



UNITED FOR A HEALTHY GULF

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RE: MVN-2014-02700-WII – Install a new 20-inch pipeline
CUP: P20141493
WQC: 150211-02

Dear Mr. Little, Ms. Zachary, and Ms. Johnson,

I am writing on behalf of the Gulf Restoration Network (GRN), 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. We have serious concerns about the joint application for a Section 404 permit (MVN-2014-02700-WII) submitted to the U.S. Army Corps of Engineers (“Corps”), a Coastal Use Permit (P20141493) submitted to the Louisiana Department of Natural Resources (“LDNR”), and a Water Quality Certification (WQC# 140801-01) submitted to the Louisiana Department of Environmental Quality (“LDEQ”) by Genesis Pipeline USA, LP (“Genesis”).

Genesis’ application proposes the installation of a 20-inch pipeline to connect its Raceland Facility in Lafourche Parish to Shell Pipeline Company’s Houma Station in Terrebonne Parish. Despite only expected to extend 11.3 miles, this pipeline will impact 53.24 acres of upland habitat as well as 46.28 acres of vegetated wetlands. In its public notice, Genesis only vaguely mentions its mitigation plans. It also fails to say what will actually flow through the potential pipeline. In presentations to its investors though, Genesis clearly expects to capitalize on the entire variety of movable materials available in today’s energy landscape. This includes bitumen mixtures sourced from Canadian tar sands and the extremely volatile oil fracked out of the Bakken Region. Permitting this sort of project would show shortsightedness from the Corps, LDNR, and LDEQ.



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I. SUMMARY

The permit application for this proposed project is deficient under the law and must not be granted. The application fails to satisfy Environmental Protection Agency regulatory requirements for Clean Water Act (“CWA”) section 404 permits promulgated pursuant to section 404(b)(1) of the CWA. *See* 40 C.F.R. § 230.10. Further, the application fails to satisfy the standards set forth in the Corps’ regulations for evaluating the sufficiency of section 404 permit applications. *See* 33 C.F.R. § 320.4. Finally, the permit application is incomplete and fails to provide necessary information required by the permitting process.

II. DISCUSSION

A. Genesis fails to clearly demonstrate that there are no practicable alternatives to the proposed project that will have less adverse impact on the aquatic ecosystem as required by the Environmental Protection Agency requirements for CWA section 404 permits.

This permit must not be granted because the application fails to overcome the presumption that dredge and fill material should not be discharged into navigable waters of the United States. *See* 40 C.F.R. § 230.10. An applicant’s proposal to discharge dredge and fill material must satisfy all the requirements set forth in the Environmental Protection Agency (EPA) regulations titled “Restrictions on discharge” (referred to here as the “Restrictions”). *Id.* If the application does not comply with these EPA regulations, the permit must be denied. *Id.* (“[A]ll requirements in [the Restrictions] must be met.”) Genesis’ permit fails to satisfy all the requirements set forth in the Restrictions, and so the permit cannot be granted.

Genesis’ permit application fails to satisfy the requirement that there be no “practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem.” 40 C.F.R. § 230.10(a). Not only do the Restrictions demand that an applicant show that there are no practicable alternatives, but for projects that are not “water dependent,” the Restrictions impose a presumption that there *are* practicable alternatives available “unless clearly demonstrated otherwise.” 40 C.F.R. § 230.10(a)(3). And for projects for that are not “water dependent” the Restrictions further presume that alternatives that do not discharge into “special aquatic sites,” which includes wetlands, inherently produce fewer adverse impacts, unless the applicant “clearly demonstrates otherwise.” *Id.*; 40 C.F.R. § 230.4.

This proposed project is also not water dependent. Water dependence is defined as “requir[ing] access or proximity to or siting within the special aquatic site in question to fulfill its basic purpose.” 40 C.F.R. § 230.10. Here, the basic purpose is hydrocarbon transport, which



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itself has nothing to do with water siting. Thus, this project is not water dependent and is subject to the presumption that there is an alternative with a less adverse impact. *Id.*

Genesis' proposed pipeline is not water dependent and it discharges into wetlands, which are considered special aquatic sties, so is subject to: 1) the presumption that there is a practicable alternative available unless clearly demonstrated otherwise, and 2) the presumption that these alternatives are have less adverse impact to sensitive waters. 40 C.F.R. § 230.10(a).

Here, Genesis has not overcome these double presumptions and clearly demonstrated that there are not practicable alternatives that would have less adverse impact on the Barataria and Terrebonne Basin water systems and other wetlands. The following subsections of this comment (subsections 1, 2) explain how Genesis has failed to overcome these burdens: first in its consideration of alternative actions, and second in its consideration of alternative routes for the pipeline.

1. Alternative Actions Analysis

In its application, Genesis simply describes its desired start and endpoints for the pipeline as well as how it will be installed. Genesis does not clearly demonstrate (or even mention), as required by the Restrictions, that this pipeline is needed and that there is no practicable alternative. 40 C.F.R. § 230.10(a)(3). Because it fails to demonstrate a need for the project, Genesis does not demonstrate that a "no-action" alternative is impracticable.

2. Alternative Route Analysis

Route siting is especially important for two reasons. First, the impact of trenching and laying a pipe is intensely disruptive to wetlands. And second, the destruction and disruption caused by the pipeline access roads and the right-of-way are permanent. Genesis proposes to backfill the material dredged during the trenching for the pipeline, which may reduce the long-term impact of the proposed project, but the effects of access roads and maintenance of the right-of-way — 75 feet wide at all points — would be permanent.

Because route selection determines where these impacts will occur, a proper analysis of alternative routes is paramount. Unfortunately, Genesis employed improper methodology when it determined the impacts of its alternative routes. It has not considered a route that would minimize the need for dredge and fill discharge into wetlands to the maximum extent practicable. Instead, Genesis used a baseline route that runs through wetlands within the Louisiana Coastal Zone. It then compared alternate routes to this baseline route to determine which alternative route would have the fewest impacts to wetlands. See Figure 1.



Figure 1: Genesis' Flawed Alternative Route Analysis

The methods employed by Genesis are improper because the Restrictions presume that there are alternatives that have fewer impacts. 40 C.F.R. § 230.10(a). Accordingly, to “clearly demonstrate” that there are no practicable alternative routes with less adverse effect on aquatic systems, **Genesis should have identified the route with the least impacts to wetlands and then demonstrated this was impracticable.** *Id.* Since it is Genesis’ burden to make such a demonstration before a permit may be granted, its failure to demonstrate this renders the permit incomplete and thus it cannot be granted.



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Moreover, these methodological failures obscure the unsuitability of the route ultimately proposed by Genesis and in turn, GRN's overarching concern with this project. The proposed route cuts through 11.3 miles of the state's Coastal Zone, and Genesis estimates approximately 46.28 acres of wetlands will be impacted by the project. Accordingly, the proposed route is inconsistent with the EPA Restrictions and must be rejected.

B. This project must not be permitted because it is not in the public interest and so is inconsistent with the Corps' section 404 permitting regulations.

This permit application must be denied because it is inconsonant with the Corps' regulations for evaluating permit applications. 33 C.F.R. § 320.4. The Corps regulations state that the determination of whether to issue a permit will be based on a public interest review. 33 C.F.R. § 320.4(a). This review considers the specific facts of the permit and the individual and cumulative impacts of the proposed actions, weighing the detrimental impacts with the beneficial impacts. *Id.* If this balancing shows that the project is not in the public interest, then the permit must not be issued. *Id.*; 33 C.F.R. § 320.4(b)(4).

1. Against Public Interest and EPA Regulations

The public interest review by the Corps looks to the evaluation of the project under the EPA section 404 permit Restrictions, which are discussed above in part "A" of this comment. 33 C.F.R. § 320.4(a)(1) ("For activities involving 404 discharges, a permit will be denied if the discharge that would be authorized by such a permit would not comply with the [EPA's 33 C.F.R. § 230.10] guidelines.") Because Genesis fails to overcome the burden created by the Restrictions and clearly show that there are no practicable alternatives with less adverse impact to wetlands, the permit must be denied under the Restrictions. *See* 33 C.F.R. § 230.10. Accordingly, because the permit application flunks the requirements of the EPA Restrictions, it also must be denied under the Corp's public interest review. 33 C.F.R. § 320.4(a)(1); *See also* 33 C.F.R. § 320.4(b)(4) ("In evaluating whether a particular discharge activity should be permitted, the district engineer shall apply the section 404(b)(1) guidelines (40 C.F.R. § 230.10(a)(1),(2),(3)).")

2. Detriment to Public Outweighs Benefits

In addition to being inconsistent with the EPA requirements, a consideration of the Corps guidance for the public interest review shows that this permit must be denied. A balancing of the proposed project's detriments and benefits shows that the proposed pipeline is not in the public interest and thus the permit must not be issued. The factors that the Corps has identified for the public interest review are diverse and include wetland protection,



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economics, general environmental concerns, conservation, mineral needs, land use, aesthetics, and others. 33 C.F.R. § 320.4(a)(1).

Congress, the Corps, and EPA have clearly identified the detriments of dredge and fill projects of the type proposed in the permit application. By devoting an entire permitting program in the Clean Water Act to the deposition of dredge and fill material Congress signaled its clear recognition that dredge and fill deposition is harmful and should be done only carefully. *See* 33 U.S.C. § 1344. Further, including this permitting program in the Clean Water Act, the stated goal for which is to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,” shows that Congress considered the depositing dredge and fill material to be an impairment to the our waters. 33 U.S.C. § 1251.

This is especially important when, as here, the waters at issue are wetlands. As the Corps’ 404 permitting regulations explain, “most wetlands constitute a productive and valuable public resource, the unnecessary alterations or destruction of which should be discouraged as *contrary to the public interest.*” 33 C.F.R. §320.4(b)(1) (emphasis added). The Corps regulations go on to say that wetlands provide important “biological functions” including general habitat for wildlife, and nesting and spawning grounds. *Id.* The applicability of these functions to the Barataria and Terrebonne Basins cannot be controverted. *See, e.g.,* 16 U.S.C. §§1451-53 (declaring a national policy to “to preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation’s coastal zone for this and succeeding generations” and defining coastal zone to include coastal wetlands).

Unfortunately, the deposition of dredge and fill proposed by Genesis would likely have a large detrimental effect. EPA regulations describe many values that could be lost: “The discharge of dredged or fill material in wetlands is likely to damage or destroy habitat and adversely affect the biological productivity of wetland ecosystems.” 40 C.F.R. § 230.41(b); *see also* 40 C.F.R. § 230.41(b) (“Discharges can also change the wetland habitat value for fish and wildlife.”)

Yet, while Congress, the Corps, and EPA have clearly stated the public interest in preserving wetlands and forbidden the destructive effect of discharges of dredge and fill material, Genesis has not clearly identified the public interest in undertaking the proposed project. As there is not even any detailed information on what kinds of oil are to be carried in the pipeline, there is no way to determine the likelihood of economic benefit or the degree and kind of pollution that could be unleashed into essential protective wetlands.

Furthermore, details on the materials that could be spilled, technological and operational measures to prevent and contain spillage, nor response plans are included in the application.



Dilbit flows into wetland east of I-14 during the Mayflower Oil spill, Mar 2013, eliminating at least 20 acres of forest and polluting other waters
(on Wings of Care)

There is undeniably a private economic gain that Genesis hopes to realize with the project and this must be taken into consideration in a meaningful way. However, balancing this economic benefit against the detriments of the project is impossible with the scant information in the permit. Genesis does not provide any information about how much economic gain it can reasonably expect from the project. It does not state that the pipeline would fundamentally change its economic position and does not provide any information about the profitability of operating the pipeline.

However, even the most charitable interpretation of Genesis' economic interest in the proposed pipeline presents the following unequal balance of interests: on one hand, unidentified and uncertain economic gain based on unexplained speculation of hydrocarbon markets; and on the other, destruction of wetlands, which are recognized by Congress, the



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Corps, and EPA, as valuable public resources that are vital to recreational, environmental, and aesthetic integrity of the coastal zone area. Accordingly, the proposed project is not in the public interest under Corps regulation 33 C.F.R. § 320.4(a), and the permit must be denied.

C. The permit must be denied because the application does not provide sufficient information about essential features of the proposed project.

1. Lack of Justification Analysis for Impacts to Coastal Resources

Genesis offers no justification for this project is necessary. This permitting process demands that the applicant's proposed project be evaluated on its particular terms, and not simply based on broad notions of issues of national importance. Genesis must explain whether there is any determination that this particular project is strategically important to the national market that is binding on agencies granting permits for work in coastal zones.

2. Mitigation

The Corps must deny this permit because Genesis has failed to propose an appropriate compensatory mitigation option. The Corps regulations, at 40 C.F.R. § 230.93(a)(1), explain: "Permit applicants are responsible for proposing an appropriate compensatory mitigation option to offset unavoidable impacts." *Id.* Other than mentioning the potential future use of a bank located within the affected hydrologic basin, Genesis has not proposed such a mitigation option. Its application must therefore be denied.

Furthermore, 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 they can be evaluated throughout the permitting 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 twelve elements that include:

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

Given the general failure of mitigation, the mere mention of possibly utilizing a bank 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.



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Due to the lack of any data concerning the mitigation plans, the public notice offers no meaningful opportunity for individuals residing 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.” 40 CFR § 230.94(b).

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.

Lastly, we question whether mitigation for the lost wetlands could completely atone for all losses, as it is undeniably difficult to replace the function and values (local flood mitigation, local flora/fauna, etc.) that tracts of wetlands perform.

3. National Environmental Policy Act Environmental Impacts Statement

The Corps cannot grant this permit because it has not prepared an Environmental Impact Statement (EIS) for the project under the National Environmental Policy Act. 42 U.S.C. § 4332(c). Because the cumulative effects of this proposed pipeline would be large, granting a CWA section 404 permit for the pipeline would be a major federal action, and thus an EIS must be prepared prior to such action. See 33 C.F.R. § 320.4(j)(4) (explaining that the applicable status of NEPA must be considered and followed in the permitting process).

4. Coastal Zone Management Compliance

Genesis has not demonstrated that the project is consistent with Louisiana Coastal Zone management plans. Corps regulations, at 33 C.F.R. § 320.4(h), states that no permit will be granted if the activity does not comply with the state coastal management program. *Id.* This project is inconsistent with the requirements of the Louisiana Coastal Use Permit, and thus a federal 404 CWA permit cannot be granted.

More specifically, affecting 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. One of the key assumptions of the 2007 *Comprehensive Plan* makes is that “a sustainable landscape is a prerequisite for both



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storm protection and ecological restoration.” See Executive Summary of CPRA’s Comprehensive Master Plan for a Sustainable Coast of 2007.

Furthermore, in 2012, land use specifications were 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. See Page 159 of CPRA’s Comprehensive Master Plan for a Sustainable Coast of 2012.

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 (See SCR No.62, 2012 Leg., Reg. Sess.), with overwhelming public support (See 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>).

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” (See Exec. Order No. BJ 2008-7; online at: <http://gov.louisiana.gov/assets/docs/OfficialDocuments/2008EO7SustainableCoast.pdf>).

The Executive Order, in addition to ordering all state agencies to comply with the 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.” *Id.*

While the Executive Order seeks to implement the Master Plan’s goals to preserve wetland areas, Genesis plans to destroy wetlands, which protect communities from localized flooding, in order to construct a pipeline. LDNR and LDEQ cannot both follow the Executive Order and issue a Coastal Use Permit and Water Quality Certification to Genesis for its



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proposed destruction of more than 46 acres of valuable wetlands and neighboring habitat for commercial development.

III. CONCLUSION

In sum, Genesis' permit application for its proposed pipeline project as currently formulated is contrary to EPA and Corps 404 permit guidelines. Genesis has not carried its burden of demonstrating that there is no less adverse alternative, as required by EPA regulation. The proposed project is not in the public interest because the adverse effects of the destruction of 46+ acres of wetlands outweigh any proposed benefit or need for the project. Finally, the permit application provides insufficient justification for the project and insufficient information to properly evaluate the project.

At the least, we seek a hearing in a location most convenient to communities impacted by the pipeline. Please keep us informed of all changes, withdrawals, additions concerning this proposal.

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

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

Scott Eustis, M.S., Coastal Wetland Specialist

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