



UNITED FOR A HEALTHY GULF

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RE: **MVN-2015-1332-CU Creekstone Development in Livingston Parish**
WQC# 150730-01

Dear Ms. Terrell and Ms. Johnson,

I am writing on behalf of the Gulf Restoration Network (GRN)¹. We have serious concerns about the application for a Section 404 permit (**MVN-2015-1332-CU**) submitted to the U.S. Army Corps of Engineers ("Corps"), and a Water Quality Certification (**WQC# 150730-01**) submitted to the Louisiana Department of Environmental Quality ("LDEQ") by Creekstone/Juban II, L.L.C, c/o D&S Environmental Services, Inc. ("Creekstone").

Creekstone is requesting a Section 404 permit for a commercial retail development located within Livingston Parish, LA. The proposed project site consists of 330 acres, of which 29.3 acres are wetlands.

Although the applicant also proposes to buy credits from a mitigation bank to offset any unavoidable losses to wetland functions caused by project implementation, we are concerned about the inevitable indirect and cumulative wetland effects that may result from a project of this scale.

The GRN opposes Creekstone's request for a Section 404 permit and Water Quality Certification, and we ask that the Corps and LDEQ deny this request based on the following concerns:

¹ a diverse coalition of individual citizens and local, regional, and national organizations committed to uniting and empowering people to protect and restore the resources of the Gulf of Mexico



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1. *The destruction of coastal wetlands directly conflicts with Louisiana’s Master Plan and a 2007 Executive Order issued by Gov. Jindal.*

Filling in these wetlands directly conflicts with Louisiana’s restoration and community protection goals. The *Comprehensive Management Plan for a Sustainable Coast*, clearly states that these valuable wetlands *must* be preserved.

For example, one of the key assumptions of the 2007 *Comprehensive Plan* makes is that “a sustainable landscape is a prerequisite for both storm protection and ecological restoration.”²

Additionally, in 2012, land use specifications were further clarified:

We do not want construction of new hurricane protection systems to encourage unwise development in high risk areas, as has occurred in the past. Such development increases overall levels of risk and diminishes the effectiveness of the protection structures themselves. This phenomenon is called “Induced Risk,” and it runs counter to the master plan’s objectives of sustaining wetland ecosystems and reducing the flooding risks borne by coastal communities. Similarly, wetland areas inside the hurricane protection system need to remain intact and undeveloped. [2012 SMP, page 159]³

Filling in these wetlands removes both the ecosystem and flood protection functions of this tract of land, thus placing it in direct conflict with the state’s goals.

The Louisiana Legislature approved the latest iteration of the Coastal Master Plan during the 2012 Regular Session,⁴ with overwhelming public support.⁵

On January 23, 2008, Louisiana Governor Bobby Jindal gave even greater weight to the recommendations laid out in the 2007 Master Plan by issuing Executive Order No. BJ 2008-7 (“Executive Order”). This Executive Order requires that all state agencies “administer their regulatory practices, programs, contracts, grants, and all other functions vested in them in a manner consistent with the Master Plan and public interest to the maximum extent possible.”⁶ The Executive Order, in addition to ordering all state agencies to comply with the

² Coastal Protection and Restoration Authority of Louisiana, *Executive Summary, in LOUISIANA’S COMPREHENSIVE MASTER PLAN FOR A SUSTAINABLE COAST 3* (2007).

³ Coastal Protection and Restoration Authority of Louisiana, *2012 Comprehensive Master Plan for a Sustainable Coast*, p 159)

⁴ SCR No.62, 2012 Leg., Reg. Sess. (La. 2012)

⁵ Louisiana Coastal Master Plan Public Opinion Survey, Southern Media & Opinion Research, Inc. Online at <http://www.mississippiriverdelta.org/files/2012/04/2012-Louisiana-CMP-Opinion-Survey.pdf>

⁶ Exec. Order No. BJ 2008-7, available at <http://gov.louisiana.gov/assets/docs/OfficialDocuments/2008EO7SustainableCoast.pdf>.



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Master Plan, asserts that “state agencies must function in a manner that recognizes the vital importance of expediting hurricane and coastal protection and ensuring sustainable practices in our coastal zone.”⁷

While the Executive Order strives to implement the Master Plan’s goals to preserve wetland areas, Creekstone seeks to obtain a permit for a project that has already destroyed approximately 29.3 acres of wetlands, which protect communities from localized flooding, in order to construct a commercial development in its place. LDEQ cannot both follow the Executive Order and issue a Water Quality Certification to Creekstone given its impact on more than 29 acres of valuable wetlands and neighboring habitat for commercial development.

The Master Plan also states that “overall hydrology must be improved by minimizing impediments to water flow.”⁸ Allowing Creekstone to continue affecting over 29 acres of wetlands is obviously inconsistent with the mandate to improve hydrology and minimize impediments to water flow.

The destruction of water flow is contrary to the unequivocal language of the Master Plan. The loss of ecosystem services is contrary to the language of the Master Plan.

2. Water Dependence is not demonstrated in the Public Notice.

According to the public notice, the purpose of the project is to construct a residential development. The applicant has not clearly demonstrated that the project is water-dependent, nor has the applicant clearly demonstrated that practicable alternatives do not exist. According to 40 CFR §230.10(a)(3):

where the activity associated with a discharge which is proposed for a special aquatic site (as defined in subpart E) does not require access or proximity to or siting within the special aquatic site in question to fulfill its basic purpose (i.e. not water dependent), practicable alternatives that do not involve special aquatic sites are presumed to be available, unless clearly demonstrated otherwise. In addition, where 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 same aquatic ecosystem, unless clearly demonstrated otherwise.⁹

Wetlands are considered “special aquatic sites.”¹⁰ There is no reason or explanation given by Mr. Bruno concerning why this development must be sited in wetlands to “fulfill its basic purpose,” and therefore, as the burden rests with the applicant, it is not water dependent. According to the regulations, it is assumed that non-wet practicable alternatives do exist.¹¹

⁷ *Id.*

⁸ *Id.*

⁹ 40 C.F.R. §230.10(a)(3) (2009).

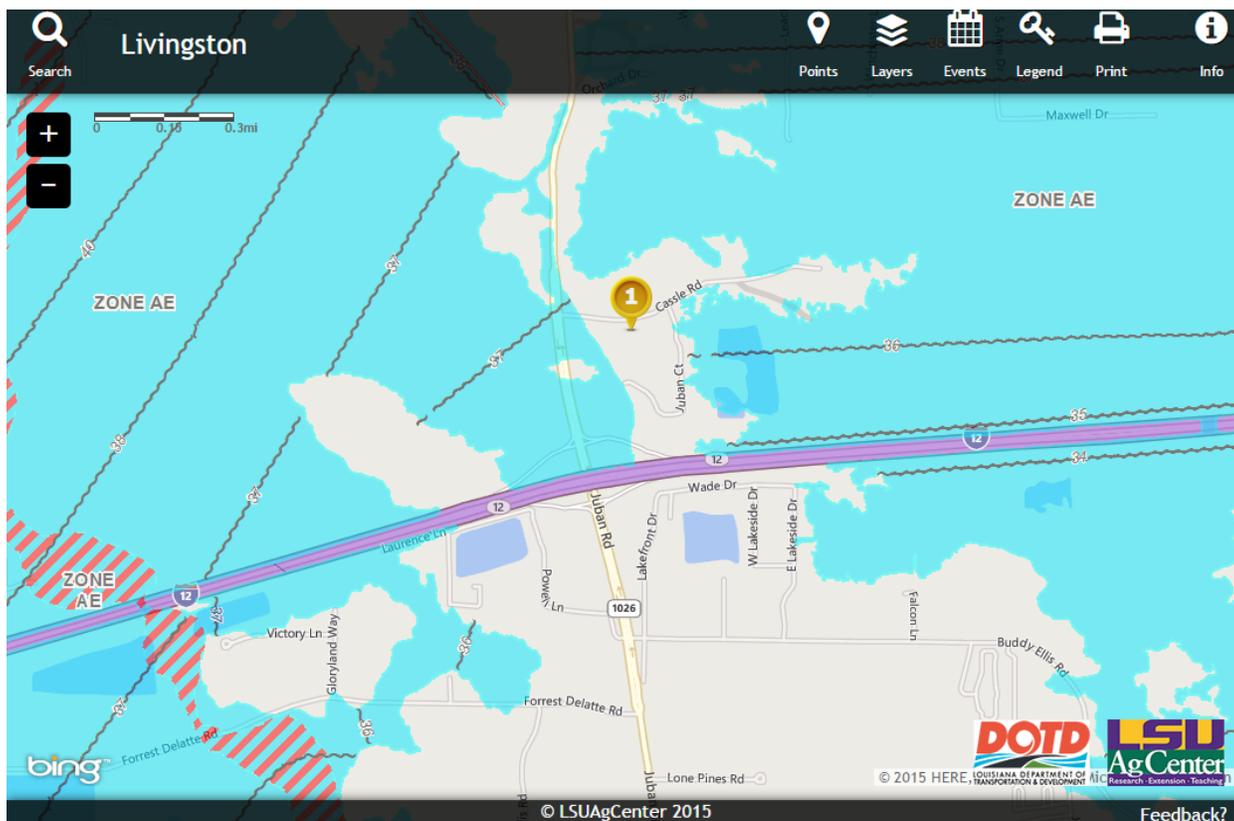
¹⁰ 40 C.F.R. §230.41.

¹¹ It should be further noted that 40 C.F.R. §230.20(a)(2) allows for the consideration of alternative sites *not owned* by the applicant if they can be reasonably obtained and utilized for the basic purpose. Here, where the basic purpose is

Given these facts, the Corps must deny the permit to Creekstone, as this development would violate federal regulations.

3. Because this permit is located within an area vulnerable to storm surge, FEMA should be included the agency review of this permit.

As stated, these wetlands lie within the inland extent of storm surge per the SLOSH model of the National Hurricane Center, as well as within the 100-year floodplain¹². Since FEMA is charged with administering the flood insurance program for this residential development, they should also be informed of this permit, which places people and developed property in harm's way.



We request that FEMA and local floodplain managers be notified of this loss to flood protection and storage.

4. Direct, indirect, secondary, and cumulative impacts must be fully considered.

commercial development, it can be easily assumed that numerous non-wetland properties could be reasonably obtained to fulfill the basic purpose, and it is clearly within the applicant's burden to demonstrate otherwise.

¹² FEMA Flood Map, 30 28 09.73,-90 54 57.89



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Given the information in the Public Notice, it does not appear that Mr. Bruno has fully considered the direct impacts, or even addressed indirect, secondary, and cumulative impacts of the proposed wetland fill and clearing:

Direct impacts – The direct impacts of this project are certainly significant. There could be a considerable impact to water quality and wildlife habitat, including a potential threat to threatened species that either reside or feed in this area.

Also, the fill of such a large area is in violation of the federal and state anti-degradation policy. The Louisiana policy states that “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.”¹³

Additionally, the Federal regulations have not been fully implemented. Per executive orders 11988 and 11990, in order to prevent impacts to wetlands certain aspects need to be analyzed.

Title 18 of the Code of Federal Regulations states,

It is the policy of the Council to provide leadership in floodplain management and the protection of wetlands. Further, the Council shall integrate the goals of the Orders to the greatest possible degree into its procedures for implementing the National Environmental Policy Act. The Council shall take action to: Avoid long- and short-term adverse impacts associated with the occupancy and modification of floodplains and the destruction or modification of wetlands; Avoid direct and indirect support of floodplain development and new construction in wetlands wherever there is a practicable alternative; Reduce the risk of flood loss; Promote the use of nonstructural loss reduction methods to reduce the risk of flood loss; Minimize the impact of floods on human health, safety and welfare; Minimize the destruction, loss or degradation of wetlands; Restore and preserve the natural and beneficial values served by floodplains; Preserve and enhance the natural and beneficial values served by wetlands.¹⁴

Given that the public notice does not thoroughly adhere to the executive order, LDEQ and the Corps should deny the permit application.

Indirect and Secondary impacts – This project both has and will further destroy wetlands that act as a buffer to reoccurring storms and localized flooding. The unpermitted destruction of these wetlands, in direct opposition to the State Master Plan, would certainly contribute to the weakening of the state’s storm defenses. The Code of Federal Regulations recognizes the significance of secondary impacts from wetland destruction by emphasizing that “minor loss of wetland acreage may result in major losses through secondary impacts.”¹⁵ Where almost 29 acres of wetlands are involved, it is unacceptable that the applicant offers no analysis of these probable impacts.

Cumulative impacts – The cumulative impacts on storm and flood protection must be taken into consideration. This project could incite additional construction and in turn jeopardize even more wetlands unique to this area. This activity,

¹³ LA. ADMIN. CODE tit. 33, pt. IX §1109(A)(2).

¹⁴ 18 C.F.R. §725.2.

¹⁵ 40 C.F.R. §230.41.



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combined with similar wetland-destroying projects, could result in more flooding in surrounding communities, as well as degraded water quality in the Colyell Creek and the Amite River, and their surrounding wetlands. The whole area must be looked at as an interrelated ecological unit in order to adequately assess the true cumulative impacts.

Since the public notice does not assess, or even recognize, the potential direct, indirect, and cumulative impacts that will result from the disruption of just fewer than 29 acres of wetlands, the Corps must not approve this permit as submitted.

5. Alternatives have not been adequately addressed.

The Public Notice gives no indication whether applicant engaged in any alternatives analysis to determine if any non-wet sites for this project exist. This alternative analysis must include direct, indirect, secondary, and cumulative impacts that take into account water quality, wildlife, and flood protection. Presently the public has not been given any information as to why this project is necessary and why it must be located in this location.

Impacts to wetland areas could be minimized if the development were relocated to a non-wet site. As noted above, a burden to show the non-existence of practicable alternatives rests with the applicant where the proposed project is not water-dependent and is located in a special aquatic habitat.

At the very least, the plan could minimize some impacts by using LDEQ's stormwater BMP tool¹⁶. Given that the applicant has failed to follow BMPs offered by the state, it is obvious that alternatives have not been adequately addressed.

We request an alternatives analysis in response to this letter. We request a response on why the applicant has not employed Stormwater Management Practices on their property.

6. The Public Notice fails to describe Mitigation Plan adequately.

Federal law also requires the applicant to compensate for, or mitigate, the damages resulting from the destruction of our nation's wetlands, if the permit is issued. In the public notice, there is only a vague mention of proposed plans for the use of a mitigation bank to offset any unavoidable losses to wetland functions caused by project implementation. It is impossible for the public to adequately comment on a project without being able to also review more detailed proposed mitigation plans. For this reason, all permit applications should include specific mitigation plans so that they can be evaluated throughout the application process. According to the joint EPA/USACE "Compensatory Mitigation for Losses of Aquatic Resources; Final Rule" (33 CFR 322.4[c]), mitigation plans for all wetland compensatory mitigation projects must contain the twelve elements, including

- site selection criteria

¹⁶ StormwaterBMP Guidance Tool. Online at http://www.bayoulandrcd.org/files/Bayou_Land_Guidance_NO_BMP.pdf



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- baseline information for impact and compensation sites
- ecological performance standards
- monitoring requirements

Given the general failure of mitigation, the mere mention of a possible plan is obviously not sufficient to evaluate whether the chosen mitigation plan is compensating for wetland losses according to these four criteria, much less the full twelve. A mitigation plan could place wetland mitigation in another Corps district, for example.

Due to the lack of any data concerning the mitigation plans, the public notice offers no meaningful opportunity for our members who reside near the development to scrutinize and comment on the proposed project. Corps/EPA regulations concerning mitigation plans specifically require that the Corps “must ensure that adequate [mitigation plan] information is included in the public notice to enable the public to provide meaningful comment,” providing exception only for data which is “legitimately confidential for business purposes.”¹⁷

The mere mention of mitigation banking cannot reasonably satisfy this requirement of “adequate information” to allow “meaningful comment.” Considering that localities in Southern Louisiana have a strong public interest in minimizing the effects of storm surge and localized flooding, the nature and location of compensatory mitigation is of vital importance to those who wish to provide meaningful comment.

To assure that minimization and mitigation in the same watershed and for the correct type of wetlands are occurring, we request that the mitigation bank and avoidance and minimization statement used are included in the public notice.

Due to the fact that this regulation is not followed, the public notice is incomplete and must be reissued with a mitigation plan.

7. The final plan, including a mitigation plan, should be made available to the public before any permits are granted.

We feel that the current Public Notice system is not adequate to fully involve the public in the Section 404 permitting process. The only item available to the public in the entire process is the initial Public Notice, which occurs before the Corps and the permitted go through the “avoid, minimize, and mitigate” process. Therefore, the public is never given the opportunity to comment on the final project, including the mitigation plan.

We have often been told that many changes happen to the permits before they are issued, but the public never sees them until the wetlands have already been filled and water quality altered.

¹⁷ 40 CFR § 230.94(b).



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We request more information in the initial Public Notice (e.g., preliminary mitigation plans, efforts made to avoid impacts, necessity of project location, adequate alternative analysis, environmental assessments, etc.).

Due to the fact that this regulation is not followed, the public notice is incomplete and must be reissued with a mitigation plan.

8. We question whether any mitigation for lost wetlands could completely replace the function and values lost.

If any impacts to wetlands occur during this project, mitigation is required. Given the history of failure of mitigation, particularly in the New Orleans District, we feel that it would be extremely difficult to replace the function and values of this particular wetland if offsite mitigation takes place. Recent scientific literature reviews^{18,19} of wetland mitigation sites have described these kinds of failure in detail, but the failure is due partially to the fact that the functions of wetland soils are largely unaccounted for. overall lack of recovery of biogeochemical functioning may have been driven largely by the low recovery of the carbon storage and the low accumulation of soil organic matter.²⁰

A recent LSU master's thesis has outlined the failure to replace ecological functions by the New Orleans District 404 regulatory branch.²¹ Although, in the abstract, acreages were replaced around a 1:1 ratio, a functional analysis showed that the acreage of improved wetland needed to replace ecological functions was close to 2.4:1 for every acre destroyed.

The mere mention of a plan is inadequate information to base an evaluation of cumulative impacts from loss of wetland function.

Even if mitigation took place within the same hydrologic basin, we question if any amount of acreage offsite would be able to replace the function and values (local flood mitigation, local flora/fauna, etc.) that this tract of wetland currently performs. Furthermore, compensatory mitigation in distant ecosystems with no ecological interrelation with the parcel and locality at issue wholly removes any meaning behind the word "compensatory."

¹⁸ Spieles, D. J. 2005. Vegetation Development in Created, Restored, and Enhanced Mitigation Wetland Banks of the United States. *Wetlands*. 25:51-63.

¹⁹ Moreno-Mateos D, Power ME, Comín FA, Yockteng R, 2012 Structural and Functional Loss in Restored Wetland Ecosystems. *PLoS Biol* 10(1): e1001247. [doi:10.1371/journal.pbio.1001247](https://doi.org/10.1371/journal.pbio.1001247)

²⁰ *Id.*

²¹ WETLAND MITIGATION BANKS AND THE NO-NET-LOSS REQUIREMENT: AN EVALUATION OF THE SECTION 404 PERMIT PROGRAM IN SOUTHEAST LOUISIANA by Abbey Anne Tyrna http://etd.lsu.edu/docs/available/etd-04102008-141642/unrestricted/Tyrna_thesix.pdf



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SUMMARY

- 1. The project is inconsistent with the State Master Plan and the 2007 executive order.**
 - a. *We request that the permit be denied.*

- 2. Water dependence of the project has not been demonstrated by the applicant in the Public Notice.**
 - a. *Given these facts, the Corps must deny the permit, as this development would violate federal regulations.*

- 3. FEMA should have agency review of this 404 project, because it increases the likelihood of local flooding.**
 - a. *We request that FEMA and local floodplain managers be notified of this loss to flood protection and storage.*

- 4. Direct, indirect, secondary, and cumulative impacts must be fully considered.**
 - a. *Since the public notice does not assess, or even recognize, the potential direct, indirect, and cumulative impacts that will result this permit, the Corps must not approve this permit as submitted.*

- 5. Alternatives have not been addressed.**
 - a. *We request an alternatives analysis in response to this letter.*

- 6. The public notice fails to describe the mitigation plan adequately.**
 - a. *To assure that minimization and mitigation in the same watershed and for the correct type of wetlands are occurring, we request that the mitigation bank and avoidance and minimization statement used are included in the public notice.*

- 7. The final plan, including a mitigation plan, should be made available to the public before any permits are granted.**
 - a. *We request more information in the initial Public Notice (e.g., preliminary mitigation plans, efforts made to avoid impacts, necessity of project location, adequate alternative analysis, environmental assessments, etc.).*
 - b. *Due to the fact that this regulation is not followed, the public notice is incomplete and must be reissued with a mitigation plan.*

- 8. We question whether any mitigation for lost wetlands could completely replace the function and values lost.**
 - a. *We request more information in the initial Public Notice on efforts made to avoid impacts, necessity of project location, adequate alternative analysis, environmental assessments, and agency comments.*



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In conclusion, the Corps and LDEQ must take the mandates of the Clean Water Act and related federal regulations seriously; this is compounded by the inadequacy of the Public Notice. The applicant has not shown that the basic purpose is water-dependent, has not shown a lack of practicable alternatives, has not assessed any type of impacts, and has only vaguely described any plan for compensatory mitigation.

Especially since the 2005 hurricane season, the GRN has become more and more alarmed by the wetland destruction that has been occurring throughout Louisiana and the rest of the Gulf Coast. We hope that the Corps and LDEQ will take the above comments seriously and act upon them accordingly.

In order to keep us and the public properly informed, we request notification of approvals/denials/changes to Creekstone's Section 404 permit and Water Quality Certification request, as well as an Environmental Assessment that quantitatively evaluates direct, indirect, secondary, and cumulative impacts. We look forward to a written response.

For a healthy Gulf,
[sent via e-mail]

A handwritten signature in black ink, appearing to read "Scott Eustis", is positioned below the text "[sent via e-mail]".

Scott Eustis, M.S., Coastal Wetland Specialist

Cc: Matt Rota, Water Resources Program Director
Machelle Hall, Tulane Environmental Law Clinic
Raul Gutierrez, U.S. EPA, Region 6