

No. 18-30257

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

ATCHAFALAYA BASINKEEPER; LOUISIANA CRAWFISH PRODUCERS
ASSOCIATION-WEST; GULF RESTORATION NETWORK; WATERKEEPER
ALLIANCE; SIERRA CLUB, AND ITS DELTA CHAPTER,

Plaintiffs–Appellees,

v.

UNITED STATES ARMY CORPS OF ENGINEERS,

Defendant–Appellant,

BAYOU BRIDGE PIPELINE, LLC; STUPP BROTHERS, INCORPORATED, DOING
BUSINESS AS STUPP CORPORATION,

Intervenor Defendants–Appellants,

On Appeal from the United States District Court for the
Middle District of Louisiana, Case No. 3:18-cv-23-SDD-EWD

**CONDITIONAL MOTION TO SUPPLEMENT
THE RECORD ON APPEAL**

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**CONDITIONAL MOTION TO SUPPLEMENT
THE RECORD ON APPEAL**

Pursuant to Federal Rule of Appellate Procedure 10(e), appellant Bayou Bridge Pipeline, LLC conditionally moves to supplement the record on appeal. The motion need only be decided if this Court deems it necessary to consider assertions in plaintiffs’ brief about events that post-date the filing of this appeal. Pursuant to Fifth Circuit Rule 27.4, Bayou Bridge has contacted all other parties to this appeal to determine whether any party will file an opposition. Stupp Brothers, Inc. supports the motion. The Corps does not oppose. Plaintiffs take no position until they have reviewed the as-filed motion.

The plaintiffs in this case obtained a preliminary injunction halting construction of the Bayou Bridge Pipeline in the Atchafalaya Basin. Bayou Bridge appealed from that order, obtained a stay of the injunction pending appeal, and filed its opening brief on the merits. On April 12, 2018, plaintiffs filed their response brief. In it, they asserted—without record citations or even a reference to any extra-record evidence—that “[c]onstruction has not resumed in the Basin even though the motion panel stayed the injunction” on March 15. Opp. 52; *see also id.* at 1-2, 14. They also assert that construction will not be able to resume for months. *Id.* at 2. Plaintiffs’ counsel did not contact Bayou Bridge to ask whether their assertions about the company’s construction activities were true.

These assertions are improper and should not be considered by the Court. Apart from the fact that they are completely unsubstantiated, the record on appeal is limited to materials before the district court. *Price v. Johnson*, 600 F.3d 460, 465 (5th Cir. 2010). Plaintiffs also have made no attempt to supplement the record on appeal in accordance with Federal Rule of Appellate Procedure 10. Nor would they be entitled to, since plaintiffs' assertions are irrelevant to the merits of this appeal—which concern whether the district court erred in issuing a preliminary injunction based on the record before the court at the time of its decision.

In the event this Court deems it appropriate to consider plaintiffs' assertions, Bayou Bridge respectfully moves to supplement the record on appeal with the attached declaration of Cary J. Farber, Project Manager for the Bayou Bridge Pipeline. The declaration explains in detail that plaintiffs' assertions are *false*: Construction in the Basin has in fact resumed since the stay of the injunction, and Bayou Bridge plans to continue construction while the case proceeds.

Federal Rule of Appellate Procedure 10(e) directs all “questions as to the form and content of the record” to this Court, which accordingly has “ample authority ... to supplement the record” with materials “deemed necessary or appropriate in the decision of the case,” *Phillips Petroleum Co. v. Williams*, 159 F.2d 1011, 1012 (5th Cir. 1947). Thus, if the Court is willing to entertain plaintiffs' baseless assertions, it should also consider Mr. Farber's declaration refuting them.

April 19, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of April, 2018, an electronic copy of the foregoing document was filed with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system, and service will be accomplished on all parties by the appellate CM/ECF system and through electronic mail upon the following:

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**CERTIFICATE OF COMPLIANCE WITH
LENGTH LIMITS, TYPEFACE REQUIREMENTS, AND TYPE
STYLE REQUIREMENTS**

1. This motion complies with the length limit of Federal Rule of Appellate Procedure 27(d)(2) because it contains 484 words, as determined by the word-count function of Microsoft Word 2016, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and 5th Cir. R. 32.2.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5), and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point New Century Schoolbook font.

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CERTIFICATE OF ELECTRONIC COMPLIANCE

I hereby certify that on this 19th day of April, 2018, the foregoing document was transmitted to the Clerk of the United States Court of Appeals for the Fifth Circuit through the Court's CM/ECF document filing system, <https://ecf.ca5.uscourts.gov>. I further certify that: (1) required privacy redactions have been made pursuant to this Court's Rule 25.2.13, (2) the electronic submission is an exact copy of the paper document pursuant to this Court's Rule 25.2.1, and (3) the document has been scanned with version 12.1.6 of Symantec Endpoint Protection and is free of viruses.

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DECLARATION OF CARY J. FARBER

1. My name is Cary J. Farber. As stated in my declaration of February 2, 2018, I am the Project Manager for Bayou Bridge Pipeline, LLC and a Staff Engineer for Energy Transfer Partners. My business address is 8100 Big Lake Road, Lake Charles, LA 70605.
2. I submit this second declaration to respond to the unsupported and inaccurate assertions made in the brief filed by Plaintiffs on April 12, 2018, regarding the status of construction within the Atchafalaya Basin.

3. Plaintiffs claim “that construction in the Basin has not resumed due to high water conditions that are likely to persist for months.” Opp. Brief at 1-2; *see also id.* at 14 (“[I]t appears that construction has not resumed in the Atchafalaya Basin.”); *id.* at 52 (“Construction has not resumed in the Basin even though the motion panel stayed the injunction.”). That is incorrect.
4. The District Court issued the preliminary injunction on February 23, 2018. Bayou Bridge immediately halted construction within the Basin and demobilized its specialized Basin construction crews. In part because of their specialized equipment, those crews could not be transferred to any of the construction areas that lie outside the injunction’s scope (the Basin).
5. After this Court stayed the preliminary injunction on March 15, 2018, Bayou Bridge and its contractors promptly conducted surveys of the right-of-way within the Basin to determine whether water conditions would allow Bayou Bridge to safely resume construction. It was determined that while water levels in the Basin were elevated, there were areas within the Basin that were safely accessible.
6. For example, the right-of-way to the east and west of the Atchafalaya River crossing within the Basin sits on higher ground, with elevations dropping away as distance from the river increases. Thus, even though water levels remain elevated, work can be safely accomplished starting at the high ground near the river and working towards lower ground. In addition, the water levels are now decreasing.

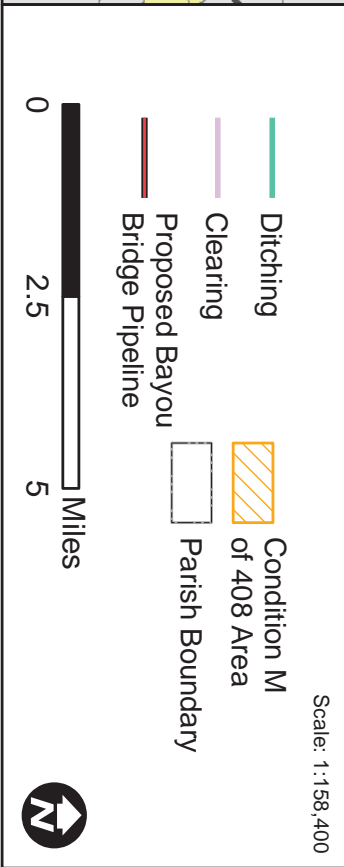
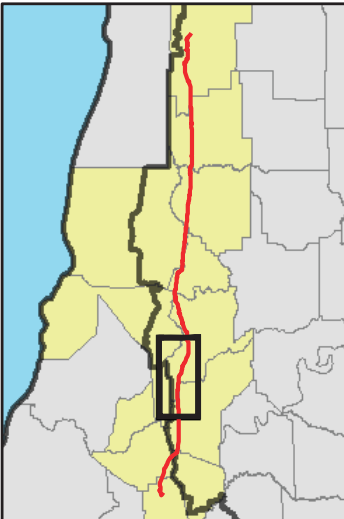
7. Construction crews were mobilized on March 17, 2018, two days after the stay was issued. Tugs and barges with equipment on board left dock in Harvey, LA that day and arrived at the Atchafalaya River crossing within the Basin on March 19, 2018.
8. Since arriving at the Atchafalaya River crossing, construction crews have successfully cleared approximately 12 acres on the eastern side of the river, and will clear an additional 11 acres on the western side over the next two weeks.
9. It is anticipated that additional acreage will be available for clearing as the water levels continue to recede, with full access to the Basin available by approximately June 1, 2018. At this time work is limited to clearing. Ditching and pipe welding will resume when full access to the Basin is available.
10. As depicted on the attached map, significant construction progress has been made within the Basin. The parts of the route depicted in light purple near the eastern and western Basin boundaries were cleared before the preliminary injunction issued, and the areas near the Atchafalaya River (also in light purple) have been cleared since the stay or are in the process of being cleared as noted above.
11. By the end of April, Bayou Bridge anticipates that it will have cleared 95.52 acres out of 262.68 total acres to be cleared within the Basin. This is in line with Bayou Bridge's planned construction schedule.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and accurate.

Executed on this 18th day of April, 2018.



Cary J. Farber



Map 2
 Atchafalaya River Basin Overview Map
 Bayou Bridge Pipeline Project
 Bayou Bridge Pipeline, LLC
 St. Martin and Iberville Parishes, Louisiana