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September 8, 2003

Via Federal Express

Margaret Hoffman, Executive Director
Texas Commission on Environmental Quality
12100 Park 35 Circle
Austin, Texas 78753

Via Federal Express

Col. Leonard D. Waterworth
U.S. Army Corps of Engineers
Galveston District
2000 Fort Point Rd.
Galveston, Texas 77550

Re: Permit Application No. 21520 (Revised); The Bayport Ship Channel Container/Cruise Terminal Project; Comments in Response to the 4th Revised Public Notice, Issued August 12, 2003

Dear Ms. Hoffman and Col. Waterworth:

These comments are submitted in response to the Galveston District of the Corps of Engineers ("Corps") and the Texas Commission on Environmental Quality's ("TCEQ") public notice issued August 12, 2003. These comments are submitted on behalf of the Galveston Bay Conservation and Preservation Association ("GBCPA"). In these comments, we will address the following issues: bias, coastal consistency and feasible alternatives and mitigation. These issues are addressed sequentially.

I. THE CORPS CONDUCT DURING THE BAYPORT PERMITTING PROCESS CONSTITUTES BIAS

It is GBCPA's belief that the Corps' permitting process is biased in favor of the Port of Houston Authority ("PHA"). This is the fifth public notice issued regarding this project; each revision has incrementally changed the Bayport Project so that PHA might put forth an acceptable application. Each and every time a new revised application is issued, GBCPA and the citizens and cities affected are forced to respond and provide comments because their failure to respond would indicate that no objections to the revised application. Time after time, we have been forced to reiterate our opposition to address the PHA's minor changes to its application. This is simply unfair.

Moreover, the Corps has never fairly or fully disclosed the alternatives or impacts of its proposal in the environmental documentation for the Bayport project. The Bayport Final Environmental Impact ("FEIS") is incomplete and contains false representations. The Bayport FEIS failed to discuss the issuance of the permit for Shoal Point. The Bayport FEIS erroneously presented the no action alternative. The Bayport FEIS contradicted PHA's proposal that co-location of the cruise terminal and container port was necessary. Therefore, an analysis of

practicable alternatives should have evaluated the impacts of locating the cruise terminal at a separate location from the container terminal. This was not done.

Similarly, the Corps failed to analyze the impact of the potential deepening of the Houston Ship Channel. The most recent permit revision includes a footnote that states that the cranes are designed to handle post-Panamax vessels. *See* May 15, 2003, Revised Public Notice No. 21520 at 5 of 30. They require 45 to 53 feet of draft. The permit application requests permission to dredge the docks to 56 feet of depth. The Bayport FEIS states that further deepening of the Houston Ship Channel is likely necessary beyond the current 45 feet, yet the Bayport FEIS fails to analyze this impact because a deepening project is not currently "authorized." This analysis by the Corps flies in the face of the case law on both secondary and cumulative impacts, yet that is the position stated in the Bayport FEIS.

If the impact of a deeper channel was fairly evaluated and if the alternative sites were appropriately analyzed, there would be a major difference between sites further up the bay and further down the bay. Sites such as Shoal Point and Pelican Island and Freeport are clearly preferable to sites further up the bay if impacts associated with a deeper channel are taken into account. At the least, this issue should have been fully analyzed by computer modeling. To go forward with this proposed permit without such an evaluation of impacts is a clear indication of the Corps' bias in favor of PHA.

The public has consistently requested that the Corps undertake a supplemental environmental impact statement, both with regard to the Bayport Draft Environmental Impact Statement ("DEIS") and FEIS. Apparently it does not matter to the Corps that it is failing to fully and fairly report on alternatives and the environmental impacts of those alternatives.

Since the Corps has failed to provide an unbiased analysis, GBCPA is requesting that TCEQ make an independent determination as to whether practicable alternatives exist to the Bayport project site and whether there is a less environmentally damaging practicable alternative under the Texas Coastal Management Program and under the §401 certification process.

By this comment, GBCPA is requesting that TCEQ and the Corps complete an independent review of practicable alternatives that includes full consideration of the following alternatives: (1) No action (with the Shoal Point permit issued); (2) Pelican Island (with the Shoal Point permit issued; and with container facilities on the 1000 acres owned by PHA on Pelican Island but with the cruise terminal in the existing Port of Galveston), and (3) Spillmans Island (with the Shoal Point permit issued; and with the container facility located along the Houston Ship Channel but with the cruise facility only located at either Bayport or at the Port of Galveston). Additionally, all alternatives should include consideration of the impacts of the construction of a 56-foot deep Houston or Galveston Ship Channel as part of a comparative analysis of alternatives. Also, the potential of a 56-foot deep port to Freeport, with container facilities at Freeport and cruise facilities at Galveston should be considered.

The point here is that an honest evaluation of alternatives and their impacts has not yet occurred. The citizens who are concerned about this project deserve an honest analysis. GBCPA does not believe that the Corps can obtain an honest analysis. *See* GBCPA and The City of Shoreacres' August 25, 2003, Letter Requesting to Disqualify Col. Leonard Waterworth

As The Final Decision Maker For Permit Application No. 21520 (Revised); The Bayport Ship Channel Container/Cruise Terminal Project, attached hereto as Exhibit 1.

GBCPA, the affected cities and citizens all have a right to a fair proceeding. Therefore, GBCPA requests that TCEQ to take over the evaluation of this project and insure that a full and fair evaluation of alternatives exists prior to making a decision under either §401 or under the rules of the Coastal Coordination Council that are applicable to this project as part of the Texas Coastal Management Program.

II. THE TEXAS COASTAL MANAGEMENT PROGRAM IS APPLICABLE TO THE PHA'S PROPOSED BAYPORT PROJECT

It is GBCPA's belief that the PHA's proposed Bayport project is inconsistent with the Texas Coastal Management Plan. First, the proposed Bayport project site is located within the Texas coastal zone. Second, TCEQ has the authority to review the Corps permit under Section 401 of the Clean Water Act. Third, the Coastal Coordination Council ("CCC") has the authority to independently review the proposed Bayport project.

A. THE TEXAS COASTAL PROGRAM

Under federal law, a state may join the Coastal Zone Management Program if it adopts and enforces a state plan. If the state joins, however, it must enforce the program submitted to the National Oceanic and Atmospheric Administration, Office of Coastal Zone Management. Once a state joins the federal coastal program, any federal development that affects the state's coastal zone must be consistent with the state's approved coastal program. This review process, e.g., consistency review, is extremely powerful. Under this review process, a state can veto a federal action that is inconsistent with the state coastal plan.

Texas joined the federal coastal zone management program in the early 1990s. The Texas Coastal Zone Management plan is now officially part of the rules of the CCC, the agency created to administer the Texas Coastal Management Program. The CCC is staffed by the General Land Office ("GLO") and is chaired by Jerry Patterson, the Commissioner of the GLO. There are several other members, including the chair (or designated member) of Texas Parks and Wildlife, the Texas Commission on Environmental Quality, the Texas Railroad Commission, the Texas Department of Transportation, the Texas Water Development Board, the Texas Soil and Water Conservation Districts and the Texas A & M Sea Grant Program. Additionally, there are four citizen members appointed by the governor. CCC's role is to oversee compliance of state agencies with the Texas Coastal Zone Management Program.

Unlike the Coastal Zone Management Program in many other states, the Texas program establishes a set of goals and policies and each state agency must conform their regulations to these rules and policies rather than setting up a separate coastal permit program. As such, the program attempted to utilize existing permitting systems and avoid duplicative permitting programs. The assumption of the program is that if each state agency incorporates these goals and policies into their programs and permits, then there will be compliance with these goals and policies. As a general proposition, the CCC usually does not engage in direct review of projects but more generally provides information to agencies and oversees the actions of other state regulatory agencies.

The Texas statute also provides the CCC to directly intervene into state agency actions. In this regard, the CCC can review a state agency's action if three members of the CCC request such a review. If it is a federal action, the CCC may seek independent review, even if another state agency has jurisdiction. Historically, the CCC has never intervened in either a state or federal action, choosing instead to allow the agencies to exercise primary control.

The goals and policies of the Coastal Zone Management Program only apply within the coastal zone boundary. *See* 31 Tex. Admin. Code § 503.1 (2003). In Harris County, the coastal zone boundary proceeds northward from the Galveston County line along IH-45 to I-10 and then eastward along IH-10. There are extensions of the boundary to the west along Clear Creek and along Buffalo Bayou and northward along the San Jacinto River. All lands seaward of this boundary line to a distance offshore of three leagues are within the coastal zone.

The PHA's proposed Bayport project is to be constructed on approximately 1000 acres of land east of State Highway 146 on the Bayport Deepwater Channel. The Bayport project's proposed site lies within the boundaries of the Texas Coastal Zone. *See* 31 Tex. Admin. Code § 503.1.

B. THE PROPOSED BAYPORT PROJECT

The Bayport project requires the construction of docks and wharves, dredging within the Bayport channel and along the Galveston Bay shoreline and the discharge of dredge and fill material into freshwater and saltwater wetlands, including specifically prairie pothole wetlands in the interior of the proposed Bayport project lands. According to the Corps, there are 146.4 acres of wetlands within the site. The Corps, however, has concluded that only 19.7 of those acres are jurisdictional (e.g., subject to regulation) under the federal Clean Water Act.

Also according to the Corps, it is reasonably foreseeable that the Houston Ship Channel will need to be deepened to accommodate the larger container vessels that are now in use around the world. The PHA has requested permission to construct the wharves to a depth of 56 feet even though the existing depth of the Houston Ship Channel is only 45 feet. The PHA's pending permit application diagrams the construction of cranes at the wharfs that are capable of handling post-Panamax vessels. Post Panamax vessels have a draft of from 45 to 53 feet. To date, there has been no analysis of the impacts of deepening the Houston Ship Channel on Galveston Bay.

Substantial concern exists about the impact of deepening the Houston Ship Channel to 50 or more feet of depth. A deeper ship channel would bring more salt water into Galveston Bay from the Gulf. Galveston Bay is an estuary, an area where salt water and freshwater come together. It is neither salt nor fresh water. The potential for significant harm to Galveston Bay exists if the channel is deepened. Bayport has been estimated to cost \$1.2 billion. Once that money is invested in this site in the upper portion of Galveston Bay, it is reasonably foreseeable that PHA will request that deepening the Houston Ship Channel is the only way to protect its investment. This deepening activity would be classified as either a cumulative and/or secondary environmental impact of the Bayport project. *See infra* II(C)(3).

Further, the Corps has failed to identify a number of alternative sites. *See supra* I. Among such alternatives are the no action alternative taking into consideration of the prior

issuance of the Shoal Point permit, Pelican Island with the cruise terminal at the Port of Galveston and taking Shoal Point into consideration, Spilmans Island with the container docks adjacent to the Houston Ship Channel and the cruise terminal at either the Port of Galveston or Bayport and the Port of Freeport. As mentioned previously, GBCPA does not believe that the Corps has failed to conduct a fair and honest analysis of these alternatives and their comparative impacts. *See supra* I.

The proposed Bayport project is within the Texas coastal zone. The basis for the review of the Bayport project under the Texas coastal program is two fold. First, the TCEQ has authority to review the Corps' permit under Section 401 of the Clean Water Act. Second, the CCC also has the authority to independently review projects in one of two ways. The CCC may vote to review a proposed agency action with regard to coastal consistency, 31 Tex. Admin. Code § 505.38, or independently review the federal action, 31 Tex. Admin. Code § 506.12(d), but not both.

C. TEXAS COASTAL ZONE MANAGEMENT RULES AND THE PROPOSED BAYPORT PROJECT

The Bayport project is subject to the Texas Coastal Zone Management Program. The Bayport project is subject to TCEQ review. The CCC can review the Bayport project directly for coastal consistency. The question is – what does the Texas Coastal Zone Management Program require with regard to Bayport?

The rules governing the Texas Coastal Zone Management Program are found in volume 31 of the Texas Administrative Code ("Code"). As stated in the Code, the CCC will coordinate the performance of agencies, subdivisions, and programs by promulgating goals and policies to guide and serve as the basis for consistency review for certain activities occurring within the coastal zone. *See* 31 Tex. Admin. Code § 501.1(b). The CCC has adopted those goals and policies.

1. Definition of Texas Coastal Wetlands

The Code specifically proscribes policies for specific activities in coastal natural resource areas and development in critical areas. *See generally* 31 Tex. Admin. Code § 501.14. The definition for "critical areas" include coastal wetlands, oyster reefs and tidal mud flats. *See id.* at § 501.3(a)(8). "Coastal wetlands" include all wetlands, as defined by the Texas Water Code, §11.502, that are seaward of the Coastal Facility Designation Line, e.g., the coastal zone boundary. *See id.* at § 501.3(b)(5). "Wetlands," as defined under the Texas Water Code, are "area[s] (including a swamp, marsh, bog, prairie pothole or similar area) having a predominance of hydric soils that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support and that under normal circumstances supports the growth and regeneration of hydrophytic vegetation." *See* Tex. Water Code Ann. § 11.502(1) (2003). However, if the state definition conflicts with the federal definition in any manner, the federal definition prevails. *See id.* at § 11.506.

The Corps has identified a total of 146.4 acres of wetlands on the proposed Bayport project site, 19.7 acres of jurisdictional wetlands and 126.7 acres of non-jurisdictional wetlands. For purposes of the Texas Coastal Management Plan, it does not appear that there is any conflict

between the state and federal definition of wetlands. Under Texas' definition, the terms jurisdictional and non-jurisdictional are irrelevant. Therefore, the Corps definition of wetlands, either jurisdictional or non-jurisdictional, is the same as under Texas law.

As a result, GBCPA asserts that under the Texas coastal program, the PHA's proposed Bayport project will impact 146.4 acres of coastal wetlands. It is without question that these wetlands are within the coastal zone. These 146.4 acres are areas that have hydric soils and are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support and that under normal circumstances support the growth and regeneration of hydrophytic vegetation. Most of these wetlands are prairie potholes, a type of wetland specifically identified in the Texas Water Code definition. *See* Tex. Water Code § 11.502(1). The Corps does not dispute any of the above information. There is no conflict. Hence, the state and federal definition are not in conflict, and thus, section 11.506 of the Texas Water Code does not apply.

2. Destruction of “Coastal Wetlands” Regulated Under Texas Coastal Management Plan

Regardless of whether the “coastal wetland” acreage is 19.7 acres or 146.4 acres, the destruction of “coastal wetlands” is regulated under the provisions of the Texas coastal program relating to critical areas. This provision requires that where dredging and construction of structures in critical areas is proposed or where discharge of dredged or fill material into critical areas is proposed, such discharge shall comply with the policies in this subsection. *See* 31 Tex. Admin. Code § 501.14(h)(1)

3. Secondary and Cumulative Impacts

According to this section, cumulative and secondary adverse effects of these activities will be considered in its implementation. These two terms are defined under the Texas Coastal Management Plan as follows:

Cumulative adverse effects – Adverse effects increasing in significance due to the collective effects of a number of actions. *See* 31 Tex. Admin. Code § 501.3(a)(9).

Secondary adverse effect – Adverse effects, which would result from a proposed action, cause significant modifications or alterations to the physical or chemical characteristics of coastal natural resource areas beyond the limit of the immediate project area. *See* 31 Tex. Admin. Code § 501.3(a)(13).

In the context of the PHA's Bayport project, the potential deepening of the Houston Ship Channel to a depth of 56 feet could be considered either a cumulative or a secondary impact. The permit application seeks permission to dredge the wharves to a depth of 56 feet and states the PHA's intention to install cranes capable of servicing post-Panamax vessels. *See* May 15, 2003, Revised Public Notice No. 21520 at 5, 6 of 30. Post-Panamax vessels require from 45 to 53 feet of depth, fully loaded. The PHA, in the Bayport FEIS, indicates that it was likely that the Houston Ship Channel would be deepened in the future to accommodate these deeper vessels. *See* Bayport FEIS 4-19. The Corps also stated in the Bayport DEIS and FEIS that it had evaluated the impact of a deeper channel when it had not. *See* Bayport DEIS 5-4; Bayport FEIS 6-3. Ultimately, the Corps stated that the deeper channel was not currently authorized and

therefore would not be evaluated as a cumulative impact, even though the federal case law on cumulative impacts clearly states that the action only be reasonably foreseeable and not proposed. *See* Bayport FEIS, vol. II 453; 40 C. F. R. § 1508.7; *Fritiofson v. Alexander*, 772 F.2d 1225 (5th Cir. 1985).

If the Texas Coastal Management Program is to have any meaning, it must search out the potential conflicts that may impact our bays and estuaries and attempt to address them in a forward-looking manner. If we are going to simply ignore potential impacts, then why have a coastal program? There is clearly a foreseeable conflict over deeper channels for container vessels. Now is the time to address this potential conflict – before the PHA spends \$1.2 billion. If a deeper channel is going to be dredged, careful consideration of the impacts of such a channel should be a part of the permitting process for the Bayport facility. Now is the time to investigate the potential impact of 56-foot deep channel on Galveston Bay – before the PHA spends \$1.2 billion in taxpayer money. Once that money is spent, the argument will be made in support of that investment, regardless of the impact to Galveston Bay. That is why Texas passed the coastal program – to address these types of issues on the front end, not the back end.

4. Substantive Requirements of the Texas Coastal Program

Texas law requires evaluating the impact of actions on critical areas such as coastal wetlands:

- (A) The policies in this subsection shall be applied in a manner consistent with the goal of achieving no net loss of critical area functions and values.
- (B) Persons proposing development in critical areas shall demonstrate that no practicable alternative with fewer adverse effects is available.
- (C) In evaluating practicable alternatives, the following sequence shall be applied:
 - (i) Adverse effects on critical areas shall be avoided to the greatest extent practicable;
 - (ii) Unavoidable adverse effects shall be minimized to the greatest extent practicable by limiting the degree or magnitude of the activity and its implementation.
 - (iii) Appropriate and practicable compensatory mitigation shall be required to the greatest extent practicable for all adverse effects that cannot be avoided or minimized.

31 Tex. Admin. Code § 501.14(h)(1)

The above section applies to the discharge of fill material into the 146.4 acres (or 19.7 acres) of coastal wetlands on the proposed Bayport site. This section also requires the analysis of the adverse cumulative impact and/or secondary impact of building Bayport including the deepening of the Houston Ship channel.

Under this section, there is to be no net loss of critical area functions and values. As such, the PHA has the burden to demonstrate that no practicable alternative with fewer adverse effects exists. *See* 31 Tex. Admin. Code § 501.14(h)(1)(B). The adverse effects here include both the loss of 146.4 acres of coastal wetlands and the potential deepening of the Houston Ship Channel, which could be classified as either a secondary or cumulative impact, both are covered by this section. To date, the PHA and the Corps have not analyzed the impact of the deepening

of the Houston Ship Channel. TCEQ must have such documentation in order to make a legally correct analysis under the rules of the Texas Coastal Management Program.

a. Practicable Alternatives and Co-Location

Of the above requirements, the most important is that the PHA must demonstrate that no practicable alternative exists with fewer adverse effects. The comparison of adverse impacts of alternatives becomes meaningful when both the loss of 146.4 acres of coastal wetlands and the impact of a deepwater channel are considered as impacts of the proposed Bayport cruise terminal and container facility. Alternatives exist that are closer to the Gulf and therefore would cause less damage to the Galveston Bay system if a deepwater channel were constructed. Alternatives exist that would lead to the destruction of fewer, if any, acres of coastal wetlands as compared to 146.4 acres.

There are several alternatives to the proposed Bayport site. The Corps, in the Bayport FEIS, identified Shoal Point as an alternative site. The Bayport FEIS, however, does not reveal that the Corps has already issued a permit to the City of Texas City to construct the Shoal Point facility. This Shoal Point alternative less adversely impacts to the coastal zone than the proposed Bayport site. Shoal Point has few coastal wetlands. A deepwater channel is already authorized and would cause much less damage than at the Bayport site, which is much further up in the estuary. Also, the Shoal Point alternative has already been evaluated as being consistent with the Texas coastal management plan. It is an excellent alternative that has already been permitted. On its face, Shoal Point has been demonstrated to be a practicable alternative with less adverse impact because it has been permitted.

The PHA's Bayport permit application should also be denied because other less adversely impacting practicable alternative sites exist. To date, there has been no analysis regarding the need for two new container facilities on Galveston Bay. Such an analysis should be required. Assuming that two new container facilities are needed to serve the Houston region, the PHA owns approximately 1000 acres on Pelican Island in Galveston County. This site is a spoil disposal area with fewer coastal wetlands than Bayport. There also would be less adverse environmental impact from the deepening of the Ship Channel into the Port of Galveston rather than twenty or more miles up the bay. Also, Spilmans Island is an alternative site that would have less impact on coastal wetlands than would Bayport although the impacts of deepening the ship channel would occur if this alternative were pursued. In the case of Spilmans Island, the impacts would be substantially reduced if the container facilities were aligned along the Houston Ship Channel and if the cruise facilities were located elsewhere, such as the Port of Galveston or even Bayport.

As discussed, it is GBCPA's belief that the PHA's proposal of locating the container and cruise facilities adjacent to one another, e.g., co-location, is not a mandatory requirement. In the Bayport DEIS and FEIS, the Corps, for the most part, evaluated all alternative sites from the perspective of locating both a cruise terminal and container facility at the same location. No rationale exists for requiring both a cruise terminal and container facility to be located at the same site. In the Bayport FEIS, the Corps states that there is no functional relationship between the cruise and container facilities. *See* Bayport FEIS 2-3. There is no need for or requirement for co-location. The cruise facilities could and should be separated from the container facility and located at either the Port of Galveston or at Bayport without the container facility.

b. Adequacy of Mitigation

Under the PHA's current permit application, the PHA proposes to mitigate the impact of the Bayport project on 146.4 acres of "coastal wetlands" by constructing 66.8 acres of emergent wetlands, enhancing 12 acres of existing wetlands, preserving 23.7 acres of forested/shrub uplands, enhancing 71 acres of coastal prairie, adding 456 acres in the Banana Bend area and preserving 500 acres of prairie in the Cypress Creek watershed over forty miles away from Galveston Bay.

This proposed mitigation does not meet the Texas Coastal Management Plan nor the Corps requirements.

i. Failure to Meet Texas Coastal Management Requirements

This proposed mitigation does not meet the primary goal of the Texas coastal management plan to ensure that there is no net loss of critical area functions and values. Under the PHA's current proposal, there will be a net loss of coastal wetlands whose values and functions will not be replaced. Over 146 acres of wetlands will be lost within one mile of Galveston Bay. In turn, the mitigation proposes to preserve coastal prairie in the Cypress Creek watershed and to preserve a tract of land on the San Jacinto River, as well as constructing 66.8 acres of wetlands and enhancing 12 acres of existing wetlands.

The PHA's proposed mitigation plan does not achieve the Coastal Zone Management's goal of no net loss of critical area functions and values. *See* 31 Tex. Admin. Code § 501.14(h)(1)(A). Indeed, "compensatory mitigation includes restoring adversely affected critical areas or replacing adversely affected critical areas by creating new critical areas." *Id.* at § 501.14(h)(1)(D). By definition, critical areas include "coastal wetland[s]." *See id.* at § 501.3(a)(8). Therefore, in order to mitigate an impact on a coastal wetland, one has to create a coastal wetland.

There are 146.4 acres of coastal wetlands impacted by this proposed action. To date, the PHA has proposed the construction of 66.8 acres of wetlands and the enhancement of 12 acres within the coastal zone. Arguably, these are the only actions that will replace functions and values of the coastal wetlands sure to be lost at the Bayport project site. The set aside of the Banana Bend tract does not restore or replace any of the coastal wetlands' functions and values that will be destroyed at the proposed Bayport site. Neither does the Cypress Creek tract. In fact, the Cypress Creek tract should not even be considered as compensatory mitigation for the lost of the coastal wetlands because it is not within the Texas coastal zone.

Further, there are extensive oyster reefs in Galveston Bay that will be negatively affected by the potential deepening of the Houston Ship Channel. Oyster reefs are defined as "critical areas." *See* 31 Tex. Admin. Code §501.3(8). The impact of the cumulative and/or secondary impacts of this filling of coastal wetlands on oyster reefs must be considered. *See id.* at § 501.14(h)(1). Until this analysis has been undertaken and until proper compensation is proposed, the permit must be denied as violating the Texas Coastal Management Plan.

ii. Failure to Comply With The Corps's Compensatory Mitigation Requirements

Mitigation in the Katy Prairie is inappropriate under the 1990 Memorandum of Agreement between the U.S. Environmental Protection Agency and the Corps of Engineers. In determining appropriate mitigation under the Clean Water Act Section 404(b)(1) Guidelines, the Corps must, when considering off-site alternatives, look to sites within “the same geographical area if practicable (i.e., in close physical proximity and, to the extent possible, the same watershed).” *See* DEPARTMENT OF THE ARMY, MEMORANDUM OF AGREEMENT BETWEEN THE ENVIRONMENTAL PROTECTION AGENCY AND THE DEPARTMENT OF THE ARMY CONCERNING THE DETERMINATION OF MITIGATION UNDER THE CLEAN WATER ACT SECTION 404(B)(1) GUIDELINES II.3 (1990) (hereinafter “1990 MOA”).

The 1990 MOA clearly defines, “in the same geographical area,” to mean sites that are in “close physical proximity, and to the extent possible, the same watershed.” “Proximity” as defined by Merriam-Webster Dictionary On-line means “closeness.” *See* Merriam-Webster Dictionary On-line (visited Sept. 8, 2003) { [HYPERLINK "http://www.m-w.com/cgi-bin/dictionary?proximity"](http://www.m-w.com/cgi-bin/dictionary?proximity) }.

The recently proposed Katy Prairie off-site mitigation location cannot reasonably be understood as being in the “same geographic area.” It is not even “close.” First, The Katy Prairie is some 40 miles away from the Bayport Project Site. Second, it is also not “in the same watershed.” The Corps, TCEQ and PHA should consider Pine Gully. It is within the “same geographic area” and is in “the same watershed.”

More importantly, PHA has to provide documentation as to why compensatory mitigation is provided so far away. Certainly there are suitable tracts within close proximity to Galveston Bay where the impacts are occurring. It is most telling if such tracts do not exist. It tells us that the PHA's Bayport project would destroy the last wetlands in this area. It tells us that the last remaining natural areas adjacent to Galveston Bay north of Clear Lake that are not already set aside as preserves (e.g. Armand Bayou, various parks) will be destroyed. It tells us that significant natural resources will be lost.

Under the EPA's 404(b)(1) Guidelines, mitigation is not appropriate if practicable alternatives exist. Therefore, one should revisit the practicable alternatives from the standpoint of whether the loss of all of these wetlands is necessary at this location. Assuming that such a determination is made, then the question also must be examined under the 1990 MOA as to whether practicable alternatives exist that would minimize the acreage of land that must be destroyed.

In this regard, the co-location issue is worth revisiting. The container facility at Bayport clearly can be constructed without the cruise facility being located at Bayport. This alternative needs to be clearly considered from the standpoint of the acreage of wetlands lost to the cruise facility when compared to the acreage that might be lost at alternative sites. This analysis has not been undertaken.

A further co-location issue is raised by the rail yard. It is not necessary to locate the rail yard immediately adjacent to the port. The design of the Shoal Point facility contained in the

permit application did not have a rail yard on-site. Instead, the rail yard was located some distance away. Significant wetland acreage will be lost if the rail yard is located against to the proposed Bayport facility. If the rail yard was located elsewhere, then its impacts could be minimized. The Corps and PHA have not analyzed this situation.

III. CONCLUSION

The Texas Coastal Management Program clearly applies to the proposed Bayport project. Currently, TCEQ is reviewing the project and will make a decision regarding whether to approve the project under §401 of the Clean Water Act. The CCC has the ability to either review this TCEQ finding or to independently review the Corps' proposed federal action.

If TCEQ issues certification under the Texas Coastal Management Program, GBCPA intends to request that the CCC review this determination. In this regard, GBCPA will file a Motion For Rehearing immediately upon certification of this proposal. The effect of the filing of a Motion For Rehearing under Texas law is to suspend the agency's action for a period of 30 days. *See generally* 30 Tex. Admin. Code § 80.272. As such, there will be no §401 certification and there will be no finding of coastal consistency until the expiration of this appeal. Therefore, the permit cannot be issued until after this appeal process is completed.

GBCPA requests that TCEQ seriously evaluate this proposal under the rules of the CCC. GBCPA also requests that TCEQ make factual findings that document compliance or non-compliance with the rules of the CCC. GBCPA further requests that the serious issues raised by this permit application not be "swept under the rug" as they have been by the Corps. We must deal with these issues and conflicts honestly, in an unbiased manner. The truth, however painful and however difficult, is preferable to living a lie and deceiving the public.

Finally, GBCPA requests that a public hearing be held regarding the 4th Revised Public Notice. If the Corps and TCEQ are going to allow the PHA to make all of these incremental changes, with this last change coming after the close of the comment period for the Bayport FEIS, the least the agencies can do is give the public a chance to orally comment about this proposal and its compliance with the regulations. It is clear that the PHA has significantly changed its proposal in an attempt to convince the agencies that it's application is acceptable. The least you can do is listen one last time to the public as intended by the Corps and TCEQ regulations.

Respectfully submitted,

BLACKBURN CARTER, P.C.

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