

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA**

ATCHAFALAYA BASINKEEPER	)	
and LOUISIANA CRAWFISH	)	No. 2:14-cv-00649-CJB-MBN
PRODUCERS ASSOCIATION-WEST,	)	
	)	Judge Carl J. Barbier
<i>Plaintiffs</i>	)	
	)	Magistrate Judge Michael B. North
v.	)	
	)	
LIEUTENANT GENERAL THOMAS P.	)	Section "J"
BOSTICK, in his official capacity as	)	
Chief of Engineers, U.S. Army Corps	)	Division 5
of Engineers, and the U.S. ARMY CORPS	)	
OF ENGINEERS,	)	
	)	
<i>Defendants.</i>	)	

**PLAINTIFFS’ MOTION FOR THE TAKING OF LIVE TESTIMONY  
AND HEARING ON STANDING**

Plaintiffs, Atchafalaya Basinkeeper and Louisiana Crawfish Producers Association-West, respectfully request this Court hear live testimony, pursuant to Fed. R. Civil. P. 43(c) and Local Rule 43.1, and set a hearing for Plaintiffs to show they have standing to bring this case. Plaintiffs request this Court hear live testimony from Plaintiffs’ members and officers, including:

- Jody Meche, a former Vice President and current LCPA member. Mr. Meche is also a board member of the Atchafalaya Basinkeeper. Mr. Meche will testify about individual and organizational standing.
- Mike Bienvenu, President of the Louisiana Crawfish Producer’s Association – West (LCPA). Mr. Bienvenu will testify about individual and organizational standing.
- Dean Wilson, Executive Director of the Atchafalaya Basinkeeper. Mr. Wilson will testify about individual and organizational standing.

This Court should allow oral testimony because it will allow the Plaintiffs to meet their burden of providing standing, aid this Court's understanding of Plaintiffs' injury, and serve the interests of justice.

For all of the foregoing reasons, this Court should GRANT Plaintiffs Atchafalaya Basinkeeper and the Louisiana Crawfish Producers Association-West's Motion for the Taking of Live Testimony and Hearing on Standing pursuant to Fed. R. Civil. P. 43(c) and Local Rule 43.1 and set a hearing for such testimony on January 29, 2015 at 10 a.m. or at another date or time convenient to the Court.

Respectfully submitted on December 12, 2014,

s/Brooke Anne Riggs  
Brooke Anne Riggs, Student Attorney

s/Elizabeth Livingston de Calderón  
Elizabeth Livingston de Calderón, La. Bar 31443  
Adam Babich, La. Bar No. 27177  
Tulane Environmental Law Clinic  
6329 Freret Street  
New Orleans, LA 70118-6321  
Phone: (504) 862-8819  
Fax: (504) 862-8721  
Email: [ecaldero@tulane.edu](mailto:ecaldero@tulane.edu)  
*Counsel for the Atchafalaya Basinkeeper and the  
Louisiana Crawfish Producers Association-West*

### **CERTIFICATE OF SERVICE**

I hereby certify that on December 12, 2014, I served a copy of the foregoing, by filing the same with the Clerk of Court through the CM/ECF system, on:

MATTHEW M. MARINELLI  
United States Department of Justice Environment & Natural Resources Division  
P.O. Box 7611  
Washington, D.C. 20044-7611

JOHN E. SULLIVAN

United States Department of Justice Environment & Natural Resources  
Division Environmental Defense Section  
P.O. Box 7611  
Washington, D.C. 20044-7611

s/ Elizabeth Livingston de Calderón  
Elizabeth Livingston de Calderon

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA**

ATCHAFALAYA BASINKEEPER	)	
and LOUISIANA CRAWFISH	)	No. 2:14-cv-00649-CJB-MBN
PRODUCERS ASSOCIATION-WEST,	)	
	)	Judge Carl J. Barbier
<i>Plaintiffs</i>	)	
	)	Magistrate Judge Michael B. North
v.	)	
	)	
LIEUTENANT GENERAL THOMAS P.	)	Section "J"
BOSTICK, in his official capacity as	)	
Chief of Engineers, U.S. Army Corps	)	Division 5
of Engineers, and the U.S. ARMY CORPS	)	
OF ENGINEERS,	)	
	)	
<i>Defendants.</i>	)	

---

**MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR  
LIVE TESTIMONY AND A HEARING ON STANDING**

**Introduction**

Plaintiffs, Atchafalaya Basinkeeper and Louisiana Crawfish Producers Association-West (LCPA), respectfully request this Court to hear live testimony, pursuant to Fed. R. Civil. P. 43(c) and Local Rule 43.1, and set a hearing for Plaintiffs to show they have standing to bring this case. Plaintiffs request this Court hear live testimony from Plaintiffs' members and officers, including:

- Jody Meche, a former Vice President and current LCPA member. Mr. Meche is also a board member of the Atchafalaya Basinkeeper. Mr. Meche will testify about individual and organizational standing.
- Mike Bienvenu, President of the Louisiana Crawfish Producer's Association – West. Mr. Bienvenu will testify about individual and organizational standing.

- Dean Wilson, Executive Director of the Atchafalaya Basinkeeper. Mr. Wilson will testify about organizational standing.

Plaintiffs ask this Court to set a hearing for such testimony on January 29, 2015 at 10 a.m. or at another date and time convenient to the Court.

### **Argument**

#### **I. Presentation of Live Testimony is a Superior Approach to Proving Facts.**

Courts have long recognized that “the presentation of a witness's testimony live and in-court is preferable to any other alternative” See U.S. v. Paracha, No. 03 CR. 1197 (SHS), 2006 WL 12768, at \*17 (S.D.N.Y. Jan. 3, 2006); *see also* Heil Trailer Int'l Co. v. Kula, 542 F. App'x 329, 334 n.17 (5th Cir. 2013) (“[I]t is fundamental that, ‘[i]f there is a factual controversy, ... oral testimony is preferable to affidavits because of the opportunity it provides to observe the demeanor of the witnesses.’”) (quoting Wright & Miller et al., 11A Fed. Prac. & Proc. Civ. § 2949 (2d ed.)); Davis v. New York City Hous. Auth., 166 F.3d 432, 438 (2d Cir. 1999) (“When a factual issue is disputed, oral testimony is preferable to affidavits.”).

#### **II. Live Testimony Will Aid the Court’s Understanding of Plaintiffs’ Standing and Serve the Interests of Justice.**

Plaintiffs’ witnesses will show how the Corps’ abuse of a general permit known as New Orleans District General Permit 13 (“NOD-13” or “the general permit”) and authorization of a wetland-fill project (“the 2012 Project”) in the Atchafalaya Basin injures Plaintiffs. These facts are central to the Plaintiffs’ standing to sue in this case. See Cook v. Reno, 74 F.3d 97, 98-99 (5th Cir. 1996) (“Standing is a jurisdictional requirement . . . . Before ruling on the merits of the case, it is imperative that the court first determine whether it has jurisdiction to hear the suit.”). When ruling on facts outside the record, “the court may hear the matter on affidavits or may hear it

wholly or partly on oral testimony.” Rule Civ. P. 43(c). Here, Plaintiffs’ proof of standing is based on facts outside the record.

Live testimony will aid this Court’s understanding of the complex physical, cultural, and emotional history in the affected area of the Atchafalaya Basin. Here, the cumulative impacts of the Corps’ abuse of the general permit and authorization of the 2012 Project are part of a “death-by-a-thousand-cuts” of the Atchafalaya Basin’s ability to support traditional Acadian culture, resulting in cultural and emotional injuries in addition to economic, recreational and aesthetic injuries. The challenged decision is part of a series of Corps’ decisions that, cumulatively, are destroying a way of life. The testimony of members of the affected community is necessary to convey the extent of the damage that the Corps is doing in the Atchafalaya Basin.

Further, the taking of oral testimony serves the interest of justice because it gives Plaintiffs an opportunity to be heard. The law generally requires “notice and opportunity for public hearings” before the Corps may issue individual Clean Water Act permits. 33 U.S.C. § 1344(a). Because the Corps purported to rely in this case on a general permit (which Plaintiffs allege is inapplicable) the Corps failed to provide an opportunity for public participation before issuing its authorization. Because it will afford Plaintiffs an opportunity to be heard on the damage that this and similar Corps decisions imposes, live testimony will serve the interest of justice.

### **III. Live Testimony Will Prove Plaintiffs’ Standing in this Case.**

The Plaintiffs’ live testimony will illustrate that the Plaintiff organizations have constitutional standing to bring this case. Further, oral testimony will assure the Court that Plaintiffs meet the prudential requirements necessary to prove standing.

***A. Plaintiffs Have Constitutional Standing to Prosecute this Action.***

In the United States federal courts, when an organization asserts standing to sue a party the organization must “ha[ve] a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy.” Sierra Club v. Morton, 405 U.S. 727, 732 (1972). “An association has standing to bring suit on behalf of its members when [A)] its members would otherwise have standing to sue in their own right, [B)] the interests at stake are germane to the organization's purpose, and [C)] neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” Friends of the Earth v. Laidlaw Env'tl. Serv., 528 U.S. 167, 181 (2000). For individual standing in a member’s own right, “a plaintiff must show (1) it has suffered an “injury in fact”; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” Id. at 180-81.

1. Plaintiffs Have Organizational Standing Because Their Members Have Standing to Sue in their Own Right.

a. *The Corps’ Unlawful Approval of the 2012 Project Injures Plaintiffs’ Members.*

Plaintiffs seek to provide live testimony from their individual members in order to show that the Corps’ authorization of 2012 Project under the general permit NOD-13 caused them injury. In environmental cases, plaintiffs suffer injury in fact when “they use the affected area and are persons ‘for whom the values of the area will be lessened’ by the challenged activity.” Laidlaw, 528 U.S. at 183 (quoting Sierra Club v. Morton, 405 U.S. 727, 735 (1972)); Friends of The Earth, Bluewater Network Div. v. U.S. Dept. of Interior, 478 F. Supp. 2d 11, 16 -17 (D.D.C. 2007). An “injury in fact” may be physical, economic, aesthetic or recreational. Laidlaw, 528 U.S. at 813-14. For example, “the desire to use or observe an animal species, even for purely

aesthetic purposes, is undeniably a cognizable interest for purposes of standing.” Id. at 183 (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 562-63 (1992)); see Friends of The Earth, 478 F. Supp. 2d at 16-17 (finding standing to challenge permit for Off Road Vehicle use in national parks where member declarant testified to “specific [Off Road Vehicle]-caused damage . . . which has in turn diminished his enjoyment of those parks.”).

Plaintiffs’ members’ testimony will describe their members’ cultural and well as aesthetic, recreational, and professional use and enjoyment of the Bayou Brown area that the 2012 Project cuts through. They will also testify as to how the 2012 Project impairs their use and enjoyment of the area, how they would like to continue to use and enjoy the area, and that they would use and enjoy the area again if the 2012 Project were removed and the area restored.

Plaintiffs’ members will also testify about how the Corps’ violation of the National Environmental Policy Act’s (NEPA’s) requirement to consider cumulative impacts injures them. Under NEPA, it is the Corps’ responsibility to assess “[c]umulative actions, which when viewed with other proposed actions have cumulatively significant impacts.” 40 C.F.R. § 1508.25(a)(2); see also id. § 1508.7 (defining cumulative impact); id. § 1508.8(b) (defining “effects” to include “indirect effects.”). In this case, the cumulative impacts of the 2012 Project and similar Corps’ authorizations are part of the death-by a thousand cuts for the Atchafalaya Basin and the Cajun way of life. Plaintiffs’ live testimony will describe the effect that the cumulative impacts the Corps’ abuse of NOD-13 and other, similar decisions has on their Acadian culture, which has for generations relied on access to the Basin’s wetlands for fishing and frogging, among other things. Here, Plaintiffs’ testimony will demonstrate that they not only suffer economic loss from the diminished wetlands, but they also lose a cultural component of the Acadian way of life.



b. *Plaintiffs' Members' Injuries Are Fairly Traceable to the Corps' Authorization of the 2012 Project.*

It is the Corps' authorization of the 2012 Project that caused the destruction of the wetlands at issue and consequent blockage of previously free-flowing waterways. See Friends of The Earth, 478 F. Supp. 2d at 20 (finding injuries fairly traceably to federal agency action “where the agency [was] in a position to directly regulate and even proscribe [the] activity [directly causing the injury] because “agency action is a ‘substantial factor’ in the third party’s decision to engage in the activity at issue.”).

c. *This Court has the Power to Redress the Injuries that Plaintiffs' Members Suffer by Ordering Declaratory and Injunctive Relief.*

Plaintiffs' injuries are redressable by this Court. To meet the redressability prong of Article III standing, plaintiffs must “demonstrate that the relief they seek will redress their injuries.” Laidlaw, 528 U.S. at 185. “An injunctive remedy is an appropriate form of redress if it will effectively abate or deter illegal conduct that is ongoing at the time of suit.” Consolidated Companies, 2006 WL 408234 (W.D. La. 2006). Also, injunctive relief is an appropriate form of redress even if it will not completely remedy the injury. Texans United for a Safe Econ. Educ. Fund v. Crown Central Petroleum Corp., 207 F.3d 789, 793 (5th Cir. 2000) (finding injunctive relief satisfied redressability requirement “even if it will not prevent all discharges of the pollutants affecting the plaintiff”). This Court can redress Plaintiffs' members' injuries because it has the authority to vacate and enjoin the Corps' authorization of the 2012 Project. 5 U.S.C. § 702. Further, the Administrative Procedure Act (APA) authorizes courts to “hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” or “without observance of procedure required by law.” 5 U.S.C. § 706(2).

2. The Interests Plaintiffs Seek to Protect Are Germane to the Organizations' Purposes.

Plaintiffs meet the second requirement for organizational standing because they have an interest in protecting the Atchafalaya Basin and the wetlands of its watershed. Testimony will show that the interests Plaintiffs seek to protect with this lawsuit are germane to their purpose.

3. This Case Does Not Require the Participation of Individual Members of the Plaintiff Organizations as Parties.

Because this action does not seek monetary damages or particularized relief limited to a single person or group, it does not require the participation of individual members of the Plaintiffs' organizations as parties. See Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333, 334 (1977). Therefore, the claims asserted or relief requested by Plaintiffs can be "properly resolved in a group context." Hunt, 432 U.S. at 344.

***B. Plaintiffs Meet Prudential Standing Requirements.***

In addition to Article III standing requirements, federal courts have developed a "prudential" standing requirement that "a plaintiff's grievance must arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit." Bennett v. Spear, 520 U.S. 154, 162 (1997). This test seeks to "exclude only those whose interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs, 539 F. Supp. 2d 331, 342 (D.D.C. 2008) (citations omitted). "In determining whether [plaintiffs] have standing under the zone-of-interests test to bring their APA claims, we look . . . to the substantive provisions of the [underlying statute], the alleged violations of which serve as the gravamen of the complaint."

Bennett, 520 U.S. at 175 (looking to the substantive provisions of the Endangered Species Act, on which petitioners based their APA claim).

Here, Plaintiffs base their APA claims on violations of the Clean Water Act and NEPA. The Clean Water Act states its purpose is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251. NEPA states its purpose is, among other things, “to promote efforts which will prevent or eliminate damage to the environment and biosphere.” 42 U.S.C. § 4321. Thus, the environmental interests Plaintiffs seek to protect in this lawsuit challenging the Corps’ administration of Clean Water Act wetlands destruction permits fall squarely within the “zone of interests” of the Clean Water Act and NEPA. Having satisfied the “zone of interests” requirement for APA and prudential standing, there is no bar to this Court’s adjudicating Plaintiffs’ claims.

### **Conclusion**

For all of the foregoing reasons, this Court should GRANT Plaintiffs Atchafalaya Basinkeeper and the Louisiana Crawfish Producers Association-West’s Motion for the Taking of Live Testimony and Hearing on Standing pursuant to Fed. R. Civil. P. 43(c) and Local Rule 43.1 and set a hearing for such testimony on January 29, 2015 at 10 a.m. or at another date or time convenient to the Court.

Respectfully submitted on December 12, 2014,

/s Brooke Anne Riggs  
Brooke Anne Riggs, Student Attorney

/s Elizabeth Livingston de Calderón  
Elizabeth Livingston de Calderón, La. Bar 31443  
Adam Babich, La. Bar No. 27177  
Tulane Environmental Law Clinic

6329 Freret Street  
New Orleans, LA 70118-6321  
Phone: (504) 862-8819  
Fax: (504) 862-8721  
Email: [ecaldero@tulane.edu](mailto:ecaldero@tulane.edu)  
*Counsel for the Atchafalaya Basinkeeper and the  
Louisiana Crawfish Producers Association-West*

**CERTIFICATE OF SERVICE**

I hereby certify that on December 12, 2014, I served a copy of the foregoing, by filing the same with the Clerk of Court through the CM/ECF system, on:

MATTHEW M. MARINELLI  
United States Department of Justice Environment & Natural Resources Division  
P.O. Box 7611  
Washington, D.C. 20044-7611

JOHN E. SULLIVAN  
United States Department of Justice Environment & Natural Resources  
Division Environmental Defense Section  
P.O. Box 7611  
Washington, D.C. 20044-7611

s/ Elizabeth Livingston de Calderón  
Elizabeth Livingston de Calderon

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA**

ATCHAFALAYA BASINKEEPER )  
and LOUISIANA CRAWFISH )  
PRODUCERS ASSOCIATION-WEST, )  
 )  
*Plaintiffs* )

No. 2:14-cv-00649-CJB-MBN

Judge Carl J. Barbier

v. )

Magistrate Judge Michael B. North

LIEUTENANT GENERAL THOMAS P. )  
BOSTICK, in his official capacity )  
Chief of Engineers, U.S. Army Corps )  
of Engineers, and the U.S. ARMY CORPS )  
OF ENGINEERS, )  
 )  
*Defendants.* )

Section "J"

Division 5

---

**ORDER**

---

**IT IS ORDERED** that the Plaintiff's Motion for the Taking of Oral Testimony and Hearing on Standing is hereby **GRANTED**. Hearing is set for January 29, 2015 at 10 a.m.

So Ordered this \_\_\_\_ day of \_\_\_\_\_, 201\_.

---

**JUDGE CARL J. BARBIER**  
UNITED STATES DISTRICT JUDGE

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA**

ATCHAFALAYA BASINKEEPER	)	
and LOUISIANA CRAWFISH	)	No. 2:14-cv-00649-CJB-MBN
PRODUCERS ASSOCIATION-WEST,	)	
	)	Judge Carl J. Barbier
<i>Plaintiffs</i>	)	
	)	Magistrate Judge Michael B. North
v.	)	
	)	
LIEUTENANT GENERAL THOMAS P.	)	Section "J"
BOSTICK, in his official capacity as	)	
Chief of Engineers, U.S. Army Corps	)	Division 5
of Engineers, and the U.S. ARMY CORPS	)	
OF ENGINEERS,	)	
	)	
<i>Defendants.</i>	)	

---

**NOTICE OF SUBMISSION**

---

Pursuant to Local Rule 7.2, Plaintiffs, Atchafalaya Basinkeeper and Louisiana Crawfish Producers Association-West, respectfully provide notice that their Motion for the Taking of Oral Testimony and Hearing on Standing is submitted to the Honorable Judge Carl Barbier, District Judge, United States District Court for decision on January 14, 2014.

Respectfully submitted on December 12, 2014,

s/Brooke Anne Riggs  
Brooke Anne Riggs, Student Attorney

s/Elizabeth Livingston de Calderón  
Elizabeth Livingston de Calderón, La. Bar 31443  
Adam Babich, La. Bar No. 27177  
Tulane Environmental Law Clinic  
6329 Freret Street  
New Orleans, LA 70118-6321  
Phone: (504) 862-8819

Fax: (504) 862-8721  
Email: [ecaldero@tulane.edu](mailto:ecaldero@tulane.edu)  
*Counsel for the Atchafalaya Basinkeeper and the  
Louisiana Crawfish Producers Association-West*

**CERTIFICATE OF SERVICE**

I hereby certify that on December 12, 2014, I served a copy of the foregoing, by filing the same with the Clerk of Court through the CM/ECF system, on:

MATTHEW M. MARINELLI  
United States Department of Justice Environment & Natural Resources Division  
P.O. Box 7611  
Washington, D.C. 20044-7611

JOHN E. SULLIVAN  
United States Department of Justice Environment & Natural Resources  
Division Environmental Defense Section  
P.O. Box 7611  
Washington, D.C. 20044-7611

s/ Elizabeth Livingston de Calderón  
Elizabeth Livingston de Calderon