

UNITED STATES DISTRICT COURT
FOR MIDDLE DISTRICT OF LOUISIANA

ATCHAFALAYA BASINKEEPER, LOUISIANA
CRAWFISH PRODUCERS ASSOCIATION-WEST,
GULF RESTORATION NETWORK,
WATERKEEPER ALLIANCE, and SIERRA CLUB
and its DELTA CHAPTER,

Plaintiffs,

v.

U.S. ARMY CORPS OF ENGINEERS

Defendant,

and

BAYOU BRIDGE PIPELINE, LLC, and STUPP
BROS. d/b/a STUPP CORPORATION

Intervenor Defendants.

Civ. No. 3:18-cv-00023-SDD-EWD

MEMORANDUM IN SUPPORT
OF SECOND MOTION FOR A
PRELIMINARY INJUNCTION

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INTRODUCTION

Plaintiffs Atchafalaya Basinkeeper, the Louisiana Crawfish Producers Association-West, Gulf Restoration Network, Waterkeeper Alliance, and Sierra Club (“Basinkeeper”) filed this lawsuit in January 2018, to challenge the U.S. Army Corps of Engineers’ violations of the Clean Water Act (“CWA”) and National Environmental Policy Act (“NEPA”) in approving the Bayou Bridge oil pipeline through the Atchafalaya Basin. Shortly after filing the complaint, the plaintiffs moved for a preliminary injunction to stop construction through the Basin. After an evidentiary hearing, this Court found that plaintiffs were likely to prevail on the merits of some of their legal claims, that construction was causing irreparable environmental harm to the Basin, and that the other injunction factors weighed in plaintiffs’ favor. Accordingly, the Court granted an injunction on pipeline construction through the Basin. A divided panel of the Fifth Circuit disagreed with this Court as to the merits component of its decision, but did not address this Court’s findings on irreparable harm and other factors. *Atchafalaya Basinkeeper v. U.S. Army Corps of Eng’rs*, 894 F.3d 692 (5th Cir. 2018). While construction of the pipeline through the Basin subsequently resumed, it is not yet complete.

For a second time, Basinkeeper seeks an injunction from this Court in an effort to prevent irreparable harm to the environment and preserve the status quo pending resolution of its legal claims. Basinkeeper already filed its motion for summary judgment. The memorandum in support of that motion describes in detail how the Corps violated NEPA and the CWA in approving this pipeline permit by rubber-stamping proponent-supplied materials and by failing to consider key issues related to both the construction and operation of the pipeline. A decision is pending. In the meantime, construction of the pipeline is continuing even though conditions in the Basin are in flood stage, gravely exacerbating environmental harm. To make matters worse, Bayou Bridge LLC (“BBP”) is violating key provisions in the permit designed to prevent this

harm. Accordingly, an injunction from this Court pending resolution of the summary judgment motions will prevent irreparable harm and will promote the public interest.

FACTUAL BACKGROUND

This Court is familiar with the factual background leading up to this dispute. *See* Preliminary Injunction Order (ECF 86) (“PI Order”). Plaintiffs also provide a detailed background section in their pending summary judgment materials. *See* Plaintiffs’ Memorandum in Support of Motion for Summary Judgment (ECF 177-1) (“SJ Mem.”), at 2-7. Basinkeeper incorporates those materials by reference, but highlights a few key facts that are particularly pertinent to this motion.

First, the waters of the Mississippi Basin, including the Atchafalaya, have been rapidly rising for weeks, and will continue to rise into the spring. The Corps defines “high water” conditions in the Basin as a reading on the Mississippi River’s Carrollton gage of 11.0 feet or higher. BBP 107. As of the date of this motion, that level is 15.66 feet.¹ It first rose above 11.0 feet starting in October and remained consistently above that level since December 12, 2018. Declaration of Dean Wilson in Support of Summary Judgment (“Wilson SJ Decl.”), Ex. C to Ex. 1 (ECF 177-2 at 43-44). High water is significant because it can produce a 90-fold increase in the amount of sediment entering the Basin compared to low water conditions. Declaration of Ivor Van Heerden in Support of Second Motion for Preliminary Injunction (“Van Heerden 2nd PI Decl.”), at ¶ 4. The spring of 2019 may bring an above-average flood season to the lower Mississippi Basin. *Id.* at ¶ 9. The pipeline right of way through the Basin is under many feet of water, and in some places even the spoil banks adjacent to the pipeline canal are now completely

¹ The current Carrollton gage reading can be found at this website: <http://rivergages.mvr.usace.army.mil/WaterControl/stationinfo2.cfm?dt=S&sid=01300&fid=NO RL1>.

submerged. Declaration of Dean Wilson in Support of Second Preliminary Injunction Motion (“Wilson 2nd PI Decl.”), at ¶ 4.

Second, construction work on the pipeline has proceeded in the Basin despite these high water conditions, and continues as of the date of this filing. As discussed below, excavation, backfilling, and other work during flood conditions causes serious environmental harm. Moreover, this work violates key provisions of the governing permits designed to reduce environmental damage. For example, the § 408 permit contains an express provision prohibiting any construction work during such “high water” events. BBP 107. The provision is unique in the permit insofar as it contains the admonition—“**No waiver will be granted.**”—in bold type. During the last preliminary injunction hearing, counsel for BBP explicitly represented to this Court that this provision ensured that the construction work Basinkeeper sought to enjoin would stop during high water—and hence no injunction was necessary.

And in fact, your honor, in the 408 permit, it says in a condition that, *if there is in fact a high water event that occurs during construction, we have to stop construction.* And so the Corps not only considered that potential harm, not only do we not think that potential harm is likely to occur in the way that they have portrayed it, but there's an explicit condition in the permit that says, should that event that they seem to be so concerned about that *we will have to be stop construction*, and interesting, your honor, and this is somewhat unusual, the corps put in a provision in the EA that says, and no waiver will be granted of this condition.... We don't see how in light of all of the conditions, *unless one is going to assume regulatory failure, and the Corps is not going to enforce its conditions and its permit conditions*, we don't see how any of this harm is going to occur.

Hearing Transcript, at 170-171 (ECF 84) (emphasis added). BBP subsequently revised its interpretation of that provision, incorrectly telling the Fifth Circuit Court of Appeals that it only applied to the levees on each side of the Basin.²

² The § 408 permit covers the levees, the Atchafalaya River itself, and numerous federal easements throughout the Basin. BBP 339-340; BBP 14500 (map of easements). The § 408 permit does not explicitly limit the restriction on construction during high water to the federal projects and easements.

The § 404 permit also contains conditions on construction that are intended to limit environmental harm. Special condition 12 of the permit states that BBP “must not cause more than minimal changes to the existing hydrologic conditions and flow characteristics in wetland areas or cause more than minimal degradation of water quality of any stream.” BBP 96. Similarly, special condition 21 requires that BBP “implement adequate erosion/siltation control measures to ensure that *no sediment or other activity-related debris is allowed to enter waters of the state.*” BBP 97 (emphasis added). The permit lists specific methods including “silt fences,” “straw bales” or other EPA-approved construction practices. *Id.*; *see also* BBP 706 (diagram of floating sediment barrier); 708 (diagram of staked sediment barrier); 702 (diagram requiring sediment barriers). As the permit explicitly notes, “[t]hese measures *shall be installed* before commencement of construction activities and maintained until construction is complete.” BBP 97 (emphasis added).

BBP repeatedly flouted these permit conditions. BBP has been working in “high water” conditions for weeks—contrary to its representations to this Court that it would have to stop. Ongoing construction work in high water is inarguably causing “more than minimal changes” to the hydrology and “more than minimal degradation of water quality.” Wilson 2nd PI Decl., ¶¶ 6-7. Although the permit prohibits sediment and debris from entering the water, sediment and debris can be seen flowing freely out BBP’s excavation sites into surrounding wetlands. *Id.* BBP is employing no “erosion/siltation control” measures at the excavation site, such as “silt fences, straw bales” or other best management practices, as required by the § 404 permit. *Id.* ¶ 8. Mr. Wilson has observed the same during previous visits. *Id.* He explains that, after 18 years of monitoring activities in the Basin, BBP’s ongoing practices are uniquely egregious in terms of their environmental harm and carelessness. *Id.* at ¶ 11.

Basinkeeper documented these and many other problems over the course of the last year, and repeatedly asked the Corps to take action to enforce the terms of its permits. Wilson SJ Decl., Exs. A-C. However, despite multiple letters to the Corps documenting permit violations, these actions continue unabated.

STANDARD OF REVIEW

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

In the Fifth Circuit, courts are to balance the various injunction factors, such that a strong showing of irreparable harm will offset something less than a substantial likelihood of success on the merits. “Where the other factors are strong, *a showing of some likelihood of success on the merits* will justify temporary injunctive relief[.]” *Productos Carnic, S.A. v. Central American Beef and Seafood Trading Co.*, 621 F.2d 683, 686 (5th Cir. 1980). Rather than the mechanical application of injunction factors, under the Fifth Circuit’s approach, a “sliding scale can be employed, balancing the hardships associated with the issuance or denial of a preliminary injunction with the degree of likelihood of success on the merits.” *Florida Medical Ass’n, Inc. v. U.S. Dep’t of Health, Educ. and Welfare*, 601 F.2d 199, 203 (5th Cir. 1979). While other Fifth Circuit cases have recited the conventional four-part test without noting this “sliding scale,” *Productos Carnic* and *Seatrain* remain good law. In 2017, the Fifth Circuit again observed that while “there is no particular degree of likelihood of success that is required in every case, the party seeking a preliminary injunction must establish at least some likelihood of success on the

merits before the court may proceed to assess the remaining requirements.” *Jefferson Community Health Care Centers, Inc. v. Jefferson Parish Government*, 849 F.3d 615, 626 (5th Cir. 2017).³ However, plaintiffs must always establish a probability of irreparable harm. PI Order, at 11.

ARGUMENT

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

Basinkeeper filed its summary judgment motion on January 11, 2018. Under a schedule adopted by this Court on October 2, 2018, the other parties’ oppositions would have been due on February 8, 2019, with the briefing complete by the end of March. ECF 151. However, due to the partial government shutdown, this Court on December 28, 2018, indefinitely stayed all civil cases in which the United States is a party, including this one. Accordingly, the schedule for resolution of Basinkeeper’s summary judgment motion has been delayed indefinitely. For purposes of this preliminary injunction motion, Basinkeeper briefly summarizes its merits claims but refers the Court to its summary judgment brief for complete argument and administrative record citations.

A. Plaintiffs Are Likely To Prevail on The Merits of their Claims that the Corps’ Analysis of Oil Spill Risk Violates NEPA and the CWA.

Basinkeeper makes two primary challenges to the adequacy of the Corps’ analysis of spill risk and impact from the pipeline in the Atchafalaya. First, the Corps failed to undertake any independent analysis or scrutiny of BBP’s claims that the risks from this pipeline were

³ In its preliminary injunction decision, the Fifth Circuit did not resolve BBP’s argument that the “sliding scale” was no longer good law. *Atchafalaya Basinkeeper*, 894 F.3d at 696 n.1. Plaintiffs are likely to prevail on the merits of their claims and an injunction is warranted under either analysis.

insignificant and that any impacts could be easily managed, in violation of NEPA. SJ Mem. at § I.A. Second, the Corps' conclusion that risks were minor failed to consider extensive evidence that they were not in fact minor at all, in violation of both NEPA and the CWA. *Id.* at § I.B. Either argument provides an adequate basis to find unlawful and set aside the Corps' permit decisions.

As to the first issue, NEPA regulations direct that agencies must “independently evaluate the information submitted and shall be responsible for its accuracy.” 40 C.F.R. § 1506.5(a) and (b); (agency must “make its own evaluation of the environmental issues and take responsibility for the scope and content of the environmental assessment”); 33 C.F.R. Part 325, App. B(8)(f) (Corps NEPA regulations) (“In all cases, the district engineer should document in the record the Corps independent evaluation of the information and its accuracy...”). The “rubber stamping of a consultant-prepared” NEPA document by the Corps is “illegal.” *Sierra Club v. Sigler*, 695 F.2d 957, 962 n.3 (5th Cir. 1983) (“an agency may not delegate its public duties to private entities... particularly private entities whose objectivity may be questioned on grounds of conflict of interest”). Courts enforce this requirement and set aside NEPA decisions that lack evidence that agencies took steps to “independently evaluate” a proponent's materials. *Sierra Club v. Van Antwerp*, 709 F. Supp. 2d 1254 (S.D. Fla. 2009).

The Corps flatly failed that test here. This Court would search the record in vain for any indication that the Corps “independently and carefully reviewed and verified” BBP's spill risk data, technical review, or draft EA. *Save our Wetlands, Inc. v. Sands*, 711 F.2d 634, 643 (5th Cir. 1983). The Corps does not appear to have any relevant expertise on staff, nor did it turn to other federal or state agencies that may have been able to supply it. *Compare Stop the Pipeline v. White*, 233 F. Supp. 2d 957 (S.D. Ohio 2002) (upholding EA where Corps “relied on the

expertise of another federal agency with superior expertise”). There is not a single document in the record to or from the Pipeline and Hazardous Materials Safety Administration (“PHMSA”) indicating that the Corps relied on them to assess BBP’s claims.⁴ As the record reveals, BBP wrote the § 408 EA, and its “analysis” of spill risk, itself: the Corps had all but zero meaningful input on that discussion. This is not a case where the Corps grappled with conflicting sources of information and used its expertise to make a reasoned determination. This is a case where the Corps uncritically relied on complex technical information submitted by a self-interested proponent, and rubber-stamped the proponent’s environmental review with no attempt to verify its claims. NEPA requires more.

As to the second issue, Basinkeeper’s summary judgment memorandum discusses in great detail how both the risks of spills in the Basin, and their potential impacts in the Basin’s unique aquatic environment, were far more serious than portrayed in the BBP-provided NEPA documentation. As to the risk of spills, the EA first simplistically and erroneously uses average spill data from all pipelines, without any attention to the unique attributes of *this* pipeline—such as its massive size and the terrible safety and compliance record of BBP’s parent companies. SJ Mem. at 17-20. The Corps’ insignificance conclusion also relies on a fundamentally flawed “worst case” spill analysis, again provided by BBP, that is wildly at odds with the data before the agency and historical precedent. *Id.* at 20-21. For example, the “worst case” spill at the Bayou Bridge pipeline represents only 16 *minutes* of its flow, while actual pipeline spills have gone on for as long as 17 *hours* before being discovered and shut down. *Id.* at 21. The EA also relies on claims about “leak detection” technology that are unsupported and flatly contradicted by the

⁴ Instead, the record reveals that the Corps fundamentally misunderstood the governing regulatory regime for crude oil pipelines, erroneously claiming that PHMSA would issue permits and oversee pipeline safety prior to the start of operations. SJ Mem. at 16.

record. *Id.* at 22. The EA further ignores that fact that relatively small leaks (which even the Corps concedes are undetectable) could cause enormous consequences given the size of this pipeline and its route through the remote Atchafalaya. *Id.*

Similar flaws infected the Corps' conclusion that the impacts of a pipeline spill were insignificant. *Id.* at 23-24. The EA casually dismisses miles of ruined rivers and scores of acres of destroyed wetlands simply because they appear small when compared to the Basin as a whole, in contravention to the law. Moreover, BBP's impact analysis is based on its flawed "worst case" spill scenario that grossly underestimates the actual potential spill size. It further relies on outlandish estimates of the company's ability to respond to a spill—between 15 and 90 minutes—in one of the nation's more inaccessible places. *Id.* The Corps also ignored extensive evidence that the pipeline could be used for tar sands bitumen, a particularly toxic and difficult-to-clean-up form of crude oil. *Id.* at 24. All of these defects render its determination that the impacts of a pipeline spill could be dismissed with no further analysis arbitrary and capricious.

As Basinkeeper explains in its summary judgment motion, this is not a situation where the Corps was faced with competing sources of technical information, and reasonably exercised its judgment to choose one over the other. Here, the record documents that the Corps simply ignored multiple key issues that were central to its CWA and NEPA determinations, and allowed BBP to make all of the decisions with no independent oversight or analysis. Basinkeeper is likely to prevail on the merits of these claims.

B. Plaintiffs Are Likely to Prevail on the Merits of their Claims that the Corps Ignored the Indirect Impacts of Pipeline Construction.

Apart from the question of oil spill risk, the Corps also unlawfully ignored critical environmental impacts associated with constructing the pipeline through the Atchafalaya Basin.

This failure to consider key evidence in the record is a further reason to find that Basinkeeper is likely to prevail on the merits of its challenge to the Corps.

First, as this Court already understands, construction of a new pipeline channel through the Atchafalaya will lead to the deposition of significant quantities of sediment in interior forested wetlands. This sediment accretion is the “death knell” of swamps and a leading reason for the slow-motion collapse of the Basin’s ecology and flood storage capabilities. Ex. 2 to Declaration of Ivor Van Heerden in Support of Preliminary Injunction (“Van Heerden PI Decl.”) (ECF 15-42), at 9. Basinkeeper and others provided abundant evidence of this harm during the comment process leading up to permit issuance, including a detailed expert report from Dr. Van Heerden. SJ Mem. at 31. However, the Corps never addressed this critical issue in its environmental analysis under either NEPA or CWA or its finding of “insignificance.” Nor were these impacts subject to any mitigation requirements. To the contrary, commenters documented in the administrative record that the Corps actually *eliminated* mitigation requirements for “cumulative, secondary, and indirect impacts.” *Id.* at 32.

The Corps’ failure to deal with the critical issue of sediment deposition violates both NEPA and the CWA. NEPA requires consideration of the “indirect” effects of agency decisions. 40 C.F.R. § 1508.25. Indirect effects are those “caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.” *Id.* § 1508.8. An impact is “reasonably foreseeable” if a “person of ordinary prudence would take it into account in reaching a decision.” *City of Shoreacres v. Waterworth*, 420 F.3d 440, 453 (5th Cir. 2005). Similarly, the CWA recognizes that “secondary impacts” are a critical consideration when permitting the destruction of wetlands under § 404. BBP 4446; 40 C.F.R. § 230.11; *Riverside Irr. Dist. v. Andrews*, 758 F.2d 508, 512 (10th Cir. 1985) (“To require [the Corps] to ignore the indirect

effects that result from its actions would be to require it to wear blinders that Congress has not chosen to impose.”). Secondary effects “are effects on an aquatic ecosystem that are associated with a discharge of dredged or fill materials, but do not result from the actual placement of the dredged or fill material.” 40 C.F.R. § 230.11(h). “Information about secondary effects on aquatic ecosystems *shall be considered*” prior to issuance of a § 404 permit. *Id.* (emphasis added).

Second, the Corps erroneously determined that most of the impacts in the Basin would be “temporary” because vegetation would grow back outside of a permanently cleared right of way. *See* SJ Mem. at 33-35. Indeed, this characterization of impacts as “temporary” was a key component of the Corps’ “insignificance” conclusion under NEPA. It also was a key determination in the imposition of mitigation for the project’s impacts, as the Corps only requires a 0.5 “credit” for a “temporary” impact, whereas a permanent impact requires 3 credits—six times as much. *Id.* at 33.

The assumption that most impacts would be temporary was completely at odds with the record, which established that the loss of forest wetland vegetation would be permanent as a result of the Basin’s altered hydrology and other factors. *Id.* The failure to consider or explain this critical issue fatally undermines the Corps’ “insignificance” conclusion under NEPA. It also renders arbitrary the Corps’ mitigation decisions. Mitigation “must be commensurate with the amount and type of impact” allowed by the permit. 33 C.F.R. § 332.3(a)(1); 40 C.F.R. § 230.10(d) (no permit allowed without steps to “minimize potential adverse impacts” of discharge). Corps regulations also explicitly direct the Corps to consider the “extent and permanence” of a project’s detrimental effects. 33 C.F.R. § 320.4(a)(2)(iii); *id.* at § 332.3(f)(2) (Corps “must” require more mitigation to address “temporal loss” of functions).

In short, incorrectly labelling the impacts as “temporary” was key to both the Corps’ NEPA insignificance finding as well as its CWA conclusion. Here too, this is not a situation where the Corps was presented with conflicting technical information and reasonably exercised its judgment to choose one approach over another. Rather, it never grappled with, or even mentioned, the evidence before it that the impacts of carving a major new channel through the Atchafalaya would be permanent. Basinkeeper is likely to prevail on the merits of its determination that the Corps’ decision here was arbitrary and capricious.

II. PLAINTIFFS WILL BE IRREPARABLY HARMED WITHOUT AN INJUNCTION.

To qualify for a preliminary injunction, Plaintiffs must show “some concrete injury or environmental harm resulting from Defendants’ actions” that is both actual and imminent. *W. Ala. Quality of Life Coal. v. U.S. Fed. Highway Admin.*, 302 F. Supp. 2d 672, 683-84 (S.D. Tex. 2004). “Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable.” *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987). As this Court already found, “the focus of this inquiry is not so much the magnitude but the irreparability of the threatened harm.” PI Order at 11; *Monumental Task Committee, Inc v. Foxx*, 157 F. Supp. 3d 573, 583 (E.D. La., 2016).

During their previous request for a preliminary injunction, Basinkeeper put on extensive, and mostly un rebutted, evidence about how construction of the Bayou Bridge pipeline would cause irreparable environmental harm in the Basin. Basinkeeper demonstrated that the creation of a new channel through the Basin would alter the flow of water in the Basin and result in the deposition of massive quantities of sediment into the Basin’s unique forested wetlands, which would be all but impossible to remove. *See, e.g.*, Van Heerden PI Decl., ¶ 4 and Ex. 2; Declaration of Scott Eustis in Support of Preliminary Injunction (ECF 15-45) (“Eustis PI Decl.”) ¶¶ 24-31. This evidence showed how sediment, accretion in forested wetlands, caused a variety

of serious environmental harms. The accumulation of sediment eventually converts forested wetlands into conventional bottomland hardwood forests, losing many of the unique habitat values of the Atchafalaya. It reduces the Basin's flood storage capacity, and robs the coast of sediment needed to counteract coastal erosion. *See, e.g.*, Transcript at 51-52.

Basinkeeper highlighted how these harms would be particularly acute during periods of high water, when the Atchafalaya River carries high loads of sediment that would be distributed into the Basin via the pipeline right of way. While a pipeline canal channels sediment into the Basin during all times of year, construction during the high water period magnifies harms because the major rivers carry vastly more sediment at this time. Hearing Transcript., 46-48, 56, 108 (“the big slug of sediment comes when the river really rises”); Van Heerden PI Decl., Ex. 2 at 6 (“The time or season of the year is very important” on sediment impacts); *id.* at 65 (describing a “very high” probability of transporting “tons of suspended sediment” because the “Atchafalaya River [is] now on the rising part of its hydrograph cycle[.]”); Eustis PI Decl. at ¶ 17 (“Construction of the pipeline during the spring will be particularly problematic” because it “will move more sediment”). Like this year, last year was anticipated to be an unusually wet flood season in the Atchafalaya Basin. Hearing Transcript, at 56-57.

The Corps did not contest any this evidence. BBP barely did so. *See, e.g.*, Freeman Decl., ¶ 14 (ECF 36-18) (claiming that plaintiffs “call sediment evil”). This Court, in its written and oral ruling, agreed that Basinkeeper had established “irreparable harm” for purposes of the injunction. PI Order at 16 (describing plaintiffs’ evidence that pipeline construction “would cause two kinds of irreparable harm: robbing the delta of the sediment necessary to sustain it and putting that sediment instead into the Basin where it would threaten cypress swamps”); Hearing

Transcript, at 175. The Fifth Circuit did not disturb—or even mention—the Court’s findings in this regard.

With this motion, Basinkeeper is supplementing this material with additional up-to-date evidence discussing why the current excavation and backfilling that plaintiffs have observed in recent days, during a period of high water, is amplifying the irreparable harm of this project’s construction. Dr. Van Heerden provides an updated declaration highlighting how construction during high water is causing ongoing irreparable harm. Both new excavation, which has been recently observed, and backfilling to bury the existing trench, which is likely to occur imminently, stirs up significant quantities of sediment at the time of year when the river can move it the farthest into the swamps, where it causes grave damage. Van Heerden 2nd PI Decl. ¶¶ 11-12. Stirring up sediment during high water also dramatically increases the turbidity of the water, which in turn reduces the amount of dissolved oxygen it carries, harming fish and wildlife, and has other adverse effects on the Basin’s ecology—including the Basin’s iconic crawfish. *Id.* Additionally, removing the spoil banks to backfill trenches during flood stages can cause more harm than good, by increasing the amount of sediment that moves out of the pipeline channel into adjacent wetlands. *Id.* Much of this harm could be avoided if work was carried out in the dry season. *Id.* at ¶ 13.

Dr. Van Heerden’s testimony is supplemented by observations from Mr. Wilson, who documents ongoing excavation and other construction practices that are resulting in serious environmental and water quality degradation. Wilson 2nd PI Decl., ¶¶ 6-8. Photographs taken by Mr. Wilson show excavators dropping sediment-laden slurry and other debris back into the water where it is carried downstream. *Id.* at Exs. 1-3. As discussed above, these practices violate mandatory permit terms designed to limit the environmental damage of construction. Ongoing

excavation during flood season is not just causing “more than minimal degradation” of water quality and hydrologic conditions in the Basin, in violation of the permit’s terms, it is causing irreparable environmental harm. Van Heerden 2nd PI Decl., ¶ 16.⁵

In sum, this Court already found that construction of the pipeline would cause irreparable harm. While a significant part of that harm has already occurred, it continues and is particularly grave as BBP continues to construct the project during high water. Water levels in the Basin are projected to continue to rise further into the spring and stay high through the summer, increasing the risks and impacts of the construction that BBP refuses to suspend. Basinkeeper has demonstrated irreparable harm for purposes of an injunction.

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

As this Court previously found, if irreparable injury to the environment is probable, the balance of harms will usually favor issuance of an injunction. *Amoco*, 480 U.S. at 542; *League of Wilderness Defenders v. Connaughton*, 752 F.3d 755, 765 (9th Cir. 2014) (“the balance of equities tips toward ... plaintiffs, because the harms they face are permanent, while the interveners face temporary delay”); *Sierra Club v. Franklin Cty. Power of Illinois*, 546 F.3d 918, 936–37 (7th Cir. 2008) (“[T]he balance of harms favors issuing an injunction. An injunction protects Sierra Club from irreparable injury while simply requiring the Company to defer construction until it obtains a permit that complies with the Clean Air Act.”); *Ohio Valley Env'tl. Coal. v. U.S. Army Corps of Eng's*, 528 F. Supp. 2d 625, 632 (S.D. W.Va. 2007) (“[T]emporary

⁵ The §404 permit statutes that it is issued “in reliance” on the permit application. BBP 95. In its application materials, BBP made sweeping promises about erosion control. “The Project's EIS will implement such measures as temporary slope breakers, silt fencing, and hay/straw bales prior to excavation activities, and will install additional BMPs for erosion and stormwater management, as needed based on existing site conditions.” BBP 663. None of these techniques are in use currently, nor were they observed being used on several previous visits. Wilson 2nd PI Decl., ¶ 8.

economic harm can be outweighed by the permanent harm to the environment that comes from the filling of streams and valleys.... Money can be earned, lost, and earned again: a valley once filled is gone.”).

In its previous injunction ruling, this Court agreed that the balance of harms weighed in favor of injunctive relief. “The Court finds the temporary delay in reaping economic benefits does not outweigh the permanent harm to the environment that has been established a result of pipeline construction.” PI Order at 56-57. The Court further found that BBP failed to support its exaggerated claims of economic harm from a delay in construction. *Id.* There is little need to revisit these findings. Indeed, Bayou Bridge’s case for economic harm is even weaker today than it was a year ago. First, the majority of the pipeline work appears to have been completed. The workforce appears to be far smaller at this juncture than when construction was just starting. To the extent that the company’s primary concern is with a delay in its hoped-for start of operations, it has no entitlement to any particular start date for the project—especially when the permits were issued without full compliance with the law. PI Order at 57.

Second, BBP’s arguments about the balance of harms are undercut by its own misconduct. As documented above, it has been violating its permits and rushing the pipeline through at the expense of the irreplaceable environment of the Atchafalaya. After explicitly representing to this Court that the permits required it to stop construction during high water, it did exactly the opposite, and continues to do so today. It has failed to comply with permit terms requiring erosion and sediment control, and has caused significant degradation of water quality. Insofar as the “balance of harms” is fundamentally an equitable analysis, BBP’s unclean hands undermine any complaints about the cost of delay.

Finally, any delay can be minimized. The administrative record has been lodged, and plaintiffs have already filed their summary judgment brief. The parties can work together to expedite a briefing schedule so that case may be fully adjudicated on summary judgment in short order. In light of the flood status of the basin, and BBP's pattern of permit violations, the balance of harms weighs in plaintiffs' favor.

IV. THE PUBLIC INTEREST WEIGHS IN FAVOR OF A PRELIMINARY INJUNCTION.

When a court finds a violation of federal environmental law, "the remedy should be shaped so as to fulfill the objectives of the statute as closely as possible, consistent with the broader public interest." *Env'tl. Def. Fund v. Marsh*, 651 F.2d 983, 1005–06 (5th Cir. 1981). "The public interest is always served by requiring compliance with Congressional statutes." *ADT v. Capital Connect, Inc.*, 145 F. Supp. 3d 671, 700 (N.D. Tex. 2015) (citations omitted). "[A]llowing a potentially environmentally damaging program to proceed without an adequate [environmental review] runs contrary to the mandate of NEPA." *Sierra Club v. Bosworth*, 510 F.3d 1016, 1033 (9th Cir. 2007). Likewise, "the public interest requires strict enforcement of the [CWA] to effectuate its purpose of protecting sensitive aquatic environments." *United States v. Akers*, 785 F.2d 814, 823 (9th Cir. 1986); *United States v. Ciampitti*, 583 F. Supp. 483, 499 (D.N.J. 1984) (finding strict enforcement of the CWA "axiomatic . . . so as to clean up the nation's waters and preserve the surrounding ecological environment").

A tailored injunction requiring BBP to halt construction during high water serves the public interest, particularly in light of its permit violations. There is "no legitimate public interest" in an action that "likely violates federal law[.]" *Planned Parenthood of Gulf Coast, Inc. v. Gee*, 862 F.3d 445, 472 (5th Cir. 2017); *see also United States v. Alabama*, 691 F.3d 1269, 1301 (11th Cir. 2012) ("Frustration of federal statutes and prerogatives are not in the public interest[.]"). This proceeding could potentially have been avoided had the Corps enforced its

own permit, but it has not—precisely as Basinkeeper predicted from the outset. *Fund for Animals, Inc. v. Espy*, 814 F. Supp. 142, 152 (D.D.C. 1993) (citations omitted) (“[T]he Constitution itself declares a prime public interest that . . . the Executive Branch ‘take Care that the Laws be faithfully executed.’”). Moreover, as Basinkeeper documented in its summary judgment brief, BBP has a longstanding pattern of permit violations and recklessness in its pipeline activities that cause serious harm. SJ Mem. at 19-20. An injunction is also in the public interest because it will minimize damage to wetlands that function as critical flood storage and as a buffer to hurricanes. *See Blanco v. Burton*, 2006 WL 2366046, *20 n.43 (E.D. La. Aug. 14, 2006) (“The real “climate of uncertainty,” however, hovers over south Louisiana as its resources are harvested by way of miles of pipelines and navigation channels, its infrastructure is taxed to the near breaking point, its natural buffer against hurricanes is carved and shredded as a result of ongoing and future [oil and gas] activities[.]”). Like the other factors, the public interest weighs in favor of a targeted injunction.

CONCLUSION

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

Respectfully submitted this 23rd day of January, 2019.

s/ Jan E. Hasselman
Jan E. Hasselman
WSBA #29107
(Lead Attorney; Admitted Pro Hac Vice)
Jaimini Parekh
CABA #309983
(Admitted Pro Hac Vice)
Earthjustice
705 2nd Avenue, Suite 203
Seattle, WA 98104
Ph: (206) 343-7340/Cell: (206) 719-6512
Fax: (206) 343-1526
jhasselman@earthjustice.cor
jparekh@earthjustice.org

Adrienne Bloch
CABA #215471
(Admitted Pro Hac Vice)
50 California St. Suite 500
San Francisco, CA 94111
Ph: (415) 217-2000/Fax: (415) 217-2040
abloch@earthjustice.org
Attorneys for Plaintiffs



Alisa Coe
LSBA #27999
Earthjustice
111 S. Martin Luther King Jr. Blvd
Tallahassee, FL 32301
Ph: (850) 681-0031/Fax: (850) 681-0020
acoe@earthjustice.org
Local Counsel for Plaintiffs

Misha L. Mitchell
LSBA #37506
Atchafalaya Basinkeeper
47 Mt Laurel Ave
Birmingham, AL 35242
Phone: (225) 692-1133/Fax: (225) 692-4114
basinkeeperlegal@gmail.com
Attorney for Atchafalaya Basinkeeper

CERTIFICATE OF SERVICE

I hereby certify that a copy of the following pleadings have been served upon all counsel of record by filing the same in this Courts' CM/ECF system on this 23rd day of January, 2019.

- *MEMORANDUM IN SUPPORT OF SECOND MOTION FOR A PRELIMINARY INJUNCTION;*
- *DECLARATION OF JAN E. HASSELMAN IN SUPPORT OF SECOND MOTION FOR PRELIMINARY INJECTION;*
- *DECLARATION OF DEAN WILSON;* and
- *DECLARATION OF IVOR VAN HEERDEN, PH.D., IN SUPPORT OF SECOND MOTION FOR PRELIMINARY INJUNCTION.*

Dated this 23rd day of January, 2019.

s/ Jan E. Hasselman

Jan E. Hasselman