

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA**

ATCHAFALAYA BASINKEEPER,
LOUISIANA CRAWFISH PRODUCERS
ASSOCIATION-WEST, GULF
RESTORATION NETWORK,
WATERKEEPER ALLIANCE, and
SIERRA CLUB and its DELTA CHAPTER,

Plaintiffs,

v.

U.S. ARMY CORPS OF ENGINEERS,

Defendant,

BAYOU BRIDGE PIPELINE, LLC,

Intervenor-Defendant,

and

STUPP BROS, INC. D/B/A STUPP
CORPORATION,

Intervenor-Defendant.

Case No. 3:18-cv-00023-SDD-EWD

**BAYOU BRIDGE PIPELINE, LLC'S OPPOSITION
TO PLAINTIFFS' MOTION TO LIFT STAY AND ISSUE BRIEFING SCHEDULE**

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After Plaintiffs failed to establish a likelihood of success on the merits of claims they advanced last year, they ask this Court to give them a do-over. But their new preliminary injunction motion relies on claims that—to the extent they even differ from their earlier claims—are even less likely to succeed. The merits of those claims aside, the Court should deny Plaintiffs’ Motion to Lift Stay and Issue Briefing Schedule for three main reasons: (1) This is not an emergency situation, despite Plaintiffs’ attempt to create one; (2) the underlying claims of permit violations are demonstrably baseless; and (3) an injunction is neither necessary nor appropriate at this time given the nearly completed construction of the pipeline. For all of these reasons, the Court should not make an exception to its General Order, which stays all matters in which the United States is a party, nor should the Court issue a special briefing schedule upon expiration of the stay.¹

First, Plaintiffs have waited until the near completion of the pipeline to attempt to manufacture an emergency through their own inaction and delay. They recently admitted to counsel for the Corps and Bayou Bridge that they first observed the construction activities and conditions that form the basis for their current motion more than eleven months ago. *See* May 9, 2018 letter from Atchafalaya Basinkeeper to Corps, D.E. 177-2 at 8 (attached to January 7, 2019 letter by Plaintiffs to DOJ and counsel for Bayou Bridge).² And they now say they observed further activities and conditions supporting these allegations on at least seven separate occasions since last February: in March (two observation dates), April (two observation dates), May, October, and December. *Id.*; June 1, 2018 letter from Atchafalaya Basinkeeper to Corps, D.E. 177-2 at 16;

¹ At the appropriate time Bayou Bridge will fully brief why injunctive relief should be denied. This response is limited to a subset of issues that bear on whether the stay in this case, as implemented by this Court’s General Order 2018-21, should be lifted.

² “D.E.” citations are to the record in this proceeding. “Doc. No.” citations are to the record in the Fifth Circuit for Bayou Bridge’s appeal of the preliminary injunction.

October 12, 2018 email from Atchafalaya Basinkeeper to Corps, D.E. 177-2 at 33; January 4, 2019 letter from Atchafalaya Basinkeeper to Corps, D.E. 177-2 at 23. Yet Plaintiffs’ counsel inexplicably waited until January 7, 2019—more than two weeks into the government shutdown—to first bring this supposedly urgent issue to the attention of counsel for the Corps and Bayou Bridge. Plaintiffs’ tactical decision to wait nearly a year before advising opposing counsel that they believed construction violated the permits and, moreover, that this was serious enough to warrant another round of emergency litigation over a preliminary injunction request is reason alone not to lift the stay.

Second, Plaintiffs’ allegations of ongoing permit violations are baseless. Their central complaint is that construction in the Basin has continued despite a supposed “prohibition in the [Section 408] permit on any work in the Basin during ‘high water events,’ defined as a Carrollton gage reading of 11.0’ or higher.” Ex. A (January 7, 2019 letter from Atchafalaya Basinkeeper to Corps) (referencing Condition M of Section 408 permit); Wilson Decl., D.E. 179-3 at ¶ 4 (calling it the “most concerning” activity); van Heerden Decl., D.E. 179-4 at ¶ 6. Plaintiffs have known for nine months that this is wrong. In fact, their same erroneous misinterpretation of the geographic scope of Condition M of the Section 408 permit was already addressed and resolved in a motion to the Fifth Circuit during Bayou Bridge’s appeal of the preliminary injunction. After Plaintiffs falsely asserted in their April 12, 2018 appeal brief that no construction had been possible in the Basin since March 15, 2018 (the date the Fifth Circuit stayed the preliminary injunction) due to the water level at the Carrollton gage, Bayou Bridge moved to supplement the appellate record with proof that construction continued, consistent with the terms of the permits. Conditional Motion to Supplement the Record on Appeal, No. 18-30257, Doc. No. 00514438746 (5th Cir. April 19, 2018).

Bayou Bridge's Fifth Circuit Motion and the accompanying declaration by Project Manager Cary J. Farber, both filed last April, showed that Plaintiffs had misinterpreted the permit restriction that relates to the Carrollton gage (*i.e.*, Condition M). The Farber declaration documented the extensive level of construction that Bayou Bridge was able to resume in those parts of the Basin where it was safe to proceed. Farber Decl., Doc. No. 00514438747 at ¶¶ 5-8. The map included with Farber's declaration plainly showed that Condition M (the permit restriction that is governed by the water level at the Carrollton gage) applies only to narrow strips of land at the two levees that form the Basin's eastern and western boundaries. *Id.* at ¶ 10. The map further showed the construction that continued elsewhere in the Basin, where Condition M does not apply. *Id.* Plaintiffs now argue that this representation to the Fifth Circuit about Condition M was "incorrect[]," D.E. 179-1 at 3, but Plaintiffs said no such thing back then, when the interpretation clearly mattered. In fact, Plaintiffs did not even respond to Bayou Bridge's Motion to Supplement, and the Fifth Circuit granted that Motion at the same time it issued its ruling vacating the preliminary injunction. Doc. No. 00514544184 (July 6, 2018). It is much too late to litigate an issue already resolved by the Fifth Circuit. Bayou Bridge will also show in its upcoming Response to Plaintiffs' Preliminary Injunction Motion that Plaintiffs' other allegations of ongoing permit violations, purportedly supported by observations that defy confirmation, are equally baseless. Each time the Corps advised Bayou Bridge of an alleged violation, Bayou Bridge documented to the Corps that the allegations were unfounded.

Third, and finally, the relief Plaintiffs seek at this late stage of project construction is neither necessary nor appropriate. Construction in the Basin is nearly complete. The pipeline is in the ground. Backfilling (*i.e.*, returning to the trench the material dug out in order to install the

pipe belowground) is nearly finished. All across the Basin, work crews are in the process of demobilizing. It would be a tremendous waste to force government attorneys and the Court to divert their attention from other matters to litigation over a request for an injunction that never had merit and is based on activity that the requested injunction will not affect because it will already have occurred.

For these reasons, this Court should deny Plaintiffs' request for an exception to its order staying this case during the pendency of the government shutdown, nor should the Court issue a special briefing schedule upon expiration of the stay.

Dated: January 25, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading has been served upon all counsel of record by filing the same in this Court's CM/ECF system this 25th day of January, 2019.

/s/ Brandon K. Black

Exhibit A



January 7, 2019

Judith E. Coleman
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RE: *Atchafalaya Basinkeeper, et al. v. U.S. Army Corps of Engineers,*
Case No. 18-cv-23-SDD-EWD

Dear Counsel:

My clients initiated this litigation, in part, due to their concerns with a long-standing lack of enforcement by the Army Corps over violations of Corps permits in the Atchafalaya Basin for oil and gas pipelines. As you recall, this was one of the reasons why the District Court enjoined construction of the Bayou Bridge pipeline last year.

We are dismayed that this long-standing pattern continues. My clients have repeatedly documented violations of the Army Corps permit during construction over the past year. Bayou Bridge contractors have continued to work during high water, failed to comply with permit conditions, and caused grave environmental damage to the Basin, all in violation of the permit. However, even though my clients have worked hard to document these violations, there appears to be have been no effort by the Army Corps to enforce its permit. The Basin has suffered as a result.

I am including the three letters from Atchafalaya Basinkeeper and the Gulf Restoration Network documenting permit violations. The most recent one was sent January 4, 2019.

Particularly concerning is the violation of a prohibition in the permit on any work in the Basin during "high water events," defined as a Carrolton gage reading of 11.0' or higher. The permit emphasizes the importance of this condition by including a unique provision, in bold text, that no waivers will be granted from this requirement. The Carrolton gage first passed that level in October, was above it from November 10 to December 2, and has remained above it since December 12 consistently. Today the reading is 14.0', and water will likely remain high for

January 7, 2019

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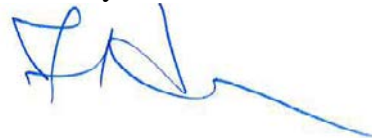
months. Even so, as far as we can tell, construction in the Basin continued throughout this period.

The Corps has not responded to my clients' multiple efforts to document Bayou Bridge's permit violations beyond acknowledgment of receipt. I also understand that my clients have submitted FOIA requests to the Corps that have been ignored.

These are serious permit violations that are causing serious environmental damage in a place already heavily degraded by past activities. Unless we can get some assurances that they will cease immediately, we intend to take them up with the Court. Alternatively, if you believe that any factual representations in these letters are incorrect, please let us know.

We look forward to your immediate response.

Sincerely,

A handwritten signature in blue ink, appearing to read "Jan E. Hasselman", with a long horizontal flourish extending to the right.

Jan E. Hasselman