



Coastal Protection and
Restoration Authority of Louisiana

Funding for Federal Navigation Channel Maintenance in Louisiana:

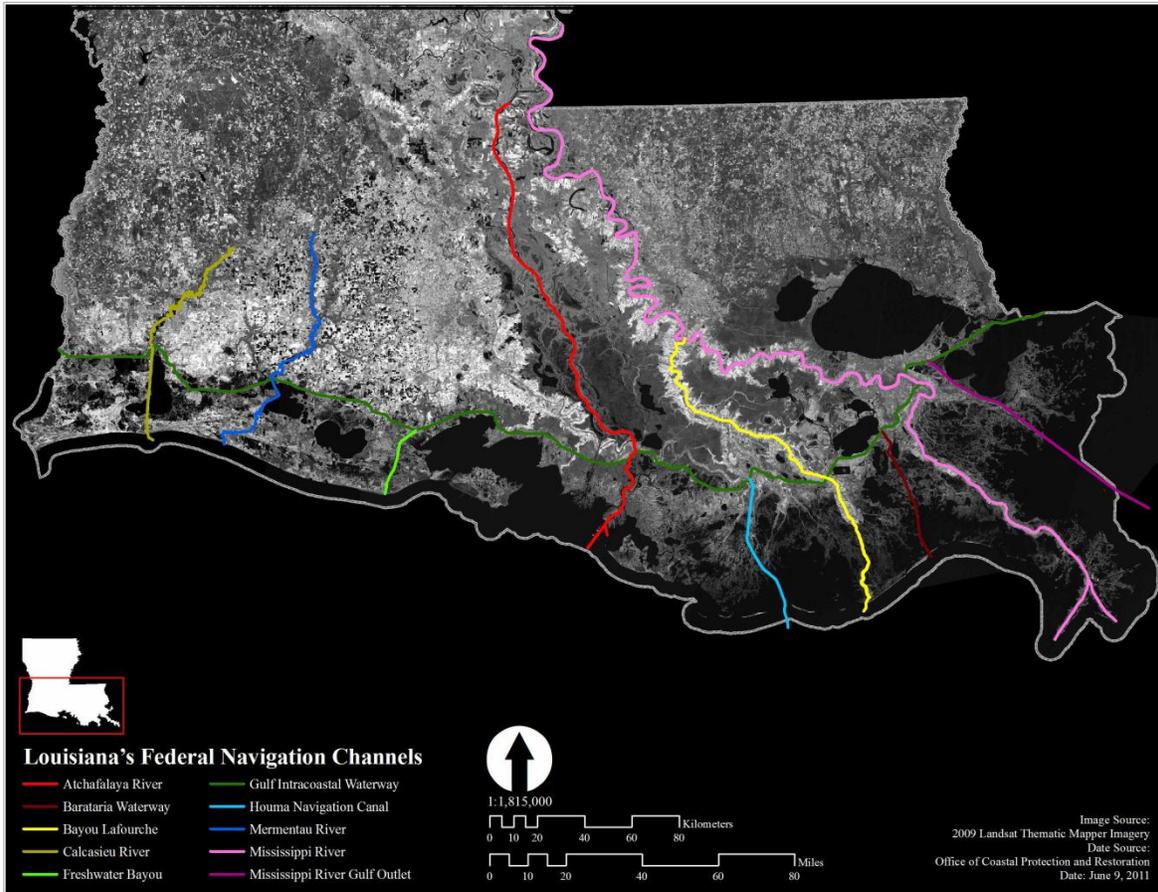
A Case for Reform

Between the 1900s and 1970s, the U.S. Army Corps of Engineers (Corps) constructed numerous major federal navigation channels in coastal Louisiana that link Mississippi River and its tributaries to the Gulf of Mexico.¹ These navigation channels linked inland communities with each other and the Gulf, and provided a mechanism for them to transport goods and services around the Nation and abroad. Because of these and other benefits, federal navigation channels have been, and continue to be, instrumental in the economic development of Louisiana and the entire Nation.² Although the Corps designed and constructed these channels, local entities were largely very supportive of them because of the myriad economic benefits they provided.

Unfortunately, these navigation channels have also brought about significant negative economic and environmental impacts, and have, in some cases, become liabilities for the very communities they were constructed to benefit. The channels were constructed through fragile wetland habitats that had previously served as a natural barrier protecting coastal communities and ecosystems from storm surges, erosion, and saltwater intrusion. For example, when the Corps constructed the Mississippi River Gulf Outlet (MRGO), nearly 20,000 acres of wetlands were converted to open water for its construction.³ However, the environmental costs did not end with the construction of the channels—indeed, they had only begun.

Over time, the banks of many of these channels, inadequately armored and subject to impacts from ship wakes, wind, and storms, have experienced severe erosion, which has in turns directly and indirectly led to the loss of hundreds of thousands of acres of adjacent wetlands. The Louisiana Department of Natural Resources (LDNR) has estimated that the losses associated with the erosion along navigation channels have ranged from 145 percent to greater than 300 percent of the original direct losses associated with their construction.⁴ These wetlands previously provided natural storm surge protection and wave attenuation areas for coastal communities, which have been significantly reduced by the construction and subsequent widening of the channels.⁵ Additionally, the widened channels altered natural hydrologic processes and allowed for greater saltwater intrusion into adjacent wetlands, further contributing to land loss and causing the deterioration of coastal habitats such as cypress forests and brackish and freshwater marshes.⁶ In turn, hundreds of thousands of acres of valuable fish and wildlife habitat have been destroyed.

In Louisiana, the problems associated with the erosion of navigation channel banks have been particularly widespread on the Gulf Intracoastal Waterway (GIWW),⁷ Freshwater Bayou Canal,⁸ and the MRGO,⁹ all of which have expanded to up to several times their originally authorized widths in several stretches. For example, the lack of bank stabilization on Freshwater Bayou Canal in Southwest Louisiana has caused the channel to widen from its authorized width of 125 feet to over 600 feet wide in some reaches. Further, numerous breaches along the channel levees have resulted in the loss of thousands of acres of adjacent wetlands.



On the MRGO, between 1968 and its closure in 2009, impacts from ship wakes and storm surges caused the unprotected banks of the channel to widen to more than 3000 feet wide in some stretches, nearly five times its originally authorized width. The lack of maintenance on the channel has been determined to have contributed to the damage caused to New Orleans during Hurricane Katrina, both because the widened yet-deepened channel provided a path for the storm surge to reach New Orleans, and because of the loss of coastal forests and wetlands which otherwise would have served as a protective barrier from the surge.¹⁰ Due in large part to widespread public opposition after Hurricane Katrina, Congress deauthorized the MRGO in 2007, leading to its permanent closure in 2009.

There is little question that to prevent further detrimental impacts caused by the widening of these navigation channels, immediate measures should be taken to stabilize those segments of the navigation channel banks which are the most vulnerable to erosion. However, to date, the Corps—which Congress charged with maintaining these channels—has failed to conduct the necessary stabilization or maintenance on thousands of miles of impacted channel banks. The problems caused by this situation have been a major contributor to the crisis facing coastal Louisiana.

In light of this void, the State, local governments, and other stakeholders have relied upon funding from numerous sources, including the Coastal Wetlands Planning, Protection and Restoration Act (CWPPRA), state general funds, and the Coastal Impact Assistance Program (CIAP), to address this deteriorating situation and conduct urgent bank stabilization measures. These projects have placed a significant burden on these programs, which were never intended to fund federal maintenance responsibilities. Of particular concern to the State is the increasing reliance on CWPPRA program to fund these projects.

In 1990, Congress enacted CWPPRA, which was intended to provide targeted funds to “significantly contribute to the long-term restoration or protection of the physical, chemical and biological integrity of coastal wetlands in the State of Louisiana.”¹¹ Since the program’s inception, CWPPRA funds have been critical to the success of restoring Louisiana’s coast, enabling the construction of projects which have restored over 110,000 acres of wetlands in coastal Louisiana. Funding for the program has ranged from between \$30-80 million annually, and grants are awarded on a competitive basis through the CWPPRA Task Force, comprised of five federal agencies and the State of Louisiana. As one of the only dedicated sources of funding for wetland restoration in Louisiana, these funds are vitally important for the long-term restoration of Louisiana’s coast.

The State of Louisiana serves as the local sponsor on all CWPPRA projects, thus is directly responsible for 15% of the cost of construction of CWPPRA projects. Because if its role as the cost share partner of projects, the State must agree to undertake a project before it can receive CWPPRA funding. For the reasons which will be articulated below, the State will no longer agree to serve as the local sponsor of CWPPRA projects which have a primary purpose of bank stabilization along federally authorized navigation channels. Since the program’s inception in the early 1990s, over \$78 million in CWPPRA funds have been utilized for these types of projects. This is over 6% of the total CWPPRA project funding expended to date. Because CWPPRA funding is highly competitive and the number of proposed projects always exceeds the number that are funded, these funds have been diverted from dozens of other potential wetland restoration projects that could otherwise have been constructed. The State of Louisiana does not believe these funds are appropriate for navigation channel maintenance projects, which are a full federal responsibility and thus should be included as part of the Corps’ annual maintenance responsibilities for which it receives Congressional funding.

The remainder of this position paper will be devoted to providing the rationale for the State of Louisiana’s policy on this issue. It will also briefly discuss some other policy and funding obstacles which must be addressed to provide a long-term solution to this problem.

THE CORPS' OBLIGATION FOR PREVENTING THE DETERIORATION OF FEDERAL NAVIGATION CHANNELS

This section will set forth the State's rationale for its view that pursuant to the Congressional authorizations for these channels, the legal responsibility for the maintenance of the navigation channel banks rests with the federal government.

Louisiana's federal navigation channels received congressional authorization in federal water resources bills from 1899-1970, including various iterations of the Rivers and Harbors Act, Flood Control Act, and the Water Resources Development Act. According to the original authorizations and agreements setting forth the provisions for the construction and subsequent maintenance of these channels, the financial obligation for the operation and maintenance (O&M) of these channels was a 100% federal responsibility.¹² Although each of the major navigation channels received local sponsorship from the parish or state governments, or a combination thereof, these agreements provided only that the local sponsor was required to secure right of ways and land necessary for the construction and dredging of the navigation channels (known as LLERRDS - Lands, Easements, Rights-of-Way, Relocations, and Disposal/Borrow Areas) which the Corps directed them to acquire and, in some cases, the maintenance of pipelines, cables, and other structures necessary for the channels. All other financial obligations for the ongoing maintenance of the channels were assumed by the Corps. It is the position of the State that this "maintenance" includes the need to take measures to ensure that the erosion of the channel will not cause harm to communities and the environment.

The Chief's Reports for several of Louisiana's navigation channels contain evidence that the Corps was aware of the erosion which would be caused by these channels at the time of their construction. However, it assured detractors, including the U.S. Fish and Wildlife Service and the Louisiana Department of Wildlife and Fisheries that measures would be taken to insure that the channels would not negatively impact fish and wildlife.¹³ Further, the Corps specifically did not require local sponsors to take measures to protect the channel banks from erosion, although the local sponsors were required to provide other assurances, as discussed above.

The fact that the Corps was aware of the need to control erosion but did not require local sponsors to take measures to prevent it leads to the natural conclusion that this responsibility was intended to be 100% federal. In fact, even other federal agencies reached this conclusion--in the comments it submitted on the Chief's Report for the modification of the Louisiana-Texas GIWW, the Assistant Secretary of the Interior wrote, "The provision of dikes, bulkheads, and embankments to retain spoil will undoubtedly be an important part of . . . measures . . . which will be needed to minimize or prevent damages to fish and wildlife resources" which the agency assumed "would become a Federal cost of the project."¹⁴

A recent decision by a federal district court supports the conclusion that the Corps bears this responsibility. In litigation commenced in the aftermath of Hurricane Katrina, landowners from flooded areas along the MRGO sued the Corps, alleging that its negligence in maintaining the MRGO significantly contributed to the damages they incurred after the storm.¹⁵ The court ruled in favor of the landowners, in large part because the trial court established that the Corps had a responsibility to conduct foreshore protection and stabilization of the MRGO's banks. In

his opinion, the trial judge determined that in its approach to maintaining the banks of the MRGO, stating,

“[C]learly, once the Corps exercised its discretion to create a navigational channel, it was obligated to make sure that the channel did not destroy the environment surrounding it thereby creating a hazard to life and property. When the Corps designed the MRGO, it recognized that foreshore protection was going to be needed, yet the Corps did nothing to monitor the problem in a meaningful way.”¹⁶

The court concluded that the Corps was negligent in its failure to conduct these measures. These words, though written in the context of the MRGO, are equally applicable to the Corps’ obligations on the entire system of navigation channels constructed by the Corps. It is the position of the State that the federal government, having constructed and assumed the maintenance obligations for these channels, cannot in good faith continue to deny having this responsibility.

The following section will discuss the major policy and funding obstacles that must be addressed in order to solve this problem and prevent the further damages caused by the erosion of these navigation channels.

POLICY AND FUNDING OBSTACLES THAT MUST BE ADDRESSED

Despite the Corps’ obligations and Congress’s original intention for CWPPRA, over \$78 million in CWPPRA funding has been spent on projects to stabilize or otherwise reconstruct the banks of these federal navigation channels. This represents over 6% of the total CWPPRA grants awarded, monies which otherwise could have been used to fund dozens of other critical coastal protection and restoration projects. In lieu of continuing to misappropriate CWPPRA funding for this purpose, the State has adopted a policy to oppose any future CWPPRA project which has the primary purpose of stabilizing or reconstructing the banks of any federally authorized navigation channel. The implementation of this policy will not be retroactive, so projects which have already been approved for any phase (Phases I-III) of CWPPRA funding will not be opposed. However, moving forward, the State will oppose new projects that fall into this category. Whether the project has a primary purpose of navigation channel bank stabilization will be determined on a case by case basis, but any projects which include rock placement along federally authorized navigation channels will be carefully scrutinized.

The State has adopted this policy because it has become clear that the continued reliance on this limited source of funding for these projects is a “Band-Aid” approach rather than a comprehensive solution to this systemic problem. The continued use of CWPPRA dollars for this purpose, rather than addressing the root of the problem, will ultimately exacerbate Louisiana’s coastal crisis, for two primary reasons: 1.) The perception that the “problem is being taken care of” provides a justification for the federal government’s failure to take comprehensive action on the issue; 2.) This practice diverts critical funding that was intended for restoration projects from other, non-maintenance related coastal restoration priorities.

As an alternative, the State believes that a comprehensive, federally-led effort to identify and address the maintenance needs on federal navigation channels must be developed. This must include measures to address two major components of this problem: 1.) The Corps' internal policy against conducting bank stabilization measures unless they are justified for improving navigation; and 2.) The lack of adequate federal funding for the Corps to conduct its maintenance obligations, including navigation channel maintenance.

First, the Corps currently has an internal policy against allocating any O&M funding toward channel maintenance that does not directly impact a navigation project. This policy was repeatedly invoked in the MRGO litigation as a reason for the Corps' inaction on performing foreshore protection on the MRGO banks,¹⁷ and has also been invoked in the context of other navigation channels.¹⁸ The district judge specifically criticized this policy of the Corps in the MRGO decision, stating that "the sole focus of the Corps . . . to guarantee the navigability of the channel . . . without regard to the safety of the inhabitants of the area or to the environment" was a "myopic and telescopic" approach.¹⁹ However, even after this decision was issued, the Corps continues to maintain this flawed policy.

This policy not only lacks adequate legal grounding, but it also fails to account for the legal requirement that the Corps consider environmental protection, along with navigation and flood control, as one of its primary missions. ("By law and administration policy, *environmental protection and restoration*, navigation and flood control are the primary Civil Works missions of the Corps." *U.S. Army Corps of Engineers Civil Works Policy Pocket Reference*, August 2001.) In accordance with this requirement, in addition to its navigation responsibilities, the Corps must also take measures to ensure that navigation channels do not cause a harm to the surrounding environment. Its policy against maintaining the banks of navigation channels therefore stands in direct conflict with the Corps' primary mission of environmental protection, and is a significant barrier to this issue being resolved. For that reason, the State of Louisiana strongly recommends that this policy be revoked.

Second, both the Administration and Congress must make a strong financial commitment to funding these maintenance needs through the Corps' budget or some other mechanism. Although Congress will ultimately bear the responsibility for appropriating the necessary funding for this maintenance, the Corps should also request the appropriate funding in its request for funding in the President's Budget. The State recognizes that the federal budget climate is not favorable, but believes that the long term costs of inaction will far exceed the costs of these projects: Unless significant federal investments are made in the near term, the banks of these navigation channels will continue to erode at an alarming rate, leading to increased salinity into freshwater ecosystems, the disappearance of valuable wetlands, and increased dredging and maintenance costs over the long term.

To date, the State has worked extensively to implement these reforms through the Administration, Louisiana's Congressional delegation, and other venues such as the Gulf Coast Ecosystem Restoration Task Force (Task Force). We believe that the renewed focus on Gulf Coast restoration after the *Deepwater Horizon* oil spill, through mechanisms such as the Task Force, will provide a forum for developing policy and funding strategies to address this issue. We also have met with the Office of Management and Budget in order to advocate for increased

funding in the Corps' budget for navigation channel maintenance needs. We recognize that the prohibition of the use of CWPRRA funding will have a short term impact on this issue, but believe that this approach is necessary to lead to a long term solution to this significant problem. We welcome further dialogue and feedback on this issue.

¹ See map, pg. 2. In Louisiana, the ten major federally-authorized navigation channels are:

- the Gulf Intracoastal Waterway (GIWW)
- Mississippi River Gulf Outlet (NOTE: Although deauthorized in 2007, there are still significant detrimental ecological effects caused by the lack of maintenance of the existing canal)
- Mississippi River
- Barataria Bay Waterway
- Lower Bayou Lafourche
- Houma Navigation Canal
- Atchafalaya River
- Freshwater Bayou
- Mermentau-Gulf of Mexico Navigation Channel
- Calcasieu Ship Channel

² For more information on the development and history of these navigation channels, see *The History of Navigation on the Lower Mississippi*, Army Corps of Engineers, National Waterways Study (1983), available at <http://www.iwr.usace.army.mil/docs/iwrreports/IWR002-000929-000999.pdf>.

³ Shaffer, G. P., J. W. Day, S. Mack, G. P. Kemp, I. van Heerden, M. A. Poirrier, K. A. Westphall, D. FitzGerald, A. Milanes, C. A. Morris, R. Bea, and P. S. Penland. *The MRGO navigation project: A massive human-induced environmental, economic, and storm disaster*. *Journal of Coastal Research* 54: 206-224 (2009). This article is based in part on expert witness reports prepared for Civil Action No. 05-4182. Available at: <http://www.katrinadocs.com>

⁴ Good, B., Buchtel, J., Meffert, D., Radford, J., Rhinehart, K., and Wilson, R., 1995, eds., Louisiana's major coastal navigation channels: Baton Rouge, La., Louisiana Department of Natural Resources, Coastal Restoration Division, 57 p.

⁵ Shaffer et al., supra n. 3, at 208-209.

⁶ Shaffer et al., supra n. 3, at 207-210.

⁷ This approximately 1,300-mile waterway extends from the Texas-Mexico border to Florida, and was constructed between the 1920s to 1949. The Louisiana segment stretches for 302.4 miles from the Texas-Louisiana state line in the west to the Louisiana-Mississippi state line in the east. The Corps maintains channel dimensions in the GIWW to 12 feet deep and between 125-150 feet wide.

⁸ Authorized In 1960, Freshwater Bayou was constructed in Southwest Louisiana from mile 161.2 of the Gulf Intracoastal Waterway south to the Gulf of Mexico. The present channel is 600 feet wide because of wakes from boat traffic. In the reach of the canal between Freshwater Bayou Lock and Belle Isle Bayou, breaches in the bank have developed at numerous locations.

⁹ Authorized by Congress in 1956 and completed by the Army Corps of Engineers (the Corps) in 1968, the MRGO originally was authorized at 650 feet wide and at least 36 feet deep. By 2005, its width had grown to over 3,000 feet in some segments. The channel was deauthorized by Congress in 2007 and permanently closed to navigation in 2009. The Corps of Engineers is currently developing a plan to restore the area impacted by the MRGO.

¹⁰ See generally Schaffer et al., supra n. 3.

¹¹ CWPPRA, Sec. 302(6).

¹² The Chief's Reports for each of these navigation channels, which set forth the cost share requirements for local sponsors and the federal government, are on file with the State of Louisiana's Coastal Protection and Restoration Authority.

¹³ See House Document 556 at v-xiv (1962) (Chief's Report for GIWW Louisiana-Texas), House Document 435 at v-xii (1960) (Freshwater Bayou Canal). Both the USFWS and the Dept. of Wildlife and Fisheries also repeatedly warned of the adverse impacts of bank erosion prior to the construction of the MRGO. Schaffer et. al, supra n. 3, at 210-211.

¹⁴ House Document 435 at v-xii (1960) (Freshwater Bayou Canal).

¹⁵ *In Re Katrina Canal Breaches Consolidated Litigation*, No. 05-4182 (E.D. LA Nov. 18, 2009) (slip copy, available at <http://www.laed.uscourts.gov/CanalCases/Orders/19415.pdf>).

¹⁶ *Id.* at 107.

¹⁷ *Id.* at 26-28.

¹⁸ See, e.g., Remarks of Tom Holden, Army Corps of Engineers at the April 11, 2011 CWPPRA Technical Committee Meeting, Transcript, 25-26 ("Unless [the erosion of channel banks] has a navigation impact, then the interest is we would not do anything for it. That is what we operate under.")

¹⁹ *In Re Katrina Canal Breaches Consolidated Litigation* at 27.