

Exhibit B



United States Department of the Interior

FISH AND WILDLIFE SERVICE
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December 17, 2012

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

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

Dear Mr. Duke:

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

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

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

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

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

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

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

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

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

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

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

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

Sincerely,



Jeffrey D. Weller
Supervisor
Louisiana Ecological Services Office

Cc: LDWF, Baton Rouge, LA

Literature Cited

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

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

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