

STATE OF LOUISIANA
COURT OF APPEAL
FIFTH CIRCUIT

No. 2018-CA-_____

HARRY JOSEPH, SR. (PASTOR), ET AL.,

VERSUS

LOUISIANA DEPARTMENT OF NATURAL RESOURCES, ET AL.

ON APPEAL FROM DECISION
OF THE TWENTY-THIRD JUDICIAL DISTRICT COURT,
PARISH OF ST. JAMES
HONORABLE ALVIN TURNER, DISTRICT JUDGE, SECTION E,
NO. 38,163
A CIVIL PROCEEDING

**APPELLEES' MOTION ON AN UNLODGED APPEAL FOR SPECIAL
ASSIGNMENT**

NOW INTO THE COURT, pursuant to Uniform Rule 2-11.2, come Appellees, Pastor Harry Joseph, Sr., Genevieve Butler, Humanitarian Enterprise of Loving People (H.E.L.P.), the Gulf Restoration Network, the Atchafalaya Basinkeeper, and Bold Louisiana, who respectfully file this Motion on an Unlodged Appeal for Special Assignment requesting an expedited hearing on the Louisiana Department of Natural Resources's (DNR's) and Bayou Bridge Pipeline, LLC's (BBP's) suspensive appeal of the ruling of the 23rd Judicial District Court.

The expeditious consideration of this appeal of a judgment which granted Appellees significant relief – including the requirement that the DNR ensure the existence of an effective emergency and evacuation plan for the affected St. James community – is critical to the Appellees' and the public's interests. In support of this request, Appellees state the following:

1. This case is an appeal from a district court's judicial review that found

unlawful the DNR's decision to grant BBP a Coastal Use Permit to construct and operate a crude oil transport pipeline in the Louisiana Coastal Zone that terminates in the town of St. James, Louisiana. In short, the district court found that DNR was required, but failed, to apply Coastal Use Guidelines 711(A) and 719(K). These two public health and environmental protection regulations mandate that DNR protect people and the natural resources of the Coastal Zone with analyses and measures ensuring that the pipeline route is in the least vulnerable coastal areas, is on land sufficiently stable to support the use, and is away from flood, storm, and unreasonable public safety hazards, as well as ensuring that an effective emergency response plan for oil spills and other disasters is developed. In light of DNR's failures, on April 30, 2018, the 23rd Judicial District Court remanded the permit to DNR with an order, among other things, "to require [BBP] to develop effective environmental protection and emergency or contingency plans relative to evacuation in the event of a spill or other disaster ... PRIOR to the continued issuance of said permit." *See* Reasons for Judgment at 4 (emphasis in original) (attached at Exhibit A). The district court confirmed that ruling with its final judgment on May 15, 2018, remanding the matter for "proceedings consistent with this Court's Reasons for Judgment." Final Judgment at 1 (attached at Exhibit B).

Rather than halt BBP's construction to do the analyses that ensure the construction and operation of the pipeline will not endanger public safety or coastal resources, DNR moved for a suspensive appeal on May 22, 2018, which the district court granted on June 1, 2018. BBP similarly moved for suspensive appeal on June 8, 2018, which the court granted on June 14, 2018. BBP continues to construct its pipeline, and is nearing completion of construction and commencement of operation of the pipeline.

2. Special assignment is warranted in this case because it meets, and even exceeds, the requirement under Uniform Rule 2-11.12. The Louisiana Uniform

Court of Appeal Rules provide that “special assignment may be given by the court in any case where the state or any subdivision thereof is a party, *or* in any matter impressed with the public interest, *or* in any case where the interest of justice clearly requires an immediate or special hearing.” La. Unif. R. Ct. App. 2-11.2 (emphasis added). Although meeting any one of the three requirement qualifies for special assignment, this case is exceptionally qualified because it meets more than one.

3. First, this matter is “impressed with the public interest” because the issue on appeal is the district court’s holding that DNR failed to meet the legal requirements of the Coastal Use Guidelines and, so “eliminat[ed] the increased protections which should have been afforded prior to issuing a permit to transport crude oil through the neighborhoods of St. James Parish and coastal areas.” Reasons for Judgment, Ex. A at 3. Accordingly, in the most straightforward way, this matter is impressed with the public interest.

4. Second, the state is a party to this case – DNR is subject to the district court’s remand and order, and it brought this appeal.

5. Third, because appeal of the district court’s decision was taken suspensively, the interests of justice requires an immediate hearing to avoid or limit the irreparable injury to Appellees and the public. BBP has represented that its pipeline will be 100% constructed by October 2018. Response to Court Directive at 2, *Atchafalaya Basinkeeper, et al. v. U.S. Army Corps of Engineers*, No. 18-30257 (E.D. La. June 27, 2018) (attached at Exhibit C).

6. “[T]he interests of justice” include avoiding “the potential for irreparable injury.” *See, e.g., Glazer Steel Corp. v. Larose Shipyard, Inc.*, 368 So. 2d 205, 206 (La. App. 1 Cir. 1979) (finding “the potential for irreparable injury” and “that the interests of justice are best served by allowing ... appeal from ... judgment which may cause [that] irreparable injury”). “Irreparable injury means the moving party

cannot be adequately compensated in money damages for his injury or suffers injuries which cannot be measured by pecuniary standards.” *Corrosion Specialties & Supply, Inc. v. Dicharry*, 93-196 (La. App. 5 Cir. 1994), 631 So. 2d 1389, 1392. The U.S. Supreme Court has noted that, “[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.* irreparable.” *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987). Further, the Louisiana First Circuit has explained that “health risk to the families occupying the residences located” near the complained of activity constituted an irreparable injury. *Marionneaux v. Talbot*, 625 So. 2d 760, 761 (La. App. 1 Cir. 1993) (affirming preliminary injunction to allow drainage of residential area).

7. Here, expediting this appeal is in the interest of justice to avoid irreparable injuries to the environment and to the health and well-being of the residents of the town of St. James, Louisiana, as well as other Coastal Zone communities. First, because DNR failed to apply the analysis, protections, and mitigating measures that Coastal Use Guideline 711(A) required, continued construction of the pipeline in the Coastal Zone causes irreparable injury and the threat of still greater irreparable injury. Section 711(A) requires that DNR protect the most vulnerable parts of the Coastal Zone. La. Admin. Code (LAC) 43.I.711(A). Among other things, it provides that commercial and industrial uses “shall, to the maximum extent practicable, take place only” in less vulnerable areas of the Coastal Zone, *i.e.* **1**) on lands at least 5 feet above sea level, or **2**) on lands otherwise sufficiently stable to support the use and away from flood, storm, and unreasonable public safety hazards. *Id.* at 711(A)(1) & (2). Accordingly, the regulation required DNR to consider the foundational, flood, storm, and other public safety hazard risks of the pipeline’s use. *See id.* at 711(A)(2). But DNR did not perform that analysis, so it did not consider, for example, **a**) the foundational stability of the lands proposed

for the pipeline's path, *b*) known flooding and storm hazards in the town of St. James and whether the proposed pipeline's route or operation could impact the area, or *c*) whether the proposed use would unreasonably endanger public safety, including by increasing the oil spill and explosion potential for the people of St. James. DNR also omitted the "maximum extent practicable" analysis and the potential conditions and mitigation that such an analysis would require. *See* LAC 43.I.711(A)(1).

Accordingly, expediting hearing on this appeal avoids or minimizes the irreparable environmental and public health injuries and potential injuries which could result from the DNR's failure to determine whether BBP's construction and operation of its pipeline is occurring:

on lands which have foundation conditions sufficiently stable to support the use, *and* where flood and storm hazards are minimal or where protection from these hazards can be reasonably well achieved, *and* where the public safety would not be unreasonably endangered.

LAC 43.I.711(A)(2) (emphasis added).

8. Further, because there is no emergency response plan for oil spills and other disasters in place for the St. James community under DNR's decision, as Coastal Use Guideline 719(K) required, expediting hearing in this appeal serves the interest of justice by shortening the time that Appellees, the public, and the environment suffer the threat of injuries from continuing action under the permit without such life-saving protections. The district court, expressly troubled by DNR's failure to address such a critical issue, found that DNR must require an effective environmental protection and emergency or contingency plans, including for "evacuation in the event of a spill or other disaster, in accordance with Guidelines 719(K), PRIOR to the continued issuance of said permit." Reasons for Judgment, Ex. A at 4. But DNR has continued the issuance of the permit, has allowed ongoing construction, and will allow operation of the transport of crude

oil, still without an emergency response plan (let alone an effective one) and still without any evacuation plan for the people living at the pipeline's terminus.

Indeed, ongoing construction interferes with the flexibility to develop potential evacuation routes and other protections under the district court's order.

9. Accordingly, this case merits special assignment for expedited hearing not only because the matter is impressed with the public interest, but also because it will serve the interests of justice.

10. **WHEREFORE**, Appellees respectfully request this Court order a Special Assignment for an expedited hearing.

Respectfully submitted this 13th day of July, 2018,

/s/ Lisa W. Jordan

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Elizabeth Livingston de Calderon, La. Bar No. 31433
Tulane Environmental Law Clinic
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New Orleans, Louisiana 70118
Telephone: (504) 865-5789
Counsel for Appellees-Petitioners

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Motion and Order for Special Assignment has been served by email upon counsel for all parties, as agreed to by counsel for all parties, on the 13th day of July, 2018.

/s/ Lisa W. Jordan

Lisa W. Jordan

STATE OF LOUISIANA
COURT OF APPEAL
FIFTH CIRCUIT

No. 2018-CA-_____

HARRY JOSEPH, SR. (PASTOR), ET AL.,

VERSUS

LOUISIANA DEPARTMENT OF NATURAL RESOURCES, ET AL.

ON APPEAL FROM DECISION
OF THE TWENTY-THIRD JUDICIAL DISTRICT COURT,
PARISH OF ST. JAMES
HONORABLE ALVIN TURNER, DISTRICT JUDGE, SECTION E,
NO. 38,163
A CIVIL PROCEEDING

[PROPOSED] ORDER

Considering the foregoing Motion on an Unlodged Appeal for Special Assignment;

IT IS ORDERED that Appellees, Pastor Harry Joseph, Sr., Genevieve Butler, Humanitarian Enterprise of Loving People, the Gulf Restoration Network, the Atchafalaya Basinkeeper, and BOLD Louisiana, are entitled a special assignment for an expedited hearing, and that hearing in this matter shall be set on the next available docket, the _____ day of _____, 2018.

THUS DONE AND ORDERED in Gretna, Louisiana, the ___ day of _____, 2018.

JUDGE

NOTIFICATION OF REASONS FOR JUDGMENT

HARRY JOSEPH SR (PASTOR), ET AL

Versus

LOUISIANA DEPARTMENT OF NATURAL
RESOURCES, ET AL



Case: 00038
Division: E
23rd Judicial District Court
Parish of St. James
State of Louisiana

APRIL 30, 2018
DATE

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NOTICE IS HEREBY GIVEN that, in the above entitled and numbered matter,
REASONS FOR JUDGMENT

was/were rendered, read and signed and made a part of the record herein.

A true and certified copy of which is attached to this notice.

Shane M. LeBlanc
Clerk of Court
P.O. Box 63
Convent, LA. 70723
225-562-2270 (TEL.)
225-562-2383 (FAX)

BY:

A handwritten signature in black ink, appearing to read "Shane M. LeBlanc", written over a horizontal line.

Deputy Clerk of Court

PASTOR HARRY JOSEPH, SR., GENEVIEVE BUTLER,
H.E.L.P., THE GULF COAST RESTORATION NETWORK,
THE ATCHAFALAYA BASINKEEPER, AND BOLD
LOUISIANA

23rd JUDICIAL DISTRICT COURT

v. 38, 163 "E"

PARISH OF ST. JAMES

SECRETARY, LOUISIANA DEPT. OF NATURAL
RESOURCES

STATE OF LOUISIANA

April 30, 2018
FILED

[Signature]
DEPUTY CLERK OF COURT

REASONS FOR JUDGMENT

After public hearings, on April 3, 2017, the Louisiana Department of Natural Resources issued permit number P20160166 to Bayou Bridge Pipeline, LLC. This permit is a Coastal Use Permit allowing for a crude oil transport pipeline to cross 11 parishes throughout Southern Louisiana, including St. James Parish, the Terminus of the proposed pipeline. In addition to allowing construction of a pipeline, the permit allows construction of two (2) pump stations and other necessary ancillary facilities. Once constructed, this pipeline has the potential to impact some of Louisiana's most coveted and ecologically sensitive areas such as the Atchafalaya Basin, as well as other wetlands throughout Louisiana.

This case arises out of a Petition for Judicial Review filed by Harry Joseph, Sr., Genevieve Butler, H.E.L.P., The Gulf Restoration Network, The Atchafalaya Basinkeeper, Bold Louisiana (collectively referred to as "petitioners"), seeking a finding from this court that the Louisiana Department of Natural Resources violated Louisiana Law and the Louisiana Constitution when it granted permit number P20160166. In response, several groups filed separate Petitions for Reconsideration with the Secretary of the Department of Natural Resources pursuant to La. R.S. 49:214.35(B). The Secretary denied the Petitions on April 14, 2017 and May 16, 2017. Those groups have joined together to file the instant Petition for Declaratory Judgment, seeking in essence, to appeal the denial of the Petitions to Reconsider. This matter was brought before this court on January 4, 2018, at which time it was taken under advisement.

Petitioners argue the final application submitted by Bayou Bridge Pipeline on March 3, 2017 is deficient and the Department of Natural Resources' issuance of the permit was contrary to Louisiana law in the following specific respects:

- 1) The Department of Natural Resources violated the Coastal Use Guidelines in granting a Coastal Use Permit for the proposed pipeline project in that it failed to apply all the pertinent guidelines, specifically 711(A) and 719(K).
- 2) The Department of Natural Resources violated its duty as a public trustee under Article IX, §1 of the Louisiana Constitution, in that it did not consider the impacts this pipeline would have on the people of St. James. The permit application does not include an emergency response plan nor does it address potential spills that may occur after construction, once the pipeline is operational. The Department of Natural Resources did not consider the potential pollution, noise and traffic in the St. James community, an area which is largely populated by African Americans.

The law is clear that judicial review of Petitions for Reconsideration of the Secretary's decisions pursuant to the Coastal Resources Management Act, such as in the case at bar as are subject to the provisions of the Administrative Procedure Act. See La. Rev. Stat. Ann. § 49:214.35 (E)(F). In so reviewing, the court is confined to the record. See La. Rev. Stat. Ann. § 49:964(F). Moreover, the court has wide discretion in determining what relief is best suited for the situation presented, but must do so within the confines of the Administrative Procedure Act. To that end, La. Rev. Stat. Ann. § 49:964 states the following in pertinent part:

G. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority of the agency;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
- (6) Not supported and sustainable by a preponderance of evidence as determined by the reviewing court. In the application of this rule, the court shall make its own determination and conclusions of fact by a preponderance of evidence based upon its own evaluation of the record reviewed in its entirety

upon judicial review. In the application of the rule, where the agency has the opportunity to judge the credibility of witnesses by first-hand observation of demeanor on the witness stand and the reviewing court does not, due regard shall be given to the agency's determination of credibility issues.

La. Rev. Stat. Ann. § 49:964 (G).

A review of the record before the court reflects that the Department of Natural Resources did not apply guideline 711(A), relative to commercial and industrial surface alterations, initially on the basis that the more specific guideline, 719(K) would apply. However, on reconsideration, the Department thereafter reasoned that 719(K), relative to "oil, gas and mineral activity" had no application either, thereby eliminating the justification for initially refusing to apply guideline 711(A). Instead, the Department applied a less stringent guideline 705, applicable to linear facilities, thereby eliminating the increased protections which should have been afforded prior to issuing a permit to transport crude oil through the neighborhoods of St. James Parish and coastal areas.

The court notes that when it is appropriate to apply one or more guidelines, the Department is under a duty to do so. The Coastal Use Guidelines state as follows, in pertinent part, "[t]he guidelines must be read in their entirety. Any proposed use may be subject to the requirements of more than one guideline or section of guidelines and all applicable guidelines must be complied with." LAC 43.I.701(A). Moreover, the Department's failure to apply either or both, 711 and 719(K), without articulating any rational basis for doing so is arbitrary, capricious and in contravention of La. R.S. 49:964(G)(5).

With regard to the Department's failure to apply guideline 711(A), this court sees no rational basis for its failure to apply 711(A), relative to commercial and industrial surface alterations. "Surface alterations" are defined as "those uses and activities which change the surface or usability of a land area or water bottom." LAC 43:I.700. The court concedes that once constructed, use of the pipeline would not result in a surface alteration. However, it cannot be disputed that once constructed, use of the pipeline could conceivably change the usability of the land.

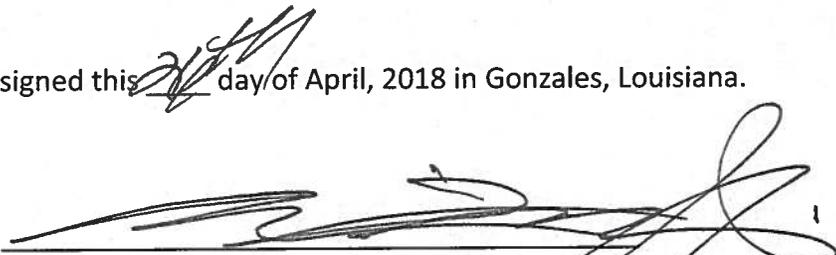
The department's failure to apply guideline 719(K) is more troubling to the court. Guideline 719(K), relative to "Oil, Gas and Other Mineral Activities" is defined in the Coastal Use Guidelines as "those activities which are directly involved in the exploration, production and refining of oil, gas and other minerals". LAC 43:1.700. It cannot be reasonably disputed that the transportation of crude oil is directly involved in the refining of oil. Once crude oil is extracted it has to be transported via pipeline to a refinery, where it is thereafter converted to various refined oil products. As such, at a minimum, guideline 719(K) is applicable and should have been considered in determining whether to grant the permit at issue.

Considering the findings and rulings herein, this court will decline to rule on petitioners' argument that the Department of Natural Resources violated its public trust duty by not requiring an emergency response plan or considering the potential adverse impacts in violation of the Louisiana Constitution.

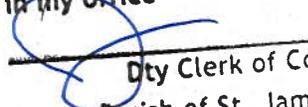
Based on the foregoing, this case is remanded to the Department of Natural Resources for further proceedings in connection with its issuance of permit number P20160166. In that this court finds the permit at issue involves mineral operations, the Department of Natural Resources is ordered to require Bayou Bridge Pipeline, LLC to develop effective environmental protection and emergency or contingency plans relative to evacuation in the event of a spill or other disaster, in accordance with Guideline 719(K), PRIOR to the continued issuance of said permit.

Counsel for Petitioners shall prepare a judgment in conformity with the reasons stated herein.

Thus, done and signed this 27th day of April, 2018 in Gonzales, Louisiana.


Honorable Alvin Turner, Jr.,
Division "E"

I hereby certify that the above and foregoing is a true and correct copy of the original on file and of record in my office


Dty Clerk of Court
Parish of St. James, LA

Date 5/11/18

FILED FOR RECORD
ST. JAMES PARISH, LA

2018 MAY 17 AM 8:25

CLERK OF COURT

PASTOR HARRY JOSEPH, SR., GENEVIEVE BUTLER,
H.E.L.P., THE GULF COAST RESTORATION NETWORK,
THE ATCHAFALAYA BASINKEEPER, AND BOLD
LOUISIANA

23rd JUDICIAL DISTRICT COURT

v. 38, 163 "E"

PARISH OF ST. JAMES

SECRETARY, LOUISIANA DEPT. OF NATURAL
RESOURCES

STATE OF LOUISIANA

May 15, 2018
FILED

[Signature]
DEPUTY CLERK OF COURT

JUDGMENT

This matter came for hearing in open court on January 4, 2018, on the Plaintiffs' Petition for Judicial Review, which appeals the decision of the Louisiana Department of Natural Resources that issued Coastal Use Permit P20160166 to Intervenor, Bayou Bridge Pipeline, LLC.

Present in Court were the following:

Elizabeth Livingston de Calderon and Lisa W. Jordan, counsel for Plaintiffs; and Ryan Sundstrom and Talia Nimmer, student attorneys for Harry Joseph and Genevieve Butler;

Harry Vorhoff and Ryan Seidermann, counsel for Defendant, Louisiana Department of Natural Resources; and

James C. Percy and Nicole M. Duarte, counsel for Intervenor, Bayou Bridge Pipeline, L.L.C.

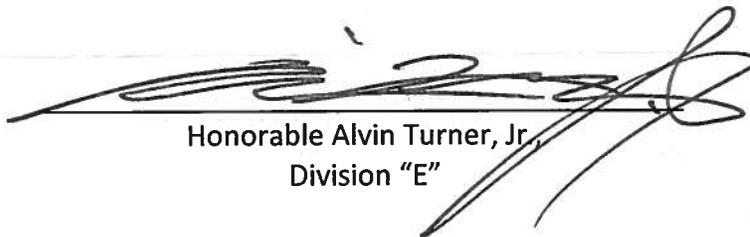
Considering the pleadings, briefs, arguments of counsel, the record of the Louisiana Department of Natural Resources, and the law, and for the written reasons assigned:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that there be judgment in favor of the Plaintiffs and against Defendant, Louisiana Department of Natural Resources and Intervenor, Bayou Bridge Pipeline, LLC.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the matter is remanded to the Louisiana Department of Natural Resources for further proceedings consistent with this Court's Reasons for Judgment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all costs in this matter are assessed to, and shall be paid by, the Louisiana Department of Natural Resources and Bayou Bridge Pipeline, LLC.

Thus, done and signed this 15th day of May, 2018 in Gonzales, Louisiana.



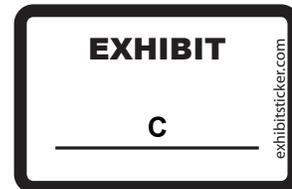
Honorable Alvin Turner, Jr.,
Division "E"

I hereby certify that the above and foregoing is a true and correct copy of the original on file and of record in my office

Dty Clerk of Court
Parish of St. James, LA

Date

MAY 18 2018



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

RESPONSE TO COURT DIRECTIVE

Pursuant to the Court’s June 22, 2018 directive to the parties to
provide “[t]he present state of construction of the pipeline at issue in this
case, to the extent known,” appellant Bayou Bridge Pipeline, LLC states
the following:

Overall Construction: As of June 24, 2018, construction of the
entire 163-mile long Bayou Bridge Pipeline was nearly 76% complete.

Construction of the entire pipeline (both inside and outside the Atchafalaya River Basin) is expected to be 100% complete by October 2018.

Construction Within the Basin: The primary construction task currently underway in the Basin is tree clearing. As of June 24, 2018, approximately 62% of the right-of-way in the Basin had been cleared of trees (approximately 164 acres cleared out of 262 acres to be cleared). Bayou Bridge estimates that 65% of the right-of-way in the Basin will be cleared by June 29, and that 100% of the right-of-way will be cleared by August 8.

Additional construction activity is also underway in the Basin. As of June 24, 2018, the totality of construction activity within the Basin (including but not limited to clearing, trenching, stringing, laying of pipe, backfilling, and tying-in of pipeline segments) was 10.5% complete. Bayou Bridge estimates that approximately 13% of construction in the Basin will be complete by June 29, and that 100% of construction in the Basin will be complete by October 2018.

June 27, 2018

Respectfully submitted,

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Justin J. Marocco
JONES WALKER LLP
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/s/ Miguel A. Estrada
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Counsel for Appellant Bayou Bridge Pipeline, LLC

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of June, 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 ELECTRONIC COMPLIANCE

I hereby certify that on this 27th day of June, 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.

/s/ Miguel A. Estrada
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