



UNITED FOR A HEALTHY GULF

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re: **MVN 2013-00550 EMM** - NOLA Oil Terminal, LLC (**WQC 160803-03**)

Dear Mr. Kennedy and Ms. Hill,

I am writing on behalf of Gulf Restoration Network (“GRN”), a diverse coalition of individual citizens and local, regional, and national organizations committed to uniting and empowering people to protect and restore the natural resources of the Gulf of Mexico. We have serious concerns about the application for a Section 404 Permit (**MVN 2013-00550 EMM**) and Water Quality Certification (**WQC 160803-03**) submitted to the United States Army Corps of Engineers (“Corps”) and Louisiana Department of Environmental Quality (“LDEQ”), respectively, by NOLA Oil Terminal, LLC (“Applicant”).

The Applicant requests Section 404 permitting and a Water Quality Certification (“WQC”) for its proposed construction of a 114-acre marine oil terminal facility, including two ship docks, two barge docks, and other supporting infrastructure (“Project”). The Project would house approximately 54 storage containers, each with a volume of tens of thousands of liquid gallons. Although the Project’s immediate wetland impact is limited to 0.1 acre, we feel there are significant indirect and cumulative impacts that will result from a project of this scale. The proposed location of the Project raises further alarm, given apparent flood risks, the amount of polluting industry already present, and the historical record of said pollution. A public hearing in Plaquemines Parish is the ideal tool to gain fuller insight into the Project’s potential impacts.

GRN opposes the Applicant's requests for a Section 404 Permit and WQC, and we ask the Corps and LDEQ to deny these requests based on the following concerns:

1. *The Project is inconsistent with Louisiana's Comprehensive Master Plan for a Sustainable Coast and a 2016 Executive Order.*

Disrupting these wetlands directly conflicts with Louisiana's restoration and community-protection goals. The *Comprehensive Master Plan for a Sustainable Coast* ("Master Plan") clearly states that valuable wetlands must be preserved.

One of the key assumptions of 2007's Master Plan is that "a sustainable landscape is a prerequisite for both storm protection and ecological restoration."¹ And in 2012's iteration, these land-use specifications were further clarified:

We do not want construction of new hurricane protection systems to encourage unwise development in high risk areas, as has occurred in the past. Such development increases overall levels of risk and diminishes the effectiveness of the protection structures themselves. This phenomenon is called "Induced Risk," and it runs counter to the master plan's objectives of sustaining wetland ecosystems and reducing the flooding risks borne by coastal communities. *Similarly, wetland areas inside the hurricane protection system need to remain intact and undeveloped* [emphasis added].²

Filling in these wetlands removes both the ecosystem and flood-protection functions of these tracts of land, in direct conflict with the state's goals. The Master Plan further states that "overall hydrology must be improved by minimizing impediments to water flow."³ Allowing the Applicant to impact wetland habitat not only limits ecological function, but it also fails to improve overall hydrology or minimize water-flow impediment.

The Louisiana Legislature approved the latest version of the Coastal Master Plan during the 2012 Regular Session,⁴ with overwhelming public support.⁵

¹ Coastal Protection and Restoration Authority of Louisiana, *Executive Summary*, in LOUISIANA'S COMPREHENSIVE MASTER PLAN FOR A SUSTAINABLE COAST 3 (2007).

² Coastal Protection and Restoration Authority of Louisiana, *2012 Comprehensive Master Plan for a Sustainable Coast*, p 159).

³ *Id.*

⁴ SCR No.62, 2012 Leg., Reg. Sess. (La. 2012).

⁵ Louisiana Coastal Master Plan Public Opinion Survey, Southern Media & Opinion Research, Inc. Online at <http://www.mississippiriverdelta.org/files/2012/04/2012-Louisiana-CMP-Opinion-Survey.pdf>.

On April 4th, 2016, Louisiana Governor John Bel Edwards gave even greater weight to the foundational recommendations laid out in the Master Plan by issuing Executive Order No. JBE 2016-09 (“Executive Order”). Like Executive Order No. BJ 2008-7 issued by his predecessor,⁶ the Governor’s mandate again requires all state agencies, departments, and offices to “administer their regulatory practices, programs, projects, contracts, grants, and all other functions vested in them in a manner consistent with the Coastal Master Plan and public interest to the maximum extent possible.”⁷ This requirement is intended to “effectively and efficiently pursue the State’s integrated coastal protection goals.”⁸

While the Executive Order strives to implement the Master Plan’s goals to preserve wetland areas, the Applicant seeks to obtain permits for its Project that will heighten community flood risks.

LDEQ cannot both follow the Executive Order and issue a WQC to the Applicant.

2. Project alternatives still exist.

In general, the regulations provide that no discharge of dredged or fill material shall be permitted: (1) if there is a practicable alternative to the proposed discharge; (2) if the discharge causes or contributes to violations of applicable state water quality standards; (3) if the discharge will cause or contribute to significant degradation of the environment; and (4) unless all appropriate steps have been taken to minimize potential adverse impacts.⁹ The Corps’ regulations also require that destruction of wetlands is to be avoided to the extent practicable.

¹⁰

The regulations further provide that “practicable alternatives” include “not discharging into the waters of the U.S. or discharging into an alternative aquatic site with potentially less damaging consequences.”¹¹

At the state level, The Louisiana First Circuit held in *In re Rubicon, Inc.* that LDEQ as a public trustee must consider whether “there are alternative projects or alternative sites or mitigating

⁶ See Exec. Order No. BJ 2008-7, issued 1/23/08:

http://dnr.louisiana.gov/assets/docs/conservation/groundwater/Appendix_B.pdf

⁷ See Exec. Order No. JBE 2016-09, issued 4/4/16: <http://gov.louisiana.gov/assets/ExecutiveOrders/JBE16-09.pdf>

⁸ *Id.*

⁹ 40 C.F.R. § 230.10.

¹⁰ 33 C.F.R. § 320.4(r).

¹¹ 40 C.F.R. §§ 230.5(c), 230.10(a).

measures that would offer more protection to the environment than the proposed project without unduly curtailing non-environmental benefits to the extent applicable.”¹²

From information provided in publicly-available documents, it appears the Applicant has investigated alternative Project sites.¹³ However, regulations mandate that an alternative analysis must weigh direct, indirect, secondary, and cumulative impacts, while also taking aspects of water quality, wildlife, and flood protection into account. The public has yet see how the Applicant’s proposal is the least environmentally damaging alternative, and how there are no other alternative locations that could avoid the likely catastrophe inherent in placing such a facility in a floodplain.

The Applicant has thus far failed to demonstrate adequate consideration of alternatives, or an avoidance of impacts to the maximum extent practicable. The ‘no-action alternative’ would indeed avoid impacts to water quality, wildlife, and flood protection to the maximum extent practicable. GRN respectfully submits that the Corps and LDEQ cannot issue the requested Section 404 permit and WQC.

3. Direct, indirect, secondary, and cumulative impacts must be fully considered.

Article IX, Section 1 of Louisiana’s Constitution provides that “the natural resources of the state, including air and water, and the healthful, scenic, historic, and esthetic quality of the environment shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people.”¹⁴

In its ‘Save Ourselves’ decision, the Louisiana Supreme Court outlined how state agencies, as public trustees, can implement this constitutional guarantee. All agencies must determine whether a project avoids or minimizes adverse environmental impacts, balance environmental costs and benefits with economic and social factors, and consider whether alternate projects, sites, or mitigating measures would better protect the environment.¹⁵

From the information available in public documents, it does not appear that LDEQ, the Corps, or the Applicant have fully weighed the costs and benefits relevant to the Project. Direct, indirect, secondary, and cumulative impacts of the proposed wetland fill remain overlooked.

¹² Rubicon, 670 So.2d 475, 483 (La. App. 1 Cir.1996).

¹³ See NOLA Oil Terminal’s Response to Comments, dated 4/4/14.

¹⁴ See Article IX of Louisiana Constitution:

<http://senate.la.gov/Documents/Constitution/Article9.htm#%C2%A71.%20Natural%20Resources%20and%20Environment;%20Public%20Policy>

¹⁵ 452 So. 2d 1152 (La. 1984).

The Louisiana policy further states that “administrative authority will not approve any wastewater discharge or certify any activity for federal permit that would impair water quality or use of state waters.”¹⁶

And federal regulations have not been fully implemented either. Per executive orders 11988 and 11990, in order to prevent impacts to wetlands certain aspects need to be analyzed. Title 18 of the Code of Federal Regulations states:

It is the policy of the Council to provide leadership in floodplain management and the protection of wetlands. Further, the Council shall integrate the goals of the Orders to the greatest possible degree into its procedures for implementing the National Environmental Policy Act. The Council shall take action to: Avoid long- and short-term adverse impacts associated with the occupancy and modification of floodplains and the destruction or modification of wetlands; Avoid direct and indirect support of floodplain development and new construction in wetlands wherever there is a practicable alternative; Reduce the risk of flood loss; Promote the use of nonstructural loss reduction methods to reduce the risk of flood loss; Minimize the impact of floods on human health, safety and welfare; Minimize the destruction, loss or degradation of wetlands; Restore and preserve the natural and beneficial values served by floodplains; Preserve and enhance the natural and beneficial values served by wetlands.¹⁷

Given that the Public Notice does not thoroughly adhere to these regulations, the Corps and LDEQ should deny the permit application.

The destruction of these wetlands, in direct opposition to the Master Plan, would further weaken the state’s storm defenses. And allowing this project to proceed would reaffirm regional precedent for continued fossil-fuel development.

The Code of Federal Regulations recognizes the significance of secondary impacts from wetland destruction by emphasizing that “minor loss of wetland acreage may result in major losses through secondary impacts.”¹⁸ Cumulative impacts on storm and flood protection must be considered too. This project could incite additional construction and in turn jeopardize even more wetlands unique to this area. When combined with similar wetland-destroying projects, the Project could result in more flooding in nearby communities, *as well as degraded water quality in the Mississippi River, Wilkinson Canal, and surrounding basin*. The whole area must be seen as an interrelated ecological unit in order to adequately assess the cumulative impacts.

¹⁶ LA. ADMIN. CODE tit. 33, pt. IX §1109(A)(2).

¹⁷ 18 C.F.R. §725.2.

¹⁸ 40 C.F.R. §230.41.

Since the Applicant's public documents do not assess, or even recognize, the direct, indirect, and cumulative impacts that could result from this potential wetland disruption, the Corps and LDEQ cannot approve this proposal as submitted.

4. The Applicant must develop disaster-response plans, and local floodplain officials should be included in the notification of this permit, since the Project sits in an area vulnerable to flooding.

The Applicant must have plans for disaster-response scenarios, in place prior to project permitting. We have yet to see these plans, in any available public documents.

LDEQ cannot be a “passive umpire” when it comes to permitted materials. This responsibility was distinctly highlighted in the recent ruling, *Sierra Club Delta Chapter v. La. Dep't Nat. Res.*, No. 00060916, Div. A.¹⁹ LDEQ must accept responsibility for materials permitted under the umbrella of water-quality. Until the Applicant has drafted thorough disaster-response plans, its application for a WQC ought to be deemed inadequate.

The Project is clearly susceptible to storm-surge events (Figure 1).²⁰ Yet the Applicant has not produced readily visible containment plans. The responsibility of managing flood risk in Louisiana lies largely with individual parishes, so these officials should be informed of this potential project that would impact flood-mitigating wetlands. The Plaquemines Parish Floodplain Manager is Mike Metcalf (504-934-6195, mmetcalf@plaqueminesparish.com) and the Parish Director of Homeland Security and Emergency Preparedness is Patrick Harvey (504-297-2477, pharvey@ppgov.net).

¹⁹ La. 19th JDC Dec. 23, 2014.

²⁰ FEMA Flood Map, Plaquemines Parish, <http://maps.lsuagcenter.com/floodmaps/>.



Figure 1: Proposed project site sits in area at-risk for flooding

As more concrete examples of flood risk, the Project site was inundated as Category-1 Hurricane Isaac passed through the region in 2012 (Figure 2). The nearby Stolthaven oil terminal site was also inundated (Figure 3, Figure 4). A day after the storm made landfall, sheen could be seen flowing east and west from the facility into the surrounding wetlands and communities, roughly a mile in both directions. Over a week-and-a-half later, there was still sheen to be seen at the Stolthaven site, even as much of the water was drained off-site without treatment (Figure 5).

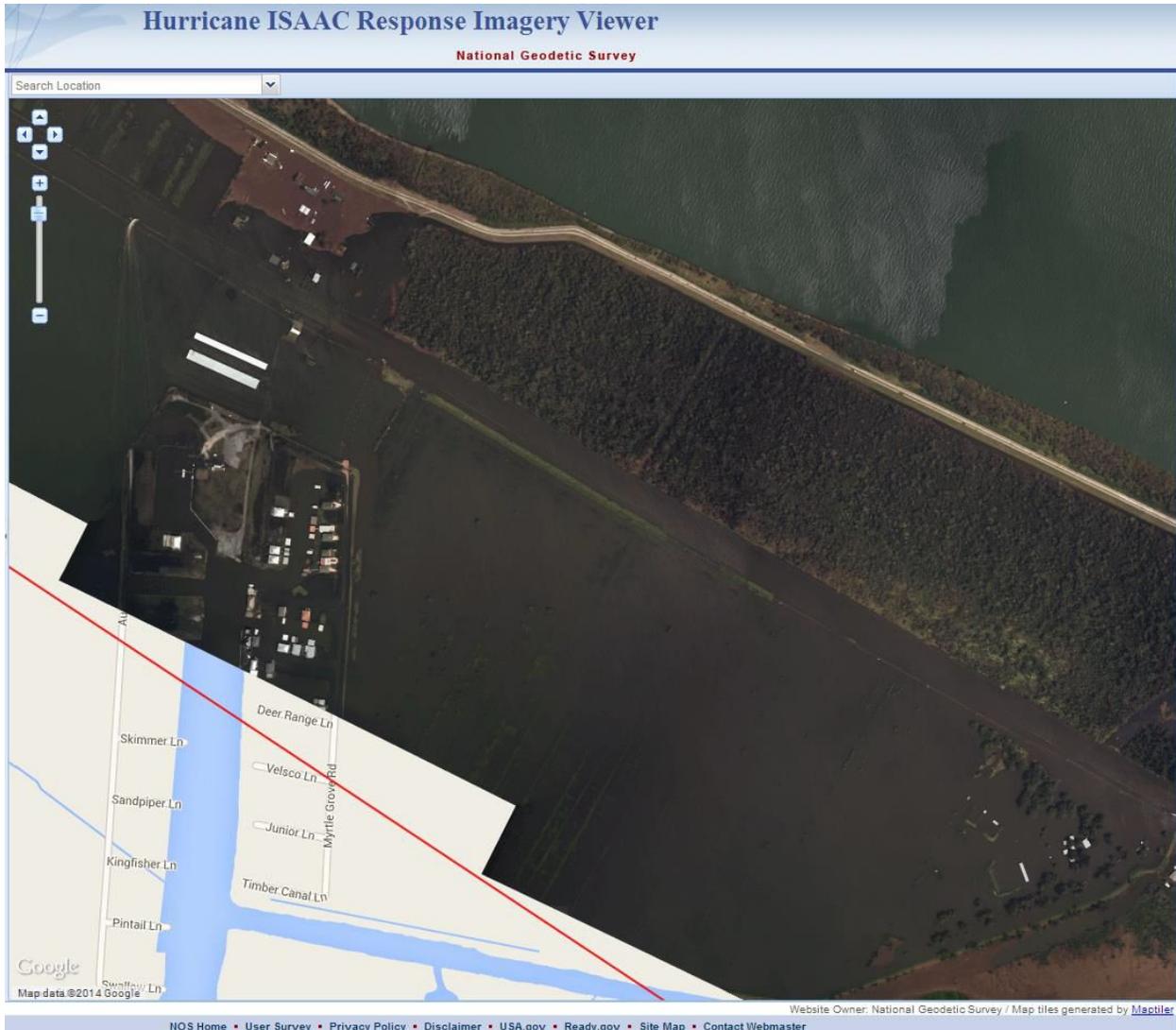


Figure 2: NOAA imagery shows a flooded Project site



Figure 3: NOAA captures a flooded Stolthaven oil terminal, with sheen apparent



Figure 4: Stolthaven's storage tanks were vulnerable to disaster



Figure 5: Sheen still visible days later, even as water flowed into surrounding environment

Located downriver from the Project site, IMT's coal terminal was inundated during Hurricane Isaac as well. The facility's meager containment system allowed contaminated water to flood the surrounding wetlands and communities (Figure 6). In addition to the initial flooding, IMT then released polluted water into the environment as it drained the facility (Figure 7). Not to be forgotten, the United Bulk coal terminal on the East Bank also experienced significant flooding with consequent pollutant discharges.



Figure 6: Flooded coal piles seep into the neighboring environment



Figure 7: Polluted discharges from IMT continued after the storm

From the drawings provided with the Applicant's Public Notice, it does not appear that the Project would fare any better during a disaster than the aforementioned facilities. The containment berms as currently proposed seem entirely insignificant, especially after remembering that oil floats. The Applicant must therefore implement strategies that promote preparedness against pollutant release, in addition to preparing thorough response plans. The Applicant's disaster-response plans must address heavy rain, storm surge flooding, and possible power outages, and include methods to capture and treat floodwater before it is discharged from the facility into surrounding wetlands. As mentioned in the next section, future risks to the Project will only increase in a warming world.

The Applicant's application must be deemed inadequate until it submits disaster-response plans. We also request that local floodplain managers be notified of the associated, significant flood and spill risks. Evidence of past flooding at similar sites and a scientific consensus around the increased vulnerability of the area to even larger storms demonstrate the unacceptable risk of severe environmental degradation present if the Project is approved.

5. Climate should be considered in the permitting process.

Today's world is one of a rapidly-changing global climate. This human-induced phenomenon threatens our nation's communities with stronger, more frequent storms, longer heat waves, more regional droughts, increased incidences of wildfires, expanded disease ranges, permafrost thawing, ocean acidification, and sea-level rise from melting glaciers. ***These impacts are felt disproportionately by communities already marginalized by histories of one-sided public policies.*** Coastal Louisiana and its wetlands are without question especially vulnerable to climate-induced phenomena. Regional subsidence from continued oil, gas, and freshwater extraction only compounds these threats.

Up to this point, the Corps has not come close to addressing August of 2016's *Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews*,²¹ issued by the President's Council on Environmental Quality (CEQ). As described in the document, "[t]his guidance is applicable to all Federal actions subject to NEPA, including site-specific actions, certain funding of site-specific projects, rulemaking actions, permitting decisions, and land and resource management decisions."²² The Corps is strongly encouraged to comply with this executive guidance and to fully address the requirements in a NEPA-related document.

²¹ See https://www.whitehouse.gov/sites/whitehouse.gov/files/documents/nepa_final_ghg_guidance.pdf

²² *Id.*; p. 9

In order to stand a chance at avoiding catastrophic, irreversible climate change, scientists have repeatedly called for the overwhelming majority of fossil-fuel reserves to remain underground. Crucially, the storage of crude oil is not isolated from its extraction. *Oil must first be captured from underground deposits, before it can be transported anywhere.* Recognizing this connection allows for the ‘total cost’ of the Project to be calculated.

A lifecycle analysis (LCA) of the the Project should be conducted, whereby the greenhouse-gas emissions from end-use, post-distribution activities are quantified alongside those released during the oil extraction and transportation phases. Given the pressing need to leave fossil-fuel reserves untapped, the LCA would act as a further tool to determine whether the Project’s expected benefits do actually outweigh its obvious costs. In a world constrained by climate change, the proper measure of the Project’s impacts should not be based on assumptions inherent in business-as-usual scenarios that guarantee climate disaster. Comparisons should instead be made to readily-available, zero-emission renewable technologies, such as wind power.²³

The Corps (or any other decision-making agency) can theoretically even determine the amount of direct land-loss that would result from this project’s implementation. A discrete amount of lifetime greenhouse-gas emissions is related to a given temperature increase, which is then tied to quantities of melting ice and rising seas. After also accounting for rates of regional subsidence, the decision-makers could be able to explicitly see the climate-related impacts of this particular project. These methods could seemingly be used on a cumulative scale to quantify the connected impacts of regional fossil-fuel infrastructure.

The incorporation of the ‘Social Cost of Carbon’ into these sorts of analyses would allow for more accurate depictions of reality, while also further satisfying CEQ’s guidance. Since the environmental, economic, and health impacts of climate-related projects are often understated and unaccounted, this quantitative tool can assign values that would otherwise be absent.²⁴

To be clear, while these sorts of calculations and investigations should be conducted, the mere mention of climate considerations is also intended to highlight the fact that they have thus far been absent from all deliberations.

²³ First offshore wind farm in North America has Louisiana roots. July 23, 2015 | Don Ames. [retrieved](#) 29 Jan 2016

²⁴ See Technical Support Document: Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866; <https://www.whitehouse.gov/sites/default/files/omb/inforeg/scc-tsd-final-july-2015.pdf>

6. The Project does not appear to offer public benefit or be in the public interest.

As already noted, the Corps must not only consider alternative project sites, it must also choose the least-damaging practicable alternative.²⁵ The least-damaging practicable alternative is the 'no-action alternative.' This alternative goes to the heart of this entire process – whether there even exists a public need for the Project.

The Applicant has described the Project need by attesting that “[t]he project is proposed to receive, store and distribute crude oil.”²⁶ That’s it. No other justification has been offered in the visible public documentation. It can therefore only be assumed that the Applicant is solely guided by its financial stake in the Project.

No mention is made regarding how the actual residents of Plaquemines Parish would benefit from the Project. Community members are instead likely to be left with all the unaccounted, external costs of the Project: health and environmental impacts, reduced flood protections, heightened spill risks, and the countless other costs associated with the climate-disrupting reliance on fossil-fuel infrastructure.

To be clear, the proposed Project site is already overburdened by industrial pollution from the existing coal terminals, oil refineries, and chemical facilities. The pollutant releases from the Isaac event in 2012 must not be forgotten.

Given the well-known volatility of oil markets, the Applicant ought to demonstrate the long-term viability of the Project. For example, an analysis that includes no fewer than five years of historical market data should be included and weighed in the decision-making process.

²⁵ 40 C.F.R. § 230.10(a).

²⁶ See Section 8, part E, Joint Permit Application For Work Within the Louisiana Coastal Zone, filed 5/23/13: http://sonris-www.dnr.state.la.us/sundown/cart_prod/cart_crm_application?pcup_num=P20130318&pline_id=6&ps_how_appl_email=N

SUMMARY

- 1. The Project is inconsistent with Louisiana's Comprehensive Master Plan for a Sustainable Coast and a 2016 Executive Order.**
- 2. Project alternatives still exist.**
- 3. Direct, indirect, secondary, and cumulative impacts must be fully considered.**
- 4. The Applicant must develop disaster-response plans, and local floodplain officials should be included in the notification of this permit, since the Project sits in an area vulnerable to flooding.**
- 5. Climate should be considered in the permitting process.**
- 6. The Project does not appear to offer public benefit or be in the public interest.**

The Corps and LDEQ must take the mandates put forth by the Clean Water Act, Louisiana's Master Plan, Executive Orders, the Louisiana Constitution, and the Louisiana Supreme Court seriously. These responsibilities are only heightened when faced with the inadequacy of the Applicant's public documents.

The Applicant has not shown that its Project is consistent with the Master Plan, has not fully weighed all practicable alternatives, has not assessed significant impacts, has not developed disaster-response plans, and has not explained how the Project offers public benefit or is in the public interest.

Over a decade since the 2005 hurricane season, GRN is beyond alarmed by the wetland destruction occurring throughout Louisiana and the Gulf Coast. We hope the Corps and LDEQ will act upon the above comments accordingly.

In order to keep us and the public properly informed, we request notification of denials, approvals, and/or changes to the Applicant's request for a Section 404 Permit and WQC. And as previously stated, we see a public hearing in Plaquemines Parish as the ideal tool to gain fuller insight into the Project's potential impacts.

We look forward to a written response.

For a healthy Gulf,
[sent via e-mail]



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