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Governor

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December 10, 2024

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NOAA/DOI/USDA/EPA

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U.S. Department of Agriculture

Mary Kay Lynch
Alternate to Principal Representative
U.S. Environmental Protection Agency

RE: Response to October 18, 2024 letter

Dear Federal Trustees:

We are in receipt of your letter dated October 18, 2024, requesting a response concerning the Mid-Barataria Sediment Diversion (Diversion). **It is apparent that no Louisiana Trustees signed onto your letter; therefore, your request does not speak for the Louisiana Trustee Implementation Group ("LATIG") in its entirety. However, we appreciate your concerns, and we remain committed to finding an amicable resolution pursuant to the Standard Operating Procedures ("SOP") that would allow the Diversion to proceed, in principle, with approval and agreement of LATIG.**

CPRA continues to maintain its commitment and obligation to inform LATIG of the status of the project, providing LATIG the most recent status report on November 22, 2024, and we see no breach of agreement. **As such, discussed below are legitimate issues of concerns that are impossible to ignore.** These issues will require modifications that must be considered at an appropriate time.

When my administration took office in January of 2024, a review of the Diversion began due to its funding, size, and costs. It became clear that a last minute out the door approval to proceed in construction was prematurely made by the prior administration. As such, local parish drainage ordinances were not followed, National Flood Insurance Program (“NFIP”) permits were not secured, and mitigation, engineering, and financial analyses were not complete. Additionally, litigation was, and continues to be, pending in both state and federal court. While we have spent the last several months studying the Diversion, due to the complexities surrounding the project and the many unknowns, a further review of all records must be made.

LATIG has portal access to all documents and meetings on this project.¹ LATIG was notified that CPRA began work on the project without obtaining the necessary permits and before mitigation and adaptive management analyses were completed.² LATIG Trustees were aware of the project’s uncertainties. As an adaptive management project, LATIG acknowledged that there are unknowns that could result in modification.³ The FEIS and other documents discuss these uncertainties.⁴ Science modeling is predictive based upon the models themselves and should not be used for projections.⁵

Best Science and Uncertainties

We have questions on some of the science conflicts and other issues which we want to discuss with you.

Pending and Prospective Litigation

Currently pending in Federal Court is the matter of *Jurisich Oysters, LLC, et al v. USACE, et al.*, No. 24-106 (E.D. La.), challenging the Administrative Procedure Act, National Environmental Policy, and Endangered Species Act. If an adverse decision is issued against USACE, the Diversion could again be enjoined, disrupted, and/or delayed, resulting in additional project costs. CPRA currently is not a party to the lawsuit. However, on November 9, 2024, CPRA was served with a demand letter from the Eubanks Law Firm, on behalf of the same Plaintiffs in the *Jurisich* lawsuit. The Plaintiffs allege that on September 24, 2024, NOAA and LATIG, via the Deepwater Horizon Restoration Office, requested that the U.S. Fish and Wildlife Services begin another contaminant evaluation.

The *Jurisich* Plaintiffs claim this request comes after having received permitting following the FEIS in 2022. In addition, they also claim CPRA is violating the Endangered Species Act and argue that this request constitutes an admission by CPRA. Considering the alleged admission, the Plaintiffs claim CPRA cannot spend funds without a lawful biological opinion.⁶ “The National Oceanic and Atmospheric Administration (NOAA) Restoration Center (RC), as a Lead Federal

¹ LATIG ROD Appendix G.

² LATIG – RP2, Sept 2022, and RD – Jan. 2023.

³ See Mitigation and OMMR Plans.

⁴ See FEIS-Appendix R-Mitigation and Adaptive Management.

⁵ See FEIS-Appendix.

⁶ See 16 USC 1536 (d).

Agency on behalf of the Louisiana Trustee Implementation Group (LA TIG), requests reinitiation of consultation under Section 7 of the Endangered Species Act (ESA) for the Mid-Barataria Sediment Diversion project (MBSD Project).”⁷

Additionally, a lawsuit is pending in Plaquemines Parish that relates to NFIP (flood) permitting. Plaquemines Parish is a recognized community for NFIP purposes.⁸ NFIP compliance is a function of the locals, and there is no law that exempts this Diversion from permitting requirements. To simply ignore NFIP requirements could potentially leave the residents in jeopardy, with the inability to obtain flood insurance or with increases in the cost of their flood insurance, especially concerning in an area prone to hurricanes and flooding. It is clear from your own documents that all permitting was required prior to the start of the construction.

To keep the project on track, considering the Plaquemines lawsuit, the Governor’s Executive Assistant for Coastal Activities, and representatives of the Coastal Protection and Restoration Authority, the Lead Pointed Implementing Trustee, scheduled a series of meetings with local officials and you, the federal trustees, to discuss these concerns and possible solutions. Due to our good faith discussions with Plaquemines Parish, the Parish granted a temporary lift of the stop work order and stay of the litigation. Contractors were able to resume work on the Diversion, and all work performed by contractors has been in accordance with the agreed upon project and plan approved by LATIG.

Funding, Mitigation, and Adaptive Management

In your October 18, 2024 letter, you request a return of funds if the project does not go forward; please clarify. These funds do not belong to you, they are Louisiana allocated funds. The funding agreement allows CPRA to reimburse itself for funds it spends on the project.

LATIG funding is limited and conditional, and it does not cover the entire cost of the Diversion. We are attempting to ascertain cost scenarios for mitigation and adaptive management over the 50-year life of the project to ensure that Louisiana can continue to pay for the Diversion. LATIG funding is capped at \$2.26 billion, and CPRA is responsible for all costs exceeding this amount. The funding agreement is clear that the Louisiana Legislature is under no obligation to appropriate any state funding.⁹ However, the Louisiana Supreme Court in June of 2024 ruled expropriation and inverse condemnation judgments must be paid by the taking agency. *See Watson Memorial Spiritual Temple of Christ v. Korban*, 24-00055 (La. 6/28/24), 387 So.3d 499. This was not the law when the implementation agreement was executed by all parties. The project in its current state will exceed the \$2.260 billion NRDA budget, as the price of the program has doubled since 2016. The projected escalation costs are estimated between 15% to 27% per year. While there is a CMAR Guaranteed Maximum Price (“GMP”), the contract allows for requested change orders

⁷ See Eubanks demand letter - November 8, 2024 – attachments 2 and 3.

⁸ See DOTD/NFIP Website - State Floodplain Administrator and NFIP Desk Manual – Chapters 19-20.

⁹ See MOU – Implementing – paragraph 16.

based upon obligations, conditions, and terms within the contract. There are currently two pending change order requests, in which the contractor wants approximately 70 million dollars because the project started at 90% design. Last week, CPRA received a request from the contractor for an additional \$952,909.84 due to Hurricane Francine claims.

Your October 18, 2024, letter claims that the associated mitigation and stewardship measures support healthier Gulf of Mexico fisheries and benefit species important to Louisiana's economy and environment. Such a determination is premature and aspirational, as the mitigation work is only just being initiated. **There may not be sufficient money available to support mitigation efforts of this scale and the requirements for operations after construction for adaptive management.** Aside from the funding allocations, the current mitigation plan does not account for the loss of culture for those who fish brown shrimp and oysters. As Governor, I am concerned with the concept of paying our people not to engage in their cultural trade. Once they are paid, they may leave the trade never to return. What is the economic cost of that to Louisiana? While some maintain that the purpose of this Diversion is to return the Mid-Barataria Basin to historic status (over 100 years), does not the Oil Pollution Act state return to the DWH Pre-Injury Status? Did not BP clean up the oil in the Basin immediately after the spill to protect and preserve the ecosystem, such as oysters, shrimp, etc.?

Saltwater Wedge

Additional analysis is needed to gauge the impact of the Diversion on the Mississippi saltwater wedge issues that have become more prominent in 2022, 2023, and 2024. Each of your offices has expounded that climate change is a threatening issue. The result of which, if correct, has not contemplated drought and saltwater intrusion issues.

Due to extended drought across the Mississippi River Basin, the water levels of the lower Mississippi River are extremely low, allowing the heavier salt water from the Gulf of Mexico to come upstream and overtake the fresh water. In 2023, former Governor Jon Bel Edwards requested a Presidential Emergency Declaration from President Biden due to saltwater issues and concerns to Plaquemines and surrounding parishes. This saltwater intrusion continues to be a threat we are monitoring closely for potential effects to local water supplies.

Many public drinking water systems in south Louisiana rely on fresh water from the Mississippi River. This year parts of Plaquemines Parish came under drinking water advisories due to high salinity levels, requiring distribution of bottled water to many residents. There also real concerns of the impact to the City of New Orleans's water supply.

The current Diversion is designed to divert fresh water from the Mississippi River into the Basin at a maximum rate of up to 75,000 cfs. To stop the saltwater wedge, the USACE has built a sill at mile marker 64 in Belle Chasse across the river. The Diversion is at Mississippi River mile marker 60.3, approximately 3 miles to the south. The USACE is currently still in this salinity fight and seeking more permanent solutions. The continued issue of saltwater encroachment up river remains and undoubtedly will impact the operation of the Diversion.

The pushing of the saltwater wedge back toward the Gulf of Mexico is dependent on the volume of the Mississippi River above the Basin to travel at a minimum of 300,000 to 450,000 CFS. This I believe to be the same condition for proper operation of the proposed Diversion. If this is in fact correct, have we considered the fact that the Diversion, in its current design may not be operable during these salinity fights? It seems both the wedge and the diversion are competing against each other.

Also, have we properly considered the effect of the project on navigation in the lower Mississippi River? These questions require further engineering, modeling, and analysis considering the current scope of the project. **The FEIS modeling was limited to qualitative modeling and saltwater wedges up to 2018. It does not include the recent saltwater wedges in 2022, 2023, and 2024, which have been historic, and scientists are racing for the reasons.**

What is clearly stated in the FEIS is a saltwater wedge that advances upstream affects the sedimentation process and “subtle changes in flow can have significant influence of the salinity intrusion length, so we cannot say that the diversion will have only limited impacts on sedimentation of fine sediments for a given year, even at lower flows.” This means that the heavily needed diversion sediments will become affected, and we know where the wedge has reached mile marker 64.5.¹⁰

Adaptive Management

LATIG funds are limited and will end someday. Most funds for this project are committed to construction, and Louisiana will be responsible for adaptive management. LATIG does not pay for litigation, expropriation, or property damages. I am concerned with risks and costs for now and over the next fifty years:

- Expropriation - There are currently seven expropriation lawsuits filed and pending related to construction property acquisitions. More lawsuits are expected, as the project was started with no mitigation property servitudes nor property acquisitions, etc.
- Private and public canals -The operation of the Diversion will fill in private and public canals, ponds, basins etc.¹¹ There has been no cost analysis, or careful thought of the Federal navigability issues, and USACE permitting for these canals. At present, no inventory has been made of the number of canals, basins, and other areas that could become affected as far as Lafourche Parish. Private canals, lakes, ponds, etc. have distinct property law issues.¹²

¹⁰ See FEIS 3.4.2.4:3, 3.4.5, 3.4.2.5, 4.21.2, 4.21.4.2., 4.21.4.2.2., Appendix Q pages 4-27.

¹¹ See FEIS – Appendix R.

¹² *Thibodeaux v Bernhard* 2023 WL 3897987 (W.D. La. 2023), *aff'd*. 2024 WL 3181458 (U.S. 5th 2024) (citing for position that Louisiana fisheries have a cause of action in Louisiana private waterways for commercial harvesting under admiralty jurisdiction for maritime torts that are independent of navigational servitudes - in support of commercial fishermen; *Newbold v. Kinder Morgan, LLC*, 65 F. 4th 175 (U.S. 5th 2023) (If canal is navigable waterway has a

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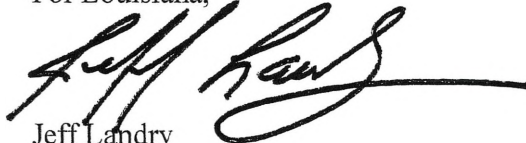
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- Land pollution - Venture Global is constructing a 15-billion-dollar project that is in the flood zone from operations. What about businesses that would become silted in and affected, such as oil and gas operations, wells, pipelines, fisheries, etc.? Navigable or not, can we just silt these waterways in without appropriate evaluations?

Based on these issues and the facts above, we are questioning the Diversion's benefits in its current form. Considering the unknowns and exposure for both the State and Federal Trustees, we simply ask for your utmost cooperation in arriving at a consensus that best represents the citizens of the State of Louisiana, and all concerned. We welcome the opportunity to meet to determine if we can reach a resolution.

For Louisiana,



Jeff Landry
Governor



Glenn Ledet, Executive Director
Coastal Protection and Restoration Authority



Gordon Dove, Chairman
Coastal Protection and Restoration Authority and
Governor's Executive Assistant for Coastal Activities

CC: Louisiana Trustees

navigational servitude, it is navigable); *Porretto v. City of Galveston Park Board of Trustees*, 113 F.4th 469 (U.S. 5th 2024) (Flooding of private property is cause of action for takings under 5th amendment and 42 U.S.C. §1983); Navigability 2 La. Civ. L. Treatise, Property § 4:3 (5th ed.).