

**TWENTY-THIRD JUDICIAL DISTRICT COURT
PARISH OF ST. JAMES
STATE OF LOUISIANA**

RISE ST. JAMES and SHARON LAVIGNE,

Civil Action: 39,963

Plaintiffs

v.

Division: D

FG LA, LLC, a/k/a Formosa Plastics,

Defendant.

**PLAINTIFFS' MEMORANDUM OF LAW
IN OPPOSITION TO DEFENDANT'S MOTION TO DISSOLVE
TEMPORARY RESTRAINING ORDER**

INTRODUCTION

Defendants mischaracterize the nature of the injunction sought in this matter and misapply the cases it relies upon to suggest technical violations of the rules governing the issuance of Temporary Restraining Orders.

First, as discussed more below, the injunction sought by Plaintiffs is clearly prohibitory – not mandatory. It does not require Defendant to *do* anything: Plaintiffs have a legal right of access to the Buena Vista Plantation Cemetery; Defendant has represented to a federal permitting agency that the public will have access to the cemetery; Plaintiffs have accessed the cemetery several times and only after being told they could not go on the property during the declared COVID emergency, did they seek Defendant's agreement to the Juneteenth event, understandably cautious and wanting clarity to make sure Defendant would not take steps to prevent their access given the severe penalties involved because a pipeline runs through it.

Second, because the Order is prohibitory, not mandatory, the correct evidentiary standard was applied here.

Third, as the inapposite case cited by Defendant clearly demonstrates, the requirement that a Temporary Restraining Order be endorsed with the date and hour of issuance is for the benefit of the party seeking the order, not the party subject to the order.

Fourth, the Order satisfies the requirements regarding notice and hearing.

Finally, the court fixed an amount of security at zero dollars "because important constitutional rights are at stake and Defendants will not suffer financial harm or other damages as a result of Plaintiffs' prayer and peaceful ceremony on the cemetery which is in an open,

empty field.” Even if this Court were required in this instance to fix a set amount of security for Plaintiffs to post, numerous courts have held that the failure to do so does not require dissolution of the Order.

LAW AND ARGUMENT

I. The Injunctive Relief Sought Is Prohibitory: It Requires the Defendant to Do *Nothing*.

The Order issued in this matter is clearly prohibitory. It does not require the Defendant to *do anything*. In fact, it requires the Defendant to do nothing – such as not call the police to arrest Plaintiffs for holding a prayer service on the cemetery. Defendant has even represented to a federal agency that the Buena Vista Plantation cemetery will be accessible to the public. In the findings concerning the cemetery accompanying the permit issued to Defendant by the Army Corps of Engineers, it specifically states: “More specifically, the cemetery will be fenced outside the facility because it is near the project boundary line and *the public will have access to it.*” *See*, Permit issued by Army Corps of Engineers, at para. 2.3, a true and correct copy of pp. 1-10 annexed hereto as Exhibit A (emphasis and highlighting added).¹

Plaintiff Sharon Lavigne and members of Plaintiff RISE St. James, and descendants of people enslaved on the Buena Vista Plantation have visited the cemetery. *See* Verified Petition at paras. 22-23; *see also*, Affidavit of Garry M. Winchester, annexed hereto. As noted in the Plaintiffs’ Verified Petition and Memorandum in Support, it was not until the declared state of emergency under COVID-19, that Defendant restricted access. Verified Petition at para. 27. Plaintiffs then began attempting to seek agreement from Defendant for the Juneteenth commemoration to which Defendant did not respond, necessitating the request for this Order. As discussed at length in the Memorandum in Support of the Verified Petition for a Temporary Restraining Order, cemetery law in Louisiana requires landowners to provide reasonable access to cemeteries on their property by descendants and friends. *See* Plaintiffs’ Memorandum in Support of Verified Petition for Temporary Restraining Order at pp. 5-8. Out of an abundance of caution in light of the severe penalties faced by those who may be deemed to be trespassing in the vicinity of a pipeline, Plaintiffs sought Defendant’s explicit agreement for the Juneteenth event. Verified Petition at para. 6.

¹ The document is 81 pages long. To save paper, and the Court’s time, Plaintiffs have excerpted the first 10 pages of the document. The cited provision is found on the last page.

The cases Defendant cites in an attempt to convert a clearly prohibitory injunction into a mandatory injunction cannot change the facts in this matter. The fact of the matter is that the order requires Defendant to do *nothing*. A temporary restraining order operates as a temporary restraint on the defendant until the propriety of granting a preliminary injunction may be determined, objectively preserving the status quo until that determination. *Powell v. Cox*, 228 La. 703, 83 So.2d 908, 910 (1955). The status quo in this matter is that the law requires access to cemeteries, a federal permitting agency noted that the cemetery at issue in this matter would be accessible to the *public* when it granted the permit to Defendant, and that Plaintiffs and other descendants have visited the site on a number of occasions, and wish to do so again on Juneteenth.

II. The Order Complies with the Requirements of La. Code Civ. Proc. 3601, et seq.

A. *Date and Hour of Issuance*. The order was dated. Asking to set aside a TRO because the time was not noted is wholly unsupportable. The requirement that the hour of issuance of a temporary restraining order be endorsed on the order signed by judge is in the interest of plaintiff and failure to comply therewith does not constitute grounds for dissolving the order at the insistence of defendant. *Rabalais v. Hillary Builders*, 62 So.2d 846 (La. Ct. App.1953) ("Further complaint is made that the hour of issuance was not endorsed on the order signed by the judge. This is correct, but this provision of the Statute, LSA–R.S. 13:4064, is in the interest of plaintiff. Persons sought to be enjoined or restrained are bound by the order from the time they have notice of the signing of the order, whether service has been made or not.")

B. *Notice and Hearing*. The case relied upon by Defendant to suggest that the notice and order in this matter are deficient is inapplicable to this case. In *Dauphine v. Carencro High Sch.*, 2002-2005 (La. 4/21/03, 8); 843 So.2d 1096, 1104, the Plaintiff's counsel did not certify whether he had made efforts to notify Defendant, or inform the court of his efforts to give notice to Defendant or certify why notice should not have been required. *Id.* In fact, the defendant in *Dauphine* testified that "no one gave them advance notice that Dauphine was pursuing judicial intervention to allow him to participate in graduation." *Dauphine*, supra at 1105.

In this matter, Plaintiffs notified the Court of their efforts to resolve the matter more than once without having to "involve this Court" and "pursue legal recourse." See Verified Petition at paras 31-32 and Exhibit D. Additionally, unlike the Plaintiff in *Dauphine*, Plaintiffs' counsel verified for the court that the filings had been sent to opposing counsel. See Verification of

William Quigley. Defendant confirmed actual notice by acknowledging receipt of the pleadings and engaging with the Court on the matter. The Court set the matter for a hearing on a preliminary injunction on Thursday, June 18, 2020, at 2 p.m., but subsequently converted that to a hearing on Defendant's Motion to Dissolve the Order.

The Order in this matter referenced and relied upon the "verified petition and accompanying pleadings" showing that "immediate and irreparable injury will occur to the constitutional and legal rights of Plaintiffs by virtue of being prevented by Defendant from accessing the Buena Vista Planttion Cemetery to conduct a prayer and ceremony for one hour on June 19, 2020 (Juneteenth)." Thus, the Order did address the issues of notice and hearing.

C. *Security*. The court fixed an amount of security at zero dollars "because important constitutional rights are at stake and Defendants will not suffer financial harm or other damages as a result of Plaintiffs' prayer and peaceful ceremony on the cemetery which is in an open, empty field." Even if this Court were required in this instance to fix a set amount of security for Plaintiffs to post, numerous courts have held that the failure to do so does not require dissolution. Rather, courts have held that "[t]he interests of justice and judicial economy would be best served by remanding [the] matter to the trial court for the furnishing of security." *Hernandez v. Star Master Shipping Corp.*, 94-1553 (La. App. 1 Cir. 4/7/95), 653 So. 2d 1318, 1321.

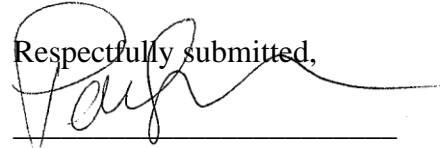
If this Court determines that a security of some kind is required, it may amend the order to provide for that. As set out in Plaintiffs' Memorandum of Law, any such security should be minimal in view of the fact that the Order provides simply that they can hold a prayer service for one hour in an open field to commemorate Juneteenth, in exercise of their rights under the United States and Louisiana constitutions, and the risk of harm to Defendant is virtually non-existent. *See, e.g.*, with regard to federal temporary restraining orders, 11A Charles A. Wright, Arthur R. Miller, et al., *Federal Practice and Procedure* § 2954 (2d ed.) ("[T]he court may dispense with security altogether if the grant of an injunction carries no risk of monetary loss to the defendant.")²

² *See also, DSE v. United States*, 169 F.3d 21, 33 (D.C. Cir. 1999), finding that Fed. R. Civ Proc. 65 which provides that the court require the moving party to post security to protect the other party from any financial harm likely to be caused to a party later found to be wrongfully enjoined by a TRO, vests broad discretion in the district court, including the discretion to require no bond at all.

CONCLUSION

For the foregoing reasons, Defendant's Motion to Dissolve the Temporary Restraining Order should be denied.

June 18, 2020

Respectfully submitted,


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CERTIFICATION

I certify that the foregoing was served on all counsel of record by email this 18th day of June 2020.

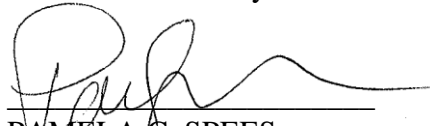

PAMELA C. SPEES
Attorney for Plaintiffs

Exhibit A

PERMIT

DATE: September 4, 2019
PROJ. MANAGER: Neil Gauthier
PUBLIC NOTICE DATE: 8/27/2018

CEMVN-ODR-C: MVN 2018-00159-CM

LETTER ADDRESS

APPLICANT ADDRESS FOR LETTER:

FG LA, LLC
445 Louisiana Avenue
Baton Rouge, Louisiana 70802

ENVELOPE ADDRESS:

FG LA, LLC
c/o POWER Engineers, Inc.
Attn: Jude Comeaux
One America Place
301 Main Street., Suite 2284
Baton Rouge, Louisiana, 70801

PROJECT DESCRIPTION: Clear, grade, excavate, and place fill and aggregate material to construct and maintain a Greenfield Petrochemical Complex and Marine Facility (The Sunshine Facility).

PROJECT LOCATION: Mississippi River, Right Descending Bank (RDB), mile 165.5, near Welcome, Louisiana, in St. James Parish within the Mississippi River and Barataria Basins (HUCs 08090301 and 08070100).

IN ACCORDANCE WITH DRAWINGS ATTACHED IN 73 SHEETS, SHEET 1, DATED July 1, 2018.

EXPIRATION DATE: 9/30/2024

SPECIAL CONDITIONS: see attached

CORPS FEE: \$100

ACTION: 10 () 404 () 10/404 (X)

Compensatory Mitigation: Yes First time out letter changes—RIBITS language

Real Estate Instrument: _____ Second time out letter changes

Conditions:

7. Your use of the permitted activity must not interfere with the public's right to free navigation on all navigable waters of the United States.
8. You must install and maintain, at your expense, any safety lights, signs, and signals prescribed by the US Coast Guard, through regulations or otherwise, on your authorized facility.
9. The permittee understands and agrees that, if future operations by the United States require the removal, relocation, or other alteration, of the structure or work herein authorized, or if, in the opinion of the Secretary of the Army or his authorized representative, said structure or work shall cause unreasonable obstruction to the free navigation of the navigable waters, the permittee will be required, upon due notice from the Corps of Engineers, to remove, relocate, or alter the structural work or obstructions caused thereby, without expense to the United States. No claim shall be made against the United States on account of any such removal or alteration.
10. If the authorized project, or future maintenance work, involves the use of floating construction equipment (barge mounted cranes, barge mounted pile driving equipment, floating dredge equipment, dredge discharge pipelines, etc.,) in the waterway, you are advised to notify the U.S. Coast Guard so that a Notice to Mariners, if required, may be prepared. Notification, with a copy of your permit approval and drawings, should be mailed to the Commander (dpw), Eighth Coast Guard District, Hale Boggs Federal Building, 500 Poydras Street, Room 1230, New Orleans, Louisiana 70130, about 1 month before you plan to start work. Telephone inquiries can be directed to the Eighth Coast Guard District, Waterways Management, at (504) 671-2107.
11. To minimize potential impacts to adjacent wetlands from construction activities, the permittee shall mark the boundaries of wetlands with clearly recognizable markers to avoid encroachment. All contractors, foremen, and/or on-site workers involved in construction activities shall be briefed as to location of the markers and the avoidance of wetlands.
12. Construction activities shall not cause more than minimal and temporal water quality degradation of any adjacent wetland, stream, or water body. Appropriate erosion and siltation controls must be utilized during construction to prevent sediment runoff into adjacent wetlands and waterways. Sediment control techniques could include but are not limited to the use of secured hay bales, sediment fencing, wooden or vinyl barriers, and/or seeding of disturbed areas. These structures should be maintained in effective operating condition until sediments are stabilized by vegetation and other impervious surfacing.
13. The permittee shall limit project construction to what is shown on the drawings. If the authorized project requires any additional work in jurisdictional wetlands not expressly permitted herein, the permittee must obtain an amendment to this authorization prior to commencement thereof.
14. The project area has been identified as an area of interest for federally recognized Native American Tribes. If during the course of work at the site, prehistoric and/or historic aboriginal cultural materials are discovered, the permittee shall cease work immediately and contact the

U.S. Army Corps of Engineers, New Orleans District, Regulatory Branch (CEMVN). CEMVN will initiate the required federal, state, and Tribal coordination to determine the significance of the cultural materials and the need, if applicable, for additional cultural resource investigations.

15. The permittee shall restore all temporarily impacted wetland areas to pre-project elevations and conditions immediately following project completion. Restoration activities shall include but are not limited to re-contouring of rutting and ground disturbance, removal of accumulated and/or additional fill materials, removal of construction material and debris, control and eradication of invasive species encroachment, and re-planting of native wetland vegetation, should natural habitat regeneration not ensue. Upon future compliance inspection(s) of the site, should it be determined by this office that permanent impacts to jurisdictional wetlands have occurred in the areas stipulated above, the need for further remedial action and/or requirement for permit modification, which may incur an additional compensatory mitigation requirement, will be assessed. Failure by the permittee to properly adhere to these requirements is considered grounds for permit suspension or revocation.

16. Many local governing bodies have instituted laws and/or ordinances in order to regulate fill activities in floodplains to assure maintenance of floodwater storage capacity and avoid disruption of drainage patterns that may affect surrounding properties. Your project involves placement of fill, therefore, you must contact the local municipal and/or parish governing body regarding potential impacts to floodplains and compliance of your authorized activities with local floodplain ordinances, regulations, or permits.

17. The permittee shall assure that all material used during construction shall be pollutant free in accordance with the EPA Guidelines for Discharge of Dredged or Fill Material, found in 40 CFR 230. The material may be obtained offsite or from site preparation. Offsite material shall not be obtained from wetlands or from areas that may adversely affect adjacent wetlands. Any excess material shall be placed in an upland area and property contained or stabilized to prevent entry into adjacent wetlands of other waters.

18. Issuance of this permit confirms that the US Army Corps of Engineers, New Orleans District, Regulatory Branch (CEMVN) has been provided with written notification from Delta Land Services, LLC that the permittee has contracted for 72.8 acres of bottomland hardwoods at the Laurel Valley Coastal Mitigation Bank Amendment One. Delta Land Services, LLC has assumed responsibility for completing the mitigation in accordance with the Laurel Valley Coastal Mitigation Bank Amendment One Mitigation Banking Instrument and has recorded the allocation of the mitigation required by this permit in the Regulatory In-lieu Fee and Bank Information Tracking System (RIBITS).

19. Permittee shall adhere to the special conditions contained in the enclosed US Fish and Wildlife document included with the authorization, titled "Project Recommendations For Intake Structures To Protect Trust Resources", to help avoid and/or minimize project related adverse effects to the pallid sturgeon.

20. The permittee is advised of the requirements set forth in both enclosed District decisions pursuant to 33 USC 408 (Section 408) concerning its request to alter or occupy an existing U.S. Army Corps of Engineers Civil Works Project. Questions concerning the enclosed permission should be directed to the point of contact provided in the Section 408 permission letter.

MEMORANDUM FOR RECORD

SUBJECT: Department of the Army Environmental Assessment and Statement of Findings for the Above-Referenced Standard Individual Permit Application

This document constitutes the Environmental Assessment, 404(b)(1) Guidelines Evaluation, as applicable, Public Interest Review, and Statement of Findings for the subject application.

1.0 Introduction and Overview: Information about the proposal subject to one or more of the Corps' regulatory authorities is provided in Section 1, detailed evaluation of the activity is found in Sections 2 through 11 and findings are documented in Section 12 of this memorandum. Further, summary information about the activity including administrative history of actions taken during project evaluation is attached (ORM2 Summary) and incorporated in this memorandum.

1.1 Applicant: FG LA, LLC

1.2 Activity location: Mississippi River, Right Descending Bank (RDB), mile 165.5, near Welcome, Louisiana, in St. James Parish within the Mississippi River and Barataria Basins (HUCs 08090301 and 08070100).

1.3 Description of activity requiring permit: The applicant has requested Department of the Army authorization to clear, grade, excavate, and place fill and aggregate material to construct and maintain a Greenfield Petrochemical Complex and Marine Facility (The Sunshine Facility) which will include the construction of a dock, water intake structure, water discharge structure, heavy haul Mississippi River levee crossing/road, barge dock, and ship dock. Additionally, the project will include a rail complex that will connect with the existing railroad crossing the site, power generation facilities, pipelines for import and export of materials, waste water treatment plant, and several storm water detention ponds. A fence will also be placed around the remains of the Buena Vista Cemetery associated with the Winchester Plantation and Acadia Plantation as avoidance of the sites. Pipelines associated with this plant have been proposed by those entities who would construct the lines, should this permit be authorized. The proposed project is situated on an approximately 2,319-acre site of which approximately 1,500 acres will be developed for this project. The project site has been determined to contain 909 acres of jurisdictional forested and herbaceous wetlands and other waters of the U.S. Approximately 53.2 acres of jurisdictional herbaceous wetlands, 8.5 acres of forested wetlands, and 54.5 acres of other waters of the U.S. will be permanently impacted by this project.

1.3.1 Proposed avoidance and minimization measures: The project site contains approximately 909 acres of jurisdictional wetlands and 56.4 acres of other waters of the U.S. Based on design plans of the manufacturing facility, FG LA has explained that all efforts were made to avoid impacts to wetlands south of LA 3127 and east of Minnie Street, as well as a small forested wetland immediately north of LA 3127. Additionally, FG LA states that they limited total impacts in the batture area adjacent to the Mississippi River to 6.7 total acres. The applicant also explained that construction within the wetlands associated with the borrow pits located immediately north of the Union-Pacific Railroad right-of-way (ROW) will result in unavoidable direct, permanent impacts. Direct, permanent impacts are anticipated to all drainage canals crossing the sugarcane fields north of LA 3127. Approximately 849.2 acres of jurisdictional wetlands and waters of the U.S. will be avoided within the property. More specifically, 847.3 acres of forested wetlands and 1.9 acres of other waters of the U.S. will be avoided. The applicant also explained that location and construction methods are limited due to project constraints including property size, access to the Mississippi River, and practicability; the proposed project has been designed to avoid and minimize adverse effects to waters of the U.S. as much as practicable. The applicant also stated that project Best Management Practices (BMPs) will be utilized during all stages of construction to control offsite sedimentation and negative effects to water quality. These BMPs would include filter berms and socks for water discharges and diversion dikes, silt fencing and hay bales for storm water control. Construction areas adjacent to wetlands and water bodies not impacted by construction would have BMPs installed where effective and appropriate. The applicant also explained that the total impacts to forested wetlands involve 8.5 acres, with 4.4 acres of impacts in the batture and 4.1 acres at the borrow pits. The linear waters onsite that will be impacted are drainage canals that were used to drain the existing fields for sugarcane production. Additionally, the applicant stated that fill activities, which are minimal in scope and will have little adverse effect on aquatic ecosystems, have been avoided and minimized to the extent practicable, and unavoidable impacts will be compensated through the purchase of mitigation credits at a Corps approved mitigation bank. The applicant also stated that, there is no dredging or discharge of dredged material associated with this project. Additionally, the applicant stated that in designing the project, several potential actions to minimize adverse effects have been considered and implemented. For example, the discharge of fill material in jurisdictional areas will occur only in the locations necessary to construct the proposed improvements, and the filling operations are expected to be completed outside of water-inundated areas because it is necessary to construct fill from a firm stable working surface; therefore, no plume is expected. The applicant also stated that the fill within the batture will be necessary to construct the vertical improvements, and impacts within the river are restricted to the placement of piles within the existing concrete St. Alice revetment. After construction, the ground will be

restored to pre-construction elevations as a permitting condition. The applicant also stated that the existing linear waters (ditches) onsite drain after rain events, and the borrow pits exhibit little fluctuation in water level and provide no floodplain benefit. Consequently, the filling of these areas is designed to minimize the creation of standing bodies of water and prevent drainage of areas subject to normally fluctuating water levels. The applicant also stated that the majority of the wetlands impacted near the back of the property are wetlands that were created by active agriculture excavation for borrow material. After material was removed, these areas were filled by ground water related to a high water table and rainwater, creating wetlands. This activity was completed in the middle of 2013 so these wetlands are only 6 years old, are not mature, and have only been part of the landscape for a short period of time. Lastly the applicant's original submittal which went on public notice described potential wetland impacts at 79.2 acres. During the permit process and efforts to minimize, this projected impact was reduced to 61.7 acres leaving 847.3 acres of jurisdictional wetlands onsite instead of 829.8 acres. For all of these reasons, the applicant states that the proposed filling includes all appropriate and practicable measures to minimize potential harm to the aquatic ecosystem.

1.3.2 Proposed compensatory mitigation: The applicant provided information in their initial submittal that they would agree to the Corps requirements under the Clean Water Act Section 404(b)(1) Guidelines (codified at 40 CFR 230) and the Corps of Engineers, New Orleans District (CEMVN) regulations (codified at 33 CFR 320.4(r)), understanding that the Corps is obligated to require mitigation (i.e., compensation) for any unavoidable impacts to aquatic resources (i.e. wetlands) as a condition of permit approval. In compliance with these regulations, the applicant stated that, based on CEMVN communication, mitigation for canals and ditches is generally not required because such waters are not considered special aquatic sites. A total of 61.7 acres of wetlands will be permanently impacted by the proposed project. Based on CEMVN guidance, use of an existing approved mitigation bank that has available credits within the project watershed is the preferred method to compensate for wetland impacts. However, the applicant stated that while evaluating various compensatory mitigation options, FG LA reviewed the concepts of onsite enhancement and creation of wetlands. The applicant then determined that Delta Land Services had adequate credits available in an existing mitigation bank, Laurel Valley Coastal Mitigation Bank Amendment One (LVCMB1), within the Barataria Watershed to compensate for project impacts. The applicant also stated that the LVCMB1 provides the most favorable alternative to on-site mitigation when considering the location of wetland impacts, the proximity of other mitigation banks, and potential credit purchase requirement.

The proposed project is located within the Barataria Basin, which can be serviced by the LVCMB1. The applicant stated that LVCMB1 contains similar or higher quality wetland communities than the communities being impacted by the project

and the potential for restoring aquatic resource functions and values of impacted wetlands within this basin is readily accomplished by utilizing the LVCMB1. The applicant then stated that purchasing mitigation bank credits at LVCMB1 is considered the preferred mitigation option at this time.

LVCMB1 (through Delta Land Services) utilizes the Louisiana Wetland Rapid Assessment Method (LRAM) to derive credits necessary to offset project impacts. The applicant used the LRAM method, and determined that the 61.7 acre wetland impact would require 443.5 LRAM credits (73.9 acres) of bottomland hardwoods if acquired from LVCMB1.

CEMVN has also determined that the impacts to be mitigated after all efforts were made to minimize and avoid wetland impacts are 61.7 acres of which 53.2 acres are low quality herbaceous wetlands and 8.5 acres are medium to low quality forested wetlands. Of the 8.5 acres of forested wetlands, 2.2 acres are Mississippi River batture wetlands and 6.3 are newly forested/scrub shrub wetlands with willow trees associated with a borrow area near the back of the property. CEMVN ran its own LRAM which resulted in 436.6 LRAM credits needed, requiring the applicant to purchase 72.8 acres of credit at the LVCMB1.

By letter dated August 6, 2019, the applicant has provided proof that 72.8 acres of credit have been purchased at the LVCMB1 and the ledger in the Regulatory In-lieu Fee and Bank Information Tracking System (RIBITS) has been updated to reflect that deduction. It is also acknowledged that the applicant reserved credits at the LVCMB1 very early in the process to ensure that credits would be available for this project if permit issuance was possible. This premature purchase caused the applicant to reserve 1.1 acres more than what is required by CEMVN.

- 1.4 Existing conditions and any applicable project history: The proposed site is currently a large agricultural farm which grows sugarcane and other crops for sale. Historically it was part of a plantation that grew and processed sugarcane. The Buena Vista cemetery onsite that will be avoided contains the individuals who were part of the family associated with the plantation. Additionally, the Acadia Cemetery which was historically know to be on the project site, contained the slaves who were associated with this plantation but has not been found in Cultural Resources Surveys of the property. It is suspected that the borrow pits onsite created 6 years ago may have destroyed and relocated the remains of that cemetery. The project site also currently includes part of the Mississippi River flood protection levee, which is a component of the Mississippi River and Tributaries, Atchafalaya Basin (MR &T) project, that is maintained by the Lafourche Basin Levee District, LA Hwy 18 (River Road), forested batture area, the Missouri Pacific Railway, LA Hwy 3127, forested wetlands to be undisturbed, and a series of shallow borrow ponds that have turned into wetlands and were dug approximately six years ago. Located to the northwest of the site, is the Mosaic Fertilizer Plant and to the southeast of the

site there is a large area of agriculture, forested wetlands and the small community of Welcome, Louisiana. To the south of the project site there is a large area of forested wetlands. The Mississippi River lies north of the project site and across the river there are residential homes and agriculture.

1.5 Permit Authority: Section 10 of the Rivers and Harbors Act (33 USC 403) and Section 404 of the Clean Water Act (33 USC 1344).

2.0 Scope of review for National Environmental Policy Act (i.e. scope of analysis), Section 7 of the Endangered Species Act (i.e. action area), and Section 106 of the National Historic Preservation Act (i.e. permit area)

2.1 Determination of scope of analysis for National Environmental Policy Act (NEPA):

The scope of analysis includes the specific activity requiring a Department of the Army permit. Other portions of the entire project are included because the Corps does have sufficient control and responsibility to warrant federal review.

Final description of scope of analysis: The entire project lies within Corps jurisdiction since adverse impacts to wetlands and WOTUS (waters of the US) are affected. The scope of analysis extends beyond the project footprint/regulated activity to examine area wetlands and drainage to ensure that excavation and fill activities do not cause further adverse effects or local water quality issues and that plant operations do not cause further adverse effects to the surrounding communities.

2.2 Determination of the “Corps action area” for Section 7 of the Endangered Species Act (ESA): The project could affect non-jurisdictional sections within the project boundary. The project boundary is not entirely within the existing waters of the U.S and wetlands impacted. The scope of the project activity is determined to be within the jurisdictional project boundary and the New Orleans District has determined that the project boundary is located in an area where there is concern for the endangered Pallid Sturgeon based on the Standard Local Operating Procedure for Endangered Species in Louisiana (SLOPES), dated October 22, 2014, between the U.S. Army Corps of Engineers, New Orleans and U.S. Fish and Wildlife Service, Ecological Services Office. The New Orleans District communicated with the applicant and The Louisiana Department of Wildlife and Fisheries (LDWF), who made comments about the project regarding the wire size for the intake structure located in the Mississippi River. LDWF was concerned for the potential loss of aquatic species due to entrainment or impingement related to the intake structure. LDWF was provided with and reviewed the intake structure specifications submitted by the applicant and they

concur with the use of wedge wire for the intake structure. If authorized, the Corps will include the “Project Recommendations For Intake Structures To Protect Trust Resources” document with the permit decision to ensure that the applicant builds the intake structure in a way that will not cause a take of or harm to the pallid sturgeon.

Additionally, migratory birds may be present in the borrow pit wetlands and batture area. In order to comply with federal law regarding impacts to migratory birds and their nests, FG LA will comply with the United States Fish and Wildlife Service (USFWS) guidance issued on April 11, 2018 pertaining to the Migratory Bird Treaty Act. Because Bald Eagles (*Haliaeetus leucocephalus*) were identified on several occasions within the project area and the existing bottomland hardwood forested wetlands within the site are consistent with Bald Eagle nesting habitat, FG LA’s environmental consultant conducted a nest survey to determine whether any Bald Eagle nests are located within the forested areas of the site or within the USFWS buffer area outlined in the Bald and Golden Eagle Protection Act. Based on the USFWS Bald Eagle Management Guidelines (2007), to avoid disturbance of eagle behavior, construction activity should be greater than 660 feet (201 meters) from active eagle nests. No such nests were identified. The nest survey utilized drone technology to survey the forested areas for the presence of existing nests within 1,000 feet of the proposed construction areas. The forested areas surveyed included the forested wetlands south of LA 3127 as well as the eastern portion of the project area north of LA 3127 and north of LA 18 within the batture. In addition, by letter dated January 19, 2017, the LDWF confirmed that its review of the Louisiana Natural Heritage Program for any records of threatened, endangered, or other protected wildlife potentially occurring within the proposed project area showed no records of any active or inactive Bald Eagle nests within 1,000 feet of the proposed construction areas. However, in accordance with the Bald and Golden Eagle Act Protection Act, if any such nests are present, no construction activity will take place within the required 660 feet from the nest. As a result, to the extent that listed species or other wildlife may be present, the specific steps noted above have been taken and will minimize and/or eliminate any potential impacts.

2.3 Determination of permit area for Section 106 of the National Historic Preservation Act (NHPA):

The permit area includes those areas comprising waters of the United States that will be directly affected by the proposed work or structures , as well as activities outside of waters of the U.S. because all three tests identified in 33 CFR 325, Appendix C(g)(1) have been met.

Final description of the permit area: The scope of the activity is determined to be within the project boundary and there are known cultural resource properties under NHPA within the project boundary. Based on a cultural resources survey conducted by the applicant, a working plantation existed and based on archival research the plantation house and slave quarters are located under the Mississippi River Levee. The cemetery for that plantation is located in the project site and will be avoided and fenced off with agreement from the State Historic Preservation Office (SHPO). More specifically, the cemetery will be fenced outside of the facility because it is near the project boundary line and the public will have access to it. Other scattered items were found including glass ware and other metal items with dates ranging from 1803 to present but were all on the surface of the agricultural fields and no intact buried materials were found. However, the possibility of subsurface archaeological remains always exists. If subsurface archaeological remains are discovered during construction activities, the District Commander, based on circumstances of the discovery, equity to all parties, and consideration of the public interest, may modify, suspend or revoke a permit in accordance with 33 CFR 325.7.

3.0 Purpose and Need

- 3.1 Purpose and need for the project as provided by the applicant and reviewed by the Corps: This project includes the construction of a facility that will fabricate many different types of plastic materials and will include a heavy haul road, water intake and outlet at the Mississippi River with a barge and ship dock, rail connection, and overhead power lines and subsurface pipelines for fuel, power, and material to enter and exit the facility. The project purpose is to build an ethylene cracker facility to provide materials used to manufacture a wide variety of consumer products used every day throughout Louisiana, the United States, and the world. These include, among many others: car casings, drainage pipes, artificial turf, polyester clothing, antifreeze, playground equipment, toys, computer casings, water supply pipes, toothbrushes, contact lens molds, carpets, vacuum cleaner frames, detergent bottles, washing machine casings, coffee makers, drinking cups, milk jugs, food containers, upholstery, lighting, wire and cable, infant car seats, and trash cans. It will ensure the satisfaction of current and future demands, which are projected to increase over time. For example, the demand for polyethylene is expected to grow approximately four percent annually based on information from the *Global Polyolefins Outlook, Executive Summary*, dated June, 2016. After 2024 additional capacity will be needed. The expected shortfall requires new world-scale ethylene crackers to be built between 2023 and 2026 to meet the demand. Further, additional tonnage of polypropylene will be required from 2023 onward as stated in the aforementioned *Global Polyolefins Outlook, Executive Summary*. Specifically, 2.78 million metric tons in additional supply will be required each year from 2023 through 2026 to keep current with an annual 3.38% global demand growth during that time frame. Louisiana is particularly well-situated to be the site of projects, like the proposed project, that

Affidavit

State of Louisiana

Parish of Orleans

I, Garry Michael Winchester, affirm as follows:

1. I was born on November 6, 1948. I live on 4440 Baccich Street, New Orleans, 70122. I am 71 years old.
2. I joined the Navy in August 1972 and served four years until honorably discharged in November 1976. After my military discharge, I started working for the Navy as a civilian in January 1977. I worked as a civilian for the Navy until September 2005. I retired on September 30, 2005 as a database administrator with 34 years of government service. I now work part-time as a database security consultant for Louisiana Offshore Oil Port (LOOP). I have been working for them for ten years.
3. I have been an active Scoutmaster and serve on the Boy Scout Executive Board with Boy Scout troops across Southeast Louisiana and teach courses on citizenship and genealogy.
4. I started learning about genealogy in 1983, helping my son trace his genealogy as a Boy Scout. I started to connect with family members, put on family reunions to gather more information from my family. I eventually created a whole database with pictures and information for my family to trace and track our ancestors.
5. As a child, I spent my summers with my grandfather, Gustave Winchester, who lived in St. James Parish. I learned from my grandfather that many Winchesters lived in St. James Parish. My grandfather also told me about my great grandfather William Lot Winchester, who was born into slavery in 1852, and his brother, Augustus Winchester, born into slavery in 1855, on the Buena Vista Plantation, which was known at one point as the Winchester Plantation because it was owned by Benjamin Winchester.
6. Both my great grandfather William and his brother Augustus lived in St. James Parish after slavery ended. William died in 1944. Augustus died in 1938. They were buried in the Buena Vista Church cemetery, which is in St. James not far from the Buena Vista Plantation.
7. I have not been able to trace back further beyond my great grandfather or my great uncle. I have no record of their parents or where they were buried – only that my great grandfather and great uncle were born on the Buena Vista Plantation into slavery. We always

understood their parents would have died and been buried on the Buena Vista plantation where they were enslaved.

8. I read about the discovery of the cemetery on the Formosa site where the Buena Vista Plantation once was in late 2019 in the news and wanted to visit the site. I went to the cemetery there one time in late 2019 or early 2020.

9. It was an eerie feeling going there. I kept thinking about my great grandfather working that property as a child in slavery. It could overcome you just thinking about that. While there, I tried to picture what the plantation looked like. I have since looked up some of the information about the plantation and found out that the plantation owners owned 240 slaves according to the 1870 Slave Census.

10. It made me feel good that I was standing on ground that my family is in. They worked that land. No matter what the circumstances were, they worked there, and they were a family there. Having a specific spot we can identify is important. It gives you a sense of connection with your ancestors. I believe that other members of my family have also gone to the cemetery on the site to reflect on our ancestry and pay their respects.

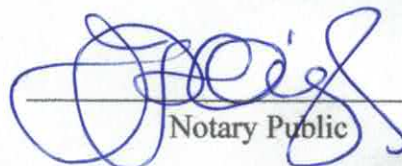
11. I lived in my grandfather's house, and I know that my great grandfather's house was even less accommodating; I know the circumstances for my great grandfather were much worse than how they were for my grandfather from talking to my grandfather

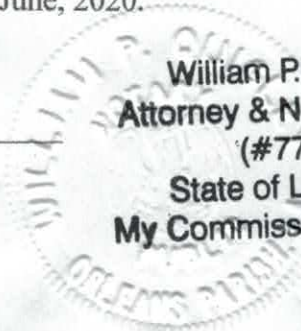
12. . But the old houses in which my grandfather and other ancestors lived are all gone. This cemetery is what is left; and it is my connection to my family's history.

13. I am going back to the land on Juneteenth. Juneteenth is important to me because it means freedom, even if it was partial. We are still fighting for freedom today, but the date is important because of what it meant to my ancestors. This date was their date. It meant a lot to them. It meant they could finally get to work for themselves.


Garry M. Winchester

SWORN TO AND SUBSCRIBED before me this 18 day of June, 2020.


Notary Public


William P. Quigley
Attorney & Notary Public
(#7769)
State of Louisiana
My Commission is for Life