evidence or discussion on this issue in response to public comment, this information should be publicly noticed. This alternatives demonstration is an essential requirement of the Guidelines which public comment should not be required to prompt, so to allow the applicant to submit it after the comment period is closed deprives the public of meaningful comment. See discussion below.

When considering the construction phase, both agencies must consider that this project is in floodplains and is in an area that flooded in 2016. Should flooding occur during construction, the agencies must consider the pollutants that will undoubtedly enter these waters, which will almost surely lead to the violation of water quality criteria including Total Suspended Solids and Turbidity. Once construction is complete, the potential for stormwater from the nearly 24 acres of impervious surfaces in the place of nutrient-retaining and pollutant-absorbing wetlands to cause violations of water quality criteria is high. Even though the applicant has proposed to include retention ponds immediately north of and, perhaps ill-advisedly, very close to the Timber Branch, to which it claims all stormwater drainage will be directed, no information has been provided, at least publicly, demonstrating that the retention ponds are of sufficient size and depth to avoid overflow in the event of an extreme rain event or flooding of the surrounding waters. Without such a demonstration, neither agency has a rational basis to conclude that the construction and continued existence of this development will not lead to a violation of water quality criteria in the remaining wetlands, the Timber Branch, or the Little Tchefuncte.

Retention ponds frequently hold stagnant water which is high in algae and algae-promoting nutrients like nitrogen and phosphorus. For example, photographs of the retention ponds at the nearby Terra Bella subdivision depict green water. Exhibit N. Thus, if retention pond water spills into the Timber Branch and from there to the Tchefuncte, the potential for violation of narrative criteria and dissolved oxygen criteria is high.

Further, this segment of the Tchefuncte River – subsegment 040807 – is a Scenic Stream and an Outstanding Natural Resource Water, as is the Timber Branch, a tributary to the Tchefuncte. LDEQ must not only ensure that the dredge and fill project will not lead to a violation of water quality criteria, but as DEQ’s duty is to determine whether the project will violate water quality *standards*, it must do a Tier 3 antidegradation analysis on the effects of the discharge.

Finally, because both of these waterbodies are Scenic Streams, the Corps and DEQ must not proceed until the Louisiana Department of Wildlife and Fisheries (LDWF) decides whether to grant a permit for the discharges of both stormwater and treated sewage that will result from this project. As the development will absolutely have a sewage treatment plant which will discharge into the Tchefuncte River, which discharge is not allowed unless permitted by the LDWF, the effects of this discharge must be considered now.

VII. THE DEVELOPMENT WILL DESTROY THE HABITAT OF LOCAL FAUNA.

A. **The Development Would Have an Adverse Effect on Local Wildlife Populations, Habitats, and Health.**

The area of the proposed development currently provides a habitat for a plethora of wildlife, including reptiles, birds, and mammals. *See* Exhibit B (Piazza Affidavit with photographs of wildlife including a bald eagle on Bricker Road, turtles in the Tchefuncte, and raccoons). Should the project go forward, many of these animals would be severely impacted. As noted in the Clean Water Act, “the discharge of dredged or fill material can result in the loss or change of breeding and nesting areas, escape cover, travel corridors, and preferred food sources

for resident and transient wildlife species associated with the aquatic ecosystem.” *See* 40 C.F.R. § 230.32(b). The Corps must evaluate the full effects of this proposed development on the wildlife which indisputably live in the area. In addition to the undisputed loss of sixty-nine acres of habitat, the Corps must consider what will happen due to this loss. Would the wildlife attempt to move into the 100’ buffer zone, and what impacts would that have on the health and wellbeing of those animals and the residents? Is it likely that a large number of the animals currently residing in the area of the proposed development would be displaced or killed? Would a large number of animals be able to relocate to other areas of St. Tammany Parish, and how would their presence impact the animals already residing in those areas? How would the proposed development impact, on a larger scale, the ability of St. Tammany Parish to support a large, biodiverse population of animals? Would the proposed development put parish residents at risk of animal encounters or attack by driving predators onto properties in search of food or shelter? The Corps must consider, in an EIS, the undoubtedly significant impact that the loss of this habitat would cause on the wildlife, including in light of the loss of other habitat for the many developments going into the area.

B. The Proposed Development Adversely Impacts Endangered and Threatened Species and Their Habitat.

The Guidelines prohibit the Corps from permitting a discharge which would jeopardize the continued existence of listed species or result in the destruction or adverse modification of their critical habitat, under the Endangered Species Act. 40 C.F.R. 203.10(b)(3). The area of the proposed development around the Timber Branch and Little Tchefuncte River is a potential habitat for the endangered Red Cockaded Woodpecker, and the Tchefuncte watershed is designated as critical habitat for the Gulf sturgeon. Elimination of wetlands and pine savannah forests in the proposed development would completely destroy a habitat for the Red Cockaded Woodpecker and would greatly increase the likelihood of harm to the habitat for sturgeon, as increased runoff and discharges into the Little Tchefuncte River from the development – including sewage discharges, would alter the characteristics of the scenic stream, from water quality and stream elevation and flow rate to water temperature. The Gulf sturgeon is particularly sensitive to low dissolved oxygen, and this area of the Tchefuncte is potential breeding habitat, placing the sturgeon in these waters when they are in their most vulnerable stages.

VIII. THE PROJECT IS NOT IN THE PUBLIC INTEREST.

The Corps must deny the Timber Branch II application because it is not in the public interest. (“[A] permit will be granted unless the district engineer determines that it would be contrary to the public interest.” 33 C.F.R. § 320.4(a)). When considering the application and the public interest, the Corps must base its decision on “an evaluation of the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest.” 33 CFR § 320.4(a)(1). The Corps must weigh all relevant factors particular to an individual case and balance the reasonably expected benefits against the reasonably foreseeable detriments. *Id.* Relevant factors include:

conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation,

shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership and, in general, the needs and welfare of the people.

Id.

In particular, however, the Corps' regulations mandate that it consider the following issues relevant to the public interest:

- (i) The relative extent of the public and private need for the proposed structure or work;
- (ii) Where there are unresolved conflicts as to resource use, the practicability of using reasonable alternative locations and methods to accomplish the objective of the proposed structure or work; and
- (iii) The extent and permanence of the beneficial and/or detrimental effects which the proposed structure or work is likely to have on the public and private uses to which the area is suited.

33 C.F.R. § 320.4(a)(2). The weight given to each factor in the balancing test depends on its relevance and importance to each individual case and will vary with each particular situation. *Id.* at § 320.4(a)(3).

The proposed Timber Branch II project is not in the public interest because the relevant factors demonstrate that the reasonably foreseeable detriment outweighs the expected benefits. The applicant has submitted no publicly-available information demonstrating the need for commercial and residential construction in this particular area, and has offered no demonstration that there are no non-wetland alternative locations for this development. Second, here significant unresolved conflicts as to resource use exist. The 24 acres of bottomland hardwood and pine savannah wetlands to be filled serve irreplaceable flood storage functions. The USDA references a study showing that a single 32-foot tall tree reduced stormwater runoff by 327 gallons. Exhibit O (excerpts from USDA brochure). This project will affect a total of 69.19 acres of land, and the Corps must consider this additional acreage as well when it considers the loss of these resources which currently serve as habitat for wildlife, including birds. Finally, the Corps must consider the permanence of all of this detrimental effects, as the wetlands to be filled will be removed forever. The extent of the detrimental effects can be enormous due to flooding issues; these effects can include the potential for loss of life.

IX. THE DEVELOPMENT MAY NEGATIVELY AFFECT AQUIFER RECHARGE BY PAVING OVER MUCH OF THE TRACT, PREVENTING SEEPAGE INTO THE WATER TABLE AND POSSIBLY AFFECTING LOCAL WELLS.

Another factor which the Corps must consider in its public interest analysis and in its Guidelines analysis is the lost function of the wetlands in aquifer recharge. *See* 40 C.F.R. 230.10(c)(1) (prohibiting the Corps from issuing a permit which would cause significant degradation of waters of the U.S., including "significantly adverse effects of the discharge of pollutants on human health or welfare, including but not limited to effects on municipal water supplies . . ."). Currently, the 24 acres of wetland allow for seepage of rainwater into the water

Ms. Kara Vick and Ms. Elizabeth Hill

April 17, 2018

Page 13 of 16

table, and likely serves as recharge for the underlying Southern Hills aquifer, designated by EPA as a sole source aquifer. Exhibit P (EPA map of Southern Hills Aquifer). Permanently paving over these wetlands will remove this source of aquifer recharge; paving over the wetlands in the rest of the tract for future planned development will worsen this impact. Many local residents obtain their water from private wells. *See* Exhibit B (Piazza Affidavit). The Corps must consider the impact of this loss of wetlands.

X. THE DEVELOPMENT WILL GREATLY INCREASE
TRAFFIC IN AN INCREASINGLY CONGESTED AREA.

The population of St. Tammany Parish has increased by thirty-three percent since 2000 and continues to grow at a rapid clip, and formerly rural and thinly populated areas of the parish are increasingly subject to congestion. *See* U.S. Census Bureau population estimates for St. Tammany Parish (<https://www.census.gov/programs-surveys/popest/data/tables.2016.html>). The addition of the proposed development to the area would contribute greatly to congestion in the area, an issue which is not at all addressed in the public notice, and the Corps must consider this congestion in relation to impact in the community. The Baptist church to the south of the proposed development already must deploy traffic guards on Sundays to ensure the smooth flow of church traffic. The proposed development would only exacerbate the increasing traffic issue in St. Tammany Parish.

XI. THE DEVELOPMENT WILL ENCROACH UPON A HIGH
RISK AE FLOOD ZONE, IN VIOLATION OF FEMA FLOOD MAPS.

FEMA has developed flood maps in connection with the National Flood Insurance Program (NFIP). These maps indicate that part of the development is in an AE flood zone. As such, it is at high risk for flooding, and is in violation of building requirements under NFIP. In the attached declaration, Dr. Tonja L. Koob, PE, attests that the "Timber Branch and its banks are within an area mapped as flood Zone AE, areas subject to inundation by the 1-percent-annual-chance flood event ("100-year flood") in the currently proposed Flood Insurance Rate Map." Exhibit I. Dr. Koob further attests that "[t]he width of Zone AE encompassing Timber Branch is approximately 1000 feet along Louisiana Highway 1085 and 680 feet along Bricker Road. Portions of Zone AE extend more than 100 feet to the north from Timber Branch." The buffer zone in the proposed development extends only 100 feet to the north from Timber Creek, indicating that properties in the proposed development would be within Zone AE, indicating a high risk of flooding under the National Flood Insurance Program. *See* Exhibit Q. The properties in the proposed development would, under this plan, be in violation of building requirements under NFIP. Homes built in areas zoned AE, as is the case in the proposed development, must be at or above Base Flood Elevation (BFE). The public notice gives no indication that homes built in the development would be at or above the Base Flood Elevation, in clear violation of FEMA regulations. *See* <https://www.fema.gov/zone-ae-and-a1-30>.

Indeed, homes and property in this area, including on Bricker Road, flooded with the heavy rains that occurred in 2016. *See* Exhibit B attachments (photographs of flooded home of Jimmy Miranda, 16461 Bricker Road); *see also* Exhibits B and C (Affidavits of Hazel Piazza and Arnold Kirschman).

XII. THE CORPS AND LDEQ MUST CONSIDER THAT THE PROPOSED DEVELOPMENT WILL DISCHARGE SEWAGE INTO THE SURROUNDING WATERBODIES

Both LDEQ and the Corps must consider the impact that the discharge of treated sewage from the sewage treatment plants that will necessarily be connected with this development will cause on the waterbodies to which it will discharge. LDEQ recognized long ago the problem in St. Tammany Parish with having many de-centralized, small sewage treatment facilities. Exhibit R (letter to St. Tammany Parish President Kevin Davis from Chuck Carr Brown). Though this recognition occurred many years ago, St. Tammany has not progressed in this regard, and instead now has many more of these small and often problematic facilities.

The Timber Branch proposed development will discharge treated sewage into the surrounding waters. Though the public notice materials disclose nothing about where and how much treated sewage the development will discharge, it is indisputable that it will do so.⁸ It is also very likely that it will discharge this treated sewage into the Little Tchefuncte, as this is the closest waterbody other than the Timber Branch, and the small Timber Branch would be overwhelmed by such a discharge.

Additionally, given that the Timber Branch and the Little Tchfuncte are Tier 3 Outstanding Natural Resource Waters, they may not be degraded, and it is unlikely that this development's treated sewage can legally be permitted to discharge into these waters. The Corps and LDEQ must consider these issues now.

LDEQ frequently attempts to put off its duty to consider the impacts of sewage discharges onto the LPDES permitting process instead of considering these impacts as part of its water quality certification duty. However, LDEQ must consider these impacts to water quality, because they are certain to occur and because the developer does not need an LPDES permit to begin construction. Therefore, by the time LDEQ considers these impacts as part of the LPDES process, it is too late for most alternative options to be effectively considered. LDDQ must consider these impacts now.

XIII. THE DEVELOPMENT WOULD CONTRIBUTE GREATLY TO LIGHT AND NOISE POLLUTION IN THE AREA.

The proposed development would contribute to light and noise pollution, increasing issues in quickly suburbanizing St. Tammany Parish. Replacing what is currently a light and noise pollution-free wetland with suburban development would brighten the night sky and imbue the area with constant background noise, potentially confusing or harming local animals already distressed by the elimination of their habitat. Light and noise pollution would also adversely affect the aesthetic and recreational value of adjacent rural areas. The Clean Water Act states that

⁸ The only type of sewage treatment which does not discharge treated sewage into surrounding waters – land treatment – would not appear to be an option in this tract, as it requires setting aside significant amounts of land and the plans for this entire tract are to fill it with residential and commercial buildings.

“[a]ctivities which degrade water quality, disrupt natural substrate and vegetational characteristics, deny access to or visibility of the resource, or result in changes in odor, air quality, or noise levels may reduce the value of an aquatic area to private property owners.” *See* 40 C.F.R. § 230.53(b). All of these factors apply to the proposed development, and the aesthetic harm done in the immediate area as a result of light and noise pollution would have an undeniably detrimental effect on the greater St. Tammany Parish area.

XIV. THE DEVELOPMENT DOES NOT ADHERE TO THE STANDARDS SET FORTH IN LOUISIANA’S PUBLIC TRUST DOCTRINE OR NEPA.

LDEQ must adhere to its public trustee duty under Article IX, section 1 of the Louisiana Constitution when it considers whether to grant a water quality certification to this project, which clearly affects the environment. Thus, LDEQ must consider: 1) whether there are alternative sites which would offer more protection to the environment than the proposed project without unduly curtailing nonenvironmental benefits, 2) whether there are alternative projects or mitigating measures which would offer more protection than the proposed project, 3) whether a cost benefit analysis demonstrates that the latter outweighs the former, and 4) whether the potential and real adverse environmental impacts have been avoided to the maximum extent practicable.

NEPA requires that the Corps engage in the same thorough analysis of alternatives, impacts, and a cost-benefit analysis.

XV. PAVING OVER MUCH OF THE SOIL IN THE DEVELOPMENT AREA WOULD SEVERELY AFFECT THE CAPACITY OF THE LAND TO CAPTURE WATER, INCREASING FLOOD RISKS.

One single acre of permeable wetlands can store roughly one million gallons of water, and wetlands drastically reduce the risk of flooding by reducing peak storm water flows. *See* EPA studies on functions of wetlands (<https://nepis.epa.gov/Exe/ZyPDF.cgi/2000D2PB.PDF?Dockey=2000D2PB.PDF>). The elimination of over twenty-four acres of wetlands in the proposed development and their replacement, by and large, by impermeable concrete, would greatly strain the capacity of the Timber Branch and make the Little Tchefuncte watershed more susceptible to harmful flood events. There are nearly one thousand repetitive flood loss properties in unincorporated St. Tammany Parish. Historically, FEMA has already spent \$1.3 billion in flood related claims in the Little Tchefuncte watershed, and developments such as that proposed will likely only make these expensive claims more likely in the future. *See* Exhibit j, a FEMA report on the Liberty Bayou-Tchefuncte watershed.

The Corps must consider the impacts, including cumulative impacts, of replacing 24 acres of wetlands and 69 acres of land with impervious paved surfaces. *See* Public Notice. It must also require the applicant to disclose the full paving acreage by including the paving associated with the houses, apartments, and commercial buildings themselves. The applicant disingenuously omitted this significant amount of paving from slab, etc., from its drawing of paving impacts. The Corps must obtain accurate information and provide it to the public for comment, as the notice with misleading information is insufficient.

XVI. THE DEVELOPMENT PLAN INSUFFICIENTLY DESCRIBES THE METHOD AND RATE OF DRAINAGE IN THE PROPOSED DEVELOPMENT AREA.

The development plan in its current state insufficiently demonstrates the method and rate of drainage in the proposed development area, precluding the opportunity for meaningful comments on the efficacy of the drainage plan. By simply providing directional indications of drainage flow, commenters are led to guess the rate that water will flow from storm drains into the proposed retention ponds, and from the retention ponds into the Timber Branch. The proposed plan does not even specify the size and elevation of culverts and catch basins, instead providing a general range. In order to fully understand the ramifications on local waterways with regards to erosion and scouring, it is critical that the notice contain specific sizes of drains and culverts, as well as estimated flow rates through the storm drains.

CONCLUSION

The Corps must not proceed further with this application until it: 1) seeks direction from the Eastern District of Louisiana regarding the injunction against development of the Timber Branch II tract, 2) completes and publicizes for comment a cumulative impacts analysis, 3) requires that the applicant provide an accurate and thorough depiction and calculation of all the impervious surfaces that the project will put in place of wetlands, including the slabs for the homes and the base of the commercial buildings and apartments, 4) perform an EIS or, at a minimum, publishes an EA for notice and comment, 5) publicizes for comment the proposed mitigation and a demonstration of how it will mitigate significant impacts, if the Corps so finds.

Further, because this project is not water-dependent and due to its numerous serious impacts on flooding, wildlife habitat, and other values, it violates the Guidelines and NEPA. The Corps must deny this application.

Substantially Prepared By:

Henry Dahlen, Law Student

Respectfully submitted,

/s/ Lisa Jordan

Lisa W. Jordan, Director
Tulane Environmental Law Clinic
6329 Freret Street
New Orleans, LA 70118
Phone: 504-865-5789
Direct: 504-314-2481
Email: lwjordan@tulane.edu

*Counsel for Hazel Piazza, Loretto O'Reilly,
the Gulf Restoration Network, the Louisiana
Audubon Council, and the Sierra Club,
Delta Chapter*

cc: Raul Guterrez, EPA