IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR BIOLOGICAL DIVERSITY, *et al.*,

Plaintiffs,

v.

U.S. ARMY CORPS OF ENGINEERS, *et al.*,

Defendants,

and

FG LA LLC,

Defendant-Intervenor.

Case No.: 1:20-cv-00103-RDM

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT
[ORAL ARGUMENT REQUESTED]

Pursuant to Federal Rule of Civil Procedure 56 and Local Rule7(h), Plaintiffs Center for Biological Diversity, RISE St. James, Louisiana Bucket Brigade, and Healthy Gulf respectfully move this Court for summary judgment on all claims alleged in their Complaint. Specifically, the U.S. Army Corps of Engineers (Corps) failed to comply with the National Environmental Policy Act, the National Historic Preservation Act, the Clean Water Act, the Rivers and Harbors Act, and the Administrative Procedure Act in issuing a permit and Memorandum of Record for Defendant-Intervenor Formosa Plastics' petrochemical complex in St. James, Louisiana.

Plaintiffs respectfully request that the Court grant their motion for summary judgment, as there is no genuine issue as to any material fact in this case and Plaintiffs are entitled to judgment as a matter of law. This motion is supported by the accompanying memorandum and standing

declarations concurrently filed with this motion. Pursuant to Local Civil Rule 7(c), a proposed order accompanies this motion. Pursuant to Local Rule 7(f), Plaintiffs respectfully request oral argument on this motion at the Court's earliest convenience.

Dated: October 1, 2020

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

INTRODUCTION

In permitting Taiwan-based Formosa Plastics to build one of the world's largest plastic-making petrochemical plants in the African American community of St. James, Louisiana, the federal government violated the law and deepened environmental racism in the South. This lawsuit seeks to safeguard clean air and water, protect wetlands, and preserve historic plantation cemeteries containing the graves of enslaved people. Based on a flimsy decision document proclaiming that the petrochemical complex (Plastics Complex) has no significant impacts, the U.S. Army Corps of Engineers (Corps) sacrificed a community to this industry's self-serving myth of an unquenched global thirst for more plastic made from cheap, fracked U.S. gas.

The Plastics Complex will transform sugarcane fields and wetlands along a stretch of the Mississippi River into a 1,500-acre industrial city 10 times the size of Washington, D.C.'s National Mall. It will double air pollution and release hazardous chemicals in a region already infamously known as "Cancer Alley." Formosa Plastics is also known as a "serial offender" of environmental laws. *E.g.*, *San Antonio Bay Estuarine Waterkeeper v. Formosa Plastics Corp.*, No. 17-0047, 2019 WL 2716544, at *8–9 (S.D. Tex. June 27, 2019). The new Plastics Complex will destroy critical wetlands that shelter the community against severe storms and flooding and provide habitat for wildlife. The construction also threatens to damage and desecrate at least two cemeteries, dishonoring the African American heritage the site holds.

In permitting this project, the Corps failed to comply with the National Environmental Policy Act (NEPA), National Historic Preservation Act (NHPA), Clean Water Act (CWA) and Rivers and Harbors Act (RHA). The Corps flouted its legal obligations under these bedrock environmental and historic-preservation laws at every step of the way. Congress enacted the laws for a reason, and Plaintiffs respectfully ask that the Court now enforce them by granting Plaintiffs' Motion and vacating the permit.

STATEMENT OF FACTS

I. The Formosa Plastics Petrochemical Complex

Formosa Plastics plans to build an industrial complex that will turn fracked gas into the building blocks for plastic products. AR005391-392, AR007761. The Plastics Complex will include ten chemical plants and numerous support facilities: a heavy haul road across a major levee for the Mississippi River, three barge and ship docks, a rail complex, power generation facilities, and pipelines. AR000104, AR005390, AR007482–483.

The Plastics Complex is sited on a 2,319-acre property on the west bank of the Mississippi River in St. James Parish, Louisiana. AR005931. The bucolic area consists of farmland and homes alongside forested wetlands. *See* AR000151, AR004162. The site's wetlands and fields were once sugarcane plantations. AR000998. The wetlands are part of the Barataria-Terrebonne National Estuary, which is part of a program Congress established to protect and restore estuaries of "national significance." *See* 33 U.S.C. § 1330; AR000105, AR000148, AR000151 ("[h]igh quality forested wetland areas border two sides of the project site."). About 850 acres of these forested wetlands are part of the Lac des Allemands swamp—a large floodplain that drains into the Gulf of Mexico, where bald-cypress and tupelo trees surround wetlands, creating rich aquatic habitat. AR005930, AR006336 (site map), AR006917.

Formosa Plastics requires a permit from the Corps because the project will destroy wetlands. It will dump 554,671 cubic yards of landfill into wetlands and low-lying areas (AR000535, AR000543, AR005369), enough to fill more than 45,000 dump trucks.

II. The Plastics Complex's Impacts on the Environment and Historic Resources

In August 2018, the Corps issued a public notice on Formosa Plastics' request to fill and pave over wetlands for the Plastics Complex, AR004679, prompting hundreds of individuals and

organizations to voice their concerns about the Plastics Complex's environmental harms, *see, e.g.*, AR001319–320, AR002313–981, AR003015–052.

Air and water pollution: The Plastics Complex will be the largest greenhouse gas emitter in the State of Louisiana and directly emit more than 13.6 million tons of carbon pollution every year—equivalent to 3.5 coal-fired power plants—and over 800 tons per year of toxic air pollutants. AR000126, AR003026, AR007493. The Plastics Complex will pollute the air with carbon monoxide, particulate matter, volatile organic compounds, and carcinogens such as formaldehyde, acetaldehyde, and ethylene oxide. AR003024–026, AR003037, AR004179, AR005392. These harmful air pollutants cause premature death; heart attacks; asthma; cancer; and respiratory, neurological, and reproductive damage. AR003024–026, AR007349, AR007674–676, AR007734–736, AR007781–782, AR009228, AR009332, AR010067–071, AR010088–091. The Plastics Complex will also discharge water pollution into the St. James Canal and Mississippi River, "the main source for municipal water down river for highly populated areas." AR000148. The Corps did not disclose or analyze any wastewater or stormwater pollutants or impacts and instead asserted that Formosa Plastics "is properly permitted with [state] air and water permits." AR000154.

Wetlands and floodplain impacts: Wetlands provide important wildlife and fish habitat, improve water quality, and protect communities like St. James from flooding. 40 C.F.R. § 230.41; AR003030–032, AR004151, AR006532. In Louisiana, 75 percent of commercial fisheries rely on wetlands for fish and shellfish spawning, nursing, and feeding. AR006531. Dozens of migratory bird species, including bald eagles, use the wetlands in this area. AR006423, AR006428. Additionally, endangered species including pallid sturgeon and manatees inhabit the area. AR006446. The project will expose wildlife to habitat destruction; traffic; and

noise, light, and water pollution. Construction of this Plastics Complex will damage 61.7 acres of wetlands and 54.5 acres of protected waters in three ways: (1) borrow pits containing herbaceous and forested wetlands will be filled and covered with a utility plant and other infrastructure, AR000104–105, AR000572; (2) 6.7 acres of batture wetlands—wetlands between the river and the levee—will be damaged or destroyed to construct a water intake facility, vessel docks, heavy haul road, and bridge, AR000105, AR000590, AR005150–152; and (3) stormwater detention ponds will be built in forested wetlands at the south end of the property. AR000104, AR000591–594. Batture wetlands are classified as rare, imperiled, or difficult to replace (RID). AR002254. The Corps only required wetlands mitigation credits for *direct* wetlands impacts, AR000106–107, and it eschewed any possibility of *indirect* wetlands impacts.

Environmental justice: Formosa Plastics intends to build in a 95 percent African American, low-income area. AR000179. This part of the South has a long history of environmental injustice. *See, e.g.*, Oliver A. Houck, *Environmental Justice at Ground Zero*, 31 Georgetown Envtl. L. Rev. 455, 459–61, 472–75 (2019). The corridor along the Mississippi River between New Orleans and Baton Rouge is known as "Cancer Alley" due to the many polluting petrochemical plants and refineries already located there. AR001865, AR002047. The Plastics Complex will disproportionately burden this community with more pollution and other environmental harms.

Cultural and historic resources: The Plastics Complex is sited on and adjacent to cemeteries that experts believe contain the remains of enslaved people who worked on the plantations. AR000107, AR000386. Formosa Plastics overlooked these historic resources and reported, "there will be no impact on cultural resources." AR005412. Only after an outside archeologist notified the Louisiana Division of Archaeology that this conclusion was erroneous

did the Division, Formosa Plastics, and the Corps acknowledge either the Buena Vista Cemetery, on the edge of the property, or the Acadia Cemetery, where Formosa Plastics intends to build a utility plant. AR005353. The Corps failed to address the errors committed in Formosa Plastics' location, identification, and evaluation of the Acadia Cemetery.

Formosa Plastics' history of non-compliance: In 2019, a federal district court held Formosa Plastics liable for polluting waterways with billions of plastic pellets from its plant in Point Comfort, Texas. *San Antonio Waterkeeper*, 2019 WL 2716544, at *8–9. The court found that Formosa Plastics had "enormous" permit violations that it failed to report. *Id.* According to the U.S. Environmental Protection Agency (EPA), six of seven Formosa Plastics facilities in the U.S. were in violation of federal environmental laws in 2018. AR003021, AR010246–248. Its Baton Rouge facility has a long history of violations, including "significant" violations of the Clean Air Act every quarter since 2009. AR003021, AR006978–979.

III. The Corps' Approval

The Corps issued a permit to Formosa Plastics on September 5, 2019, authorizing permanent damage to 116.2 acres of wetlands and waters. AR000104. This permit is necessary for Formosa Plastics to construct and operate the Plastics Complex. AR000139. The Memorandum of Record accompanying the permit constitutes the Corps' entire analysis under NEPA, the NHPA, the CWA, and the RHA. *See* AR000104–185.

The Corps declined to prepare an Environmental Impact Statement (EIS) and instead issued an Environmental Assessment (EA) concluding that the Plastics Complex will have no significant environmental impacts. AR000184. Under the NHPA, the Corps concluded there will be no impact to the Buena Vista Cemetery because it is "excluded from the project site." AR000129; *see also* AR000110. As for the Acadia Cemetery, the Corps concluded there will be no historic properties affected. AR000129, AR000165–166. The Corps deemed the project "the

Least Environmentally Damaging Alternative [sic] Practicable Alternative" under the CWA, AR000144, and concluded the permit was not contrary to the public interest. AR000185.

STANDARD OF REVIEW

The Administrative Procedure Act directs the Court 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." 5 U.S.C. § 706(2)(A). An agency's decision is arbitrary if it "entirely failed to consider an important aspect of the problem" or "offered an explanation for its decision that runs counter to the evidence." *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Courts "must thoroughly review an agency's decision and may not 'rubber stamp' decisions that are inconsistent with statutory mandates." *Gov't of the Province of Manitoba v. Norton*, 398 F. Supp. 2d 41, 53–54 (D.D.C. 2005) (citation omitted).

ARGUMENT

I. Plaintiffs Have Standing to Bring This Case

As described in their declarations, Plaintiffs' members have concrete and particularized injuries that are traceable to Defendants' actions, and those injuries will be redressed by a favorable decision. Plaintiffs' detailed declarations establish how the Plastics Complex will harm their health, wellbeing, aesthetic, spiritual, and recreational interests, and livelihoods. *See* Alexander Decl., Cayette Decl., Cooper Decl., Eustis Decl., Lavigne Decl., London Decl., Rolfes Decl., Sakashita Decl., and Sarthou Decl. (filed concurrently). Plaintiffs' members include residents who will breathe the Complex's air pollution, drink downstream water, and suffer increased health, flooding, and safety risks. *See, e.g.* Cayette Decl. ¶¶ 12–13, Lavigne Decl. ¶¶ 16–21, 24–29, Cooper Decl. ¶¶ 5–7, 9 ,12, London Decl. ¶¶ 6–8, 16. Several members can trace their ancestry in St. James to antebellum slavery and are harmed by the action's impacts to

historic and cultural resources in St. James' African American community. *See, e.g.* Cayette Decl. ¶¶ 2, 6–7, London Decl. ¶¶ 5, 9, Lavigne Decl. ¶¶ 30–32. Plaintiffs' members enjoy farmlands, wetlands, waterways, and wildlife, and their aesthetic and recreational interests will suffer concrete injury from filling wetlands and degrading habitat. *See, e.g.* Alexander Decl. ¶¶ 5–10, Cayette Decl. ¶¶ 10–12, Eustis Decl. ¶¶ 6–18, Lavigne Decl. ¶¶ 19, 22–23, London Decl. ¶ 11. This establishes standing. *See, e.g.*, *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 180–81 (2000). Formosa Plastics has targeted a rural, low-income, and minority community already bearing the brunt of a staggering number of industrial facilities and an inequitable exposure to environmental harms. The project's approval absent full compliance with the law deepens this injustice. A decision from this Court will redress these harms.

II. The Corps Failed to Comply with the National Environmental Policy Act

NEPA "is our basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a).[1] NEPA mandates that agencies take a "hard look" at the environmental impacts of their actions to ensure informed decisionmaking and public participation. *See id.* § 1500.1(b). To accomplish these objectives, NEPA requires agencies to fully disclose all potential environmental impacts of an action, 42 U.S.C. § 4332(2)(C), including "ecological . . . aesthetic, historic, cultural, economic, social, [and] health" effects. 40 C.F.R. § 1508.8. The agency may prepare an EA to determine whether an EIS is warranted. *Id.* §§ 1508.9(a), 1501.4(b)–(c). An EA must analyze all direct, indirect, and cumulative impacts of the action. *Id.* §§ 1508.7, 1508.8.

If an EA "demonstrates that significant effects *could* result, the agency must prepare an [EIS]." *Am. Rivers v. Fed. Energy Reg. Comm'n*, 895 F.3d 32, 38 (D.C. Cir. 2018) (citing 42

[1] Recent changes to NEPA regulations went into effect on September 14, 2020. All regulations cited herein refer to those that were in effect at the time the Corps approved the permit.

U.S.C. § 4332(2)(C) (emphasis added). If, after taking a "hard look" at the impacts, the agency determines an EIS is not required, it must provide a convincing statement of reasons why the project's impacts are insignificant and issue a finding of no significant impact (FONSI). 40 C.F.R. §§ 1501.4(e), 1508.13.

A. The Corps' Environmental Assessment Is Inadequate

The D.C. Circuit uses a four-part inquiry to evaluate the adequacy of an EA and FONSI:

> (1) whether the agency took a "hard look" at the problem; (2) whether the agency identified the relevant areas of environmental concern; (3) . . . whether the agency made a convincing case that the impact was insignificant; and (4) if there was an impact of true significance, whether the agency convincingly established that changes in the project sufficiently reduced it to a minimum.

Nat. Res. Def. Council, Inc. v. Herrington, 768 F.2d 1355, 1430 (D.C. Cir. 1985) (quoting *Sierra Club v. Peterson*, 717 F.2d 1409, 1413 (D. C. Cir. 1983). Under this test, the Corps' EA "will pass muster only if it undertook a well-considered and fully informed analysis of the relevant issues and opposing viewpoints." *Am. Rivers*, 895 F.3d at 49 (citation and internal quotation marks omitted). Here, as in *American Rivers*, the Corps' EA falls far short of the "hard look" NEPA requires. *See* 895 F.3d at 50 (ordering an EIS because the agency "just shrugged off" potentially significant impacts). The EA impermissibly accepts Formosa Plastics' self-serving assessments and failed to meaningfully examine several impacts of concern. As in *Citizens Exposing Truth About Casinos v. Norton,* No. 02-1754 (TPJ), 2004 WL 5238116, at *9 (D.D.C. April 24, 2004), "the analysis leading to certain specific conclusions of the absence of significant impact is wanting." This Court should reject the Corps' inadequate EA and grant Plaintiff's motion for summary judgment for any one of the reasons described below.

1. *The Corps' Environmental Assessment Fails to Take a Hard Look at the Environmental Impacts of Its Permit*

a. The Corps failed to take a hard look at hydrology and flooding impacts

The Corps failed to take a hard look at the direct and indirect hydrological impacts of permitting the Plastics Complex as NEPA requires.[2] The Plastics Complex will destroy 116.2 acres of wetlands and other waters (the size of 88 football fields), build on 1,500 acres along the flood-prone Mississippi River, and damage adjacent wetlands. Yet the Corps did not take a "hard look" at the harmful effects of its action on hydrology.

The Corps improperly relied on Formosa Plastics' drainage and hydrology reports to summarily conclude that the Plastics Complex will have "no impact on the effort to flood proof the area." AR000114–15. This unsupported assertion—based solely on the applicant's representations—mirrors the analysis the D.C. Circuit struck down in *Idaho v. Interstate Com. Comm'n*, 35 F.3d 585, 595–96 (D.C. Cir. 1994); *see also Calvert Cliffs' Coordinating Comm. v. Atomic Energy Comm'n*, 449 F.2d 1109, 1117, 1122–23 (D.C. Cir. 1971) ("NEPA was meant to do more than regulate the flow of papers in the federal bureaucracy."). The agency's error is particularly glaring here, where the underlying reports are based on faulty data. *See, e.g.*, 40 C.F.R. § 1502.24 (agencies must ensure the "scientific integrity" of NEPA analyses). Formosa Plastics' drainage report assumes unrealistically low water levels in the St. James Canal that ignore the region's increasingly severe rains, storm surges, and hurricanes. *See* AR003058, AR003060. Similarly, the reports fail to *mention* climate change. AR005156–167. While the

[2] Direct effects "are caused by the action and occur at the same time and place." 40 C.F.R. § 1508.8(a). Indirect effects are reasonably foreseeable effects "caused by the action and are later in time or farther removed in distance." *Id.* § 1508.8(b).

reports look at a Category 1 hurricane event, AR005164, the EA does nothing to describe the risk or effects of the increasingly frequent Category 3 and higher storms.

The Corps failed to consider that the Plastics Complex will severely alter the hydrology of the site and increase flooding. The permit allows Formosa Plastics to dump 554,671 cubic yards of fill in wetlands and low-lying areas. AR000535. Then Formosa Plastics will pave and build atop 1,500 acres. AR006903. These changes will create impervious surfaces, dramatically altering the site's hydrology, increasing the flow of water from the site during storms, and damaging adjacent storm-protecting wetlands. AR003031, AR007778–779, AR007977, AR007984. The Corps admitted "[f]loods [sic] hazards typically increase when waters of the U.S. are impacted and wetlands area [sic] filled," AR000155, but it then failed to analyze these harmful direct and indirect impacts. This violates NEPA's "hard look" mandate. *See Friends of the Earth, Inc. v. U.S. Army Corps of Eng'rs*, 109 F. Supp. 2d 30, 37–38 (D.D.C. 2000) (rejecting Corps' EA on a Section 404 permit because it failed to evaluate impacts to hydrology and wetlands from "runoff, sedimentation and placement of impervious surfaces.").

These hydrological and flooding effects, which the Corps ignored, could be catastrophic for the local community. Flooding at the Plastics Complex risks toxic runoff and spills of chemicals and plastic pellets; equipment malfunctions and other accidents; emergency shutdowns with uncontrolled emissions; and increased traffic on evacuation routes. *See, e.g.*, AR002314–315, AR002329–330. According to a federal report, the impacts of increasingly frequent flooding are dire, leading to injury, disease, and threats to public safety—with disproportionate impacts on the poor, sick, and those who live in floodplains. AR008078. The EA failed to analyze these impacts, instead relying on Formosa Plastics' reports to conclude the impact of flood hazards is "neutral because it has been mitigated onsite." AR000155.

Flooding at the site is highly probable, as much of it is already barely above sea level. AR001205, AR002984, AR003029–32. This area is at risk from intense storm surges from the Gulf of Mexico. AR003030, AR004247, AR006336, AR007854. Record evidence shows the site is in the floodplain, AR002330, and that 100-year floods now routinely occur every few years. AR009250; *see* AR007344–345, AR007774–775. Scientific evidence in the record shows flooding, storm surge, and severe storms are becoming more frequent and severe due to climate change, AR007854, AR007933–40, AR009241; and wetlands offer protection "from storm surge and filter pollutants." AR006543. Federal scientists determined that chances of torrential rains, which resulted in devastating floods in the project area in August 2018, have increased by 40 percent due to climate change. AR007783-787. Nuisance flooding has increased substantially over the past 50 years, including on the Gulf Coast, by 300 to 925 percent. AR007927; *see also* AR007998. Climate-related sea level rise, land subsidence, and loss of natural barriers—such as wetlands—intensifies flooding impacts and increases the frequency of floods. AR007344–45. These factors compound flood risks at the site of the Plastics Complex. AR007941.

b. The Corps failed to take a hard look at accidents

The Corps failed to evaluate the reasonably foreseeable impacts of accidents. *See* 40 C.F.R. § 1502.22(b)(4) (agency must consider events that "have catastrophic consequences, even if their probability of occurrence is low"). The Plastics Complex risks numerous accidents with catastrophic consequences, including chemical spills, toxic emissions releases, explosions, fires, and oil spills. AR002281–282, AR004192. An explosion or chemical spill could kill workers and endanger residents. *See, e.g.*, 40 C.F.R. § 68.42. While these types of accidents are listed as *risks* in Formosa's safety and emergency response plans, *see, e.g.*, AR004457–608, the Corps never mentioned or evaluated their *impacts* in its EA. This violates NEPA. *See New York v. Nuclear Reg. Comm'n,* 681 F.3d 471, 481–82 (D.C. Cir. 2012) (agency must consider the consequences

of catastrophic risks even if the chances are low); *see also Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 255 F. Supp. 3d 101, 139–40 (D.D.C. 2017) [hereinafter, "*Standing Rock 2017*"] (rejecting EA's "minimal" discussion of spill impacts "as distinct from the risk of a spill occurring").

c. The Corps failed to take a hard look at air and water pollution

The Corps' EA was impermissibly narrow, and thus disregarded the Plastics Complex's air and water pollution. The EA only attempts to analyze the impacts of wetlands filling, but it should have examined the environmental effects of operating the Plastics Complex as a whole—the project's stated purpose. *See* AR000111. Indeed, the Corps admitted the EA should have a broad scope:

> The *scope of analysis extends beyond the project footprint/regulated activity* to examine area wetlands and drainage to ensure that excavation and fill activities do not cause further adverse effects or local water quality issues *and that plant operations do not cause further adverse effects to the surrounding communities*.

AR000108 (emphasis added). However, the Corps then confined its EA analysis to a "review of the project's impacts on public navigation and wetlands which are within the Corps' authority to regulate," ignoring impacts from air and water pollution. AR000184. This falls far short of the "hard look" NEPA requires.

The CWA and RHA require that the Corps base permit decisions on "an evaluation of probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest," including consideration of "aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, . . .water quality, . . . and in general, the needs and welfare of the people." 33 C.F.R. § 320.4(a)(1). The Corps can, and indeed must, consider these broad environmental factors to issue a permit; therefore, it must analyze *all* those impacts under NEPA. *Sierra Club v. Fed. Energy Reg.*

Comm'n, 867 F.3d 1357, 1373 (D.C. Cir. 2017). In *Sierra Club v. Fed. Energy Reg. Comm'n*, the D.C. Circuit held that the agency's NEPA analysis had to include *all* environmental impacts of a gas pipeline approval—including downstream greenhouse pollution of burning the gas—because the agency could consider environmental impacts as part of its "public convenience and necessity" review under the Natural Gas Act. *Id.* (quoting 15 U.S.C. § 717f(e)); *see also Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 105–108 (D.D.C. 2006) (Park Service's NEPA analysis required to consider air and noise pollution impacts from nearby surface drilling activities on park resources in deciding whether to permit activity); *WildEarth Guardians v. Zinke,* 368 F. Supp. 3d 41, 73 (D.D.C. 2019) (agency obligated to analyze air emissions because the agency could decline to sell the oil and gas leases if not in the public's long-term interest).

The Corps generally acknowledged the Plastics Complex will cause air and water pollution, AR000154, but never analyzed these impacts quantitatively or qualitatively. This failure violates NEPA. *See, e.g.*, *Mainella,* 459 F. Supp. 2d at 105–108; *Mont. Envtl. Info. Ctr. v. U.S. Office of Surface Mining*, 274 F. Supp. 3d 1074, 1093–99 (D. Mont. 2017) (EA for a coal mine expansion deficient for failing to take a hard look at air pollution impacts). Any contention that the Corps need not analyze these impacts is "simply wrong." *Friends of the Earth v. Army Corps*, 109 F. Supp. 2d at 41.

First, the EA failed to evaluate the consequences of the Plastics Complex's air emissions. It will emit approximately 7,000 tons of criteria pollutants every year, including carbon monoxide, particulate matter, nitrogen oxides and volatile organic compounds (VOCs). AR004179, AR007493. These air pollutants damage human health. AR007349–350, AR007781–782, AR009103, AR009228, AR010041–042. For example, when particulate matter, nitrogen oxides, and VOCs combine, they react with sunlight to form ground-level ozone (smog), which

aggravates respiratory ailments like asthma and causes heart disease and death. AR007736, AR009228, AR010039-41; AR009228 (elevated ozone exposure causes between 4,300 and 19,000 premature deaths in the United States annually). The EA also failed to examine hazardous air pollutants the Plastics Complex will emit. 42 U.S.C. § 7412(b); AR007493. For example, ethylene oxide can damage the brain and nervous system and cause lymphoid and breast cancer. AR007674–675. The Plastics Complex will also emit acetaldehyde, benzene, butadiene, ethylene glycol, formaldehyde, hexane, naphthalene, and vinyl acetate, AR004179, AR007493, which all have serious human health effects. *E.g.* AR009274, AR010044, AR010045–046, AR010048–051, AR010058–062, AR010067–071, AR010072–075, AR010088–091; 67 Fed. Reg. 66,151 (Oct. 30, 2002). Yet the EA failed to evaluate the health impacts from air pollution, violating NEPA.

The EA's failure to analyze the effects of the Plastics Complex's 13.6 million tons of annual greenhouse pollution also violates NEPA. *See* AR000125–126, AR003028, AR003037. An agency must fully analyze the direct, indirect, and cumulative impacts of greenhouse gas emissions stemming from its action. *WildEarth Guardians,* 368 F. Supp. 3d at 73–75. Here, the EA's narrow analysis of climate change considers impacts only from filling wetlands—that is, the net effect of losing the wetlands' carbon sequestration function, which the Corps claimed is fully mitigated. AR000158. The EA completely fails to analyze the impacts of greenhouse gas emissions from the Plastics Complex, AR007493. There is international consensus and evidence that human-caused climate change is already harming human and natural systems. *E.g.* AR008073-083; 74 Fed. Reg. 66,496 (Dec. 15, 2009). The Plastics Complex will directly contribute to the climate crisis, yet the Corps failed to analyze the impacts of its emissions. AR008057–897, AR008898–9066.

Finally, the Corps unlawfully ignored the Plastics Complex's water pollution. *See* AR000156, AR00166 (merely noting the Louisiana Department of Environmental Quality (LADEQ) issued a water quality certification). The EA's failure to recognize or analyze water pollution is striking. Operation of the Plastics Complex will generate process wastewaters and stormwater contaminated with dangerous chemicals. AR004187–188. In addition, plastic pellets are a major source of pollution at Formosa Plastics' similar facilities. *San Antonio Waterkeeper*, 2019 WL 2716544, at *7 ("[i]n spite of Formosa's source controls, plastic pellets and PVC powder regularly and routinely leave the production areas, and get into the stormwater and wastewater system"). The EA completely fails to disclose and analyze the impacts of wastewater and stormwater discharges from the Plastics Complex on the environment, including the adjacent National Estuary.

In short, the Corps never quantified the Plastic Complex's air emissions or water discharges, much less took a "hard look" at resulting impacts. Instead, the Corps shirked its statutory duty to examine the impacts and summarily concluded "the plant will not impact water quality or air quality in a manner that is not accepted by [LADEQ]," AR000171–172; *see also* AR000152 (concluding without support that such pollution is "subject to local and state regulatory authorities and are thus are [sic] anticipated to be local in extent, minor in intensity, and/or short-term in duration."), AR000128 ("the project will be permitted by the LDEQ and will be required to comply with all applicable laws and regulations"), AR000130, AR000154.

NEPA requires more than wholesale reliance on state permitting. *See, e.g.*, *Am. Rivers*, 895 F.3d at 54. Indeed, it is well-settled that "the existence of permit requirements overseen by another federal agency or state permitting authority cannot substitute for a proper NEPA analysis." *Sierra Club v. Fed. Energy Reg. Comm'n*, 867 F.3d at 1375 (citing *Calvert Cliffs,* 449

F.2d at 1122–23). The Corps cannot rely on "[c]ertification by another agency that its own environmental standards are satisfied" in lieu of performing its own NEPA analysis. *Idaho,* 35 F.3d at 595–96 (quoting *Calvert Cliffs,* 449 F.2d at 1123 (additional citation omitted)); *see also S. Fork Band of W. Shoshone v. U.S. Dep't of Interior*, 588 F.3d 718, 726 (9th Cir. 2009). Disclosure of these impacts is even more critical when the applicant has a history of violations at its other facilities, as Formosa Plastics does. *See infra* at 42. For example, in *American Rivers*, the agency relied on a state water quality certification to find no significant water quality impacts. *Am. Rivers,* 895 F.3d at 52. The D.C. Circuit found this an unacceptable stand-in for the required NEPA analysis, especially with the applicant's record of violations. *Id*. at 53–54.

d. The Corps failed to take a hard look at environmental justice

The EA arbitrarily concluded there are no adverse effects on environmental justice. AR000173–177. The Corps failed to comply with Executive Order 12,898, which directs that, "[t]o the greatest extent practicable and permitted by law," the Corps "shall make achieving environmental justice part of its mission by identifying and addressing . . . disproportionately high and adverse human health or environmental effects of [their] activities on minority populations and low-income populations." 59 Fed. Reg. 7629, at § 1-101 (Feb 11, 1994).

The Corps did not address the project's disproportionately high adverse health and environmental effects on this low-income, African American community as required by Executive Order 12,898. Notably, the Corps' flawed analysis hinges on whether the siting of the Plastics Complex evinces "intentional racial discrimination," AR000173. However, the Corps is charged with evaluating discriminatory *impact*, not intent. Exec. Order No. 12,898. In rubber-stamping Formosa Plastics' flawed evaluation, the Corps violated NEPA in several respects.

First, the Corps impermissibly concluded that the project will have of "no adverse effect" because the "facility will meet all [national air quality standards] for criteria pollutants and

ambient air standards for toxic air pollutants." AR00173–174. The Fourth Circuit has rejected the same kind of "flawed" environmental justice analysis in the NEPA context. *Friends of Buckingham v. State Air Pollution Control Bd.*, 947 F.3d 68, 90–92 (4th Cir. 2020). It concluded that "even if all pollutants within the county remain below state and national air quality standards, the Board failed to grapple with the likelihood that those living closest to the [project]—an overwhelmingly minority population . . . —will be affected more than those living in other parts of the same county." *Id*. at 91–92. Here, as in *Friends of Buckingham*, the Corps' analysis fails because it did not assess the disproportionate harm of air pollution on St. James' African American population. *See also California v. Bernhardt*, No. 4:18-cv-05712-YGR, 2020 WL 4001480, at *34 (N.D. Cal. July 15, 2020) (the agency "must not only disclose . . . that certain communities and localities are at greater risk, but must also fully assess these risks").

Next, the Corps violated NEPA by parroting Formosa Plastics' irrelevant excuse that the site is "remote." AR000174. Regardless of the area's population density, in executing its environmental justice duties the Corps is directed to consider "whether there may be disproportionately high and adverse human health or environmental effects on minority . . . [or] low-income populations." AR010106; *see, e.g.*, *Standing Rock 2017*, 255 F. Supp. 3d at 137–40 (rejecting the Corps' environmental justice analysis). The Plastics Complex will be just one mile from St. Louis Academy primary school, a half-mile from the residential community of Union, and two miles from the residential community of Welcome. AR006336, AR006905. These communities are predominantly low-income and African American, and it is critical that the Corps evaluate the project's impacts on their safety, public health, and air and water quality.

Finally, the Corps violated NEPA by ignoring the disproportionate pollution burden of petrochemical plants along this stretch of the Mississippi River. Missing from the Corps' EA is

EPA's Environmental Justice Screening ("EJ Screen") data about cancer risks and pollutant exposures around this site. AR000180–183 (using EJ Screen Reports for demographics but omitting the page on cancer risk and existing exposure levels); *cf*., AR005699–701 (EJ Screen includes page on cancer risk and exposure levels for an unselected, alternative site). Under NEPA, agencies should consider "the potential for multiple or cumulative exposure to human health or environmental hazards in the affected population and historical patterns of exposure to environmental hazards." AR010106; *see also Standing Rock 2017*, 255 F. Supp. 3d at 137–40. The Corps failed to do so and instead reiterated its misunderstanding of its duties by concluding, "[i]n summary, the project was not *intentionally placed* in a predominately African-American community." AR000177 (emphasis added). On this basis alone, this EA is unlawful.

e. The Corps failed to take a hard look at historic resources

An EA must consider whether the action "may cause loss or destruction of significant scientific, cultural, or historical resources." 40 C.F.R. § 1508.27(b)(8). As discussed *infra* at 31-38, the Corps failed to meaningfully identify and evaluate the Plastics Complex's impacts on historic resources, including burial sites; took no initiative to correct flaws in Formosa Plastics' surveys; failed to consider relevant factors by allowing Formosa Plastics to mis-plot, mis-survey, and to this day ignore a significant portion of the Acadia Cemetery; and did not offer a reasoned explanation for its bare bones "no effect" determination. AR000129. As noted in *Hammond v. Norton*, 370 F. Supp. 2d 226, 251–52 (D.D.C. 2005), this Court has "recognized the danger of agencies merely accepting the 'self-serving statements or assumptions' of interested parties," and cautioned that where there is "good cause to believe that information is inaccurate," the agency has "a duty to substantiate" (citations omitted).

f. The Corps failed to take a hard look at impacts to wetlands habitat and wildlife

The Corps failed to take a "hard look" at the direct and indirect impacts of destroying 116.2 acres of wetlands and other waters and the wildlife that depend upon them. This includes damage to sensitive batture wetlands that are habitat for bald eagles and other wildlife. AR000105, AR006432. Several acres of forested wetlands—habitat for 25 species of migratory birds—will be destroyed. AR000104, AR005505. The EA ignores the project's indirect degradation of adjacent wetlands—including the contiguous Lac des Allemands swamp, which includes wetlands that provide important habitat and protection from storms. AR003030, AR009904, AR010183. Formosa Plastics purchased mitigation credits for *direct* wetlands impacts, AR000106–107, but this does not substitute for a NEPA analysis of the project's concomitant *indirect* impacts. *Manitoba*, 398 F. Supp. 2d at 65 n.24 (even with mitigation, an EA must completely account for any possible adverse impacts).

The EA also inadequately describes the Plastics Complex's impacts on migratory birds that use the Mississippi flyway migration corridor. AR000109; *cf.*, AR006543 (Louisiana's "marshes provide winter habitat for more than 5 million migratory waterfowl—an astonishing 20% of the entire North American continent's water bird population"). Coupled with deforestation, the construction, noise, traffic, and lighting from the Plastics Complex will displace birds from preferred habitat and impair feeding and nesting. *See* AR005507. Yet, rather than analyzing impacts to migratory birds, the EA unreasonably focuses on the absence of bald eagle nests in a single 2017 survey to conclude that all bird impacts on and adjacent to the site have been minimized or eliminated. AR000125, AR006433.

The Corps' error-filled, "no effect" finding for endangered species fails to provide sufficient information to determine whether there are significant impacts. Although the

endangered pallid sturgeon may inhabit the project area (AR006446; 55 Fed. Reg. 36,641 (Sept. 6, 1990)), the EA concluded the project has "no effect" on them. AR000146. This conflicts with the Corps' own determination that the action *may affect,* but with mitigation is *not likely to adversely affect* (NLAA), pallid sturgeon. AR010242–243; *see* AR006778–779 (describing the difference between "no effect" and "not likely to adversely affect"). Yet, the Corps did not fully address effects on pallid sturgeon. While it required a screen on a water intake pipe to reduce entrainment of sturgeon (AR000005, AR004151), it did not examine or require other mitigation. Notably, the Louisiana Department of Wildlife and Fish "advised that necessary measures be taken to avoid the Pallid Sturgeon breeding season, which is between July and August." AR000125. Instead, the Corps accepted Formosa Plastics' statement that it will limit construction during the breeding season "as much as practicable." *Id.*

Additionally, the Corps' EA is silent on the project's impacts to threatened West Indian manatees even though manatees are on the U.S. Fish and Wildlife Service's list of species the project may affect. AR005519. The record shows the Corps erred by checking the box that indicates the project is not in St. James Parish, which resulted in a "no effect" finding for manatees. AR006012. The project's construction of three docks and vessel traffic will impact manatees and should have been considered. AR000104, AR004166 (discussing increased traffic servicing the facility); *see also* 82 Fed. Reg. 16,668, 16,696 (Apr. 5, 2017) (discussing harm to manatees from vessel strikes). These mistakes demonstrate the Corps did not take a hard look. *See Found. for N. Am. Wild Sheep v. U.S. Dep't of Agric.*, 681 F.2d 1172, 1178 (9th Cir. 1982) (faulting an EA's "omission of any meaningful consideration" of traffic impacts on wildlife).

g. The Corps failed to analyze cumulative impacts

The Corps also violated NEPA by failing to analyze *any* cumulative impacts to wildlife, air or water quality, public health, historic resources, or environmental justice, and providing

only a cursory mention of cumulative impacts to wetlands. Cumulative effects are those resulting from the "incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency . . . or person undertakes" them. *Grand Canyon Trust v. Fed. Aviation Admin.*, 290 F.3d 339, 345 (D.C. Cir. 2002) (quoting 40 C.F.R. § 1508.7); *see* 40 C.F.R. § 1508.27(b)(7). As the D.C. Circuit emphasized:

> a meaningful cumulative impact analysis must identify (1) the area in which the effects of the proposed project will be felt; (2) the impacts that are expected in that area from the proposed project; (3) other actions—past, present, and proposed, and reasonably foreseeable—that have had or are expected to have impacts in the same area; (4) the impacts or expected impacts from these other actions; and (5) the overall impact that can be expected if the individual impacts are allowed to accumulate.

Great Old Broads for Wilderness v. Kempthorne, 452 F. Supp. 2d 71, 84 (D.D.C. 2006) (quoting *Grand Canyon Trust*, 290 F.3d at 342).

The Corps' EA does not satisfy these requirements. The EA only discussed cumulative impacts to wetlands from unspecified "future activities," stating, "wetlands will continue to be negatively affected by human development." AR000163. Despite a cursory subject matter list of other potential effects—increases in emissions, traffic, plastics, and spill potential, and "changes in aesthetics"—the cumulative effects section lacks any discussion of those effects. AR000162–163. Notably, the EA fails to mention any other past, present, or reasonably foreseeable projects in the area, including other industrial projects noted in public comments. AR003043 (LADEQ has recently issued air pollution permits to numerous industrial projects clustered in the same vicinity, including Yuhuang Chemical, Inc., Americas Styrenics LLC, Mosaic Phosphate Company, Nustar Logistics, and Marathon Pipeline, among others). Instead, the EA's unsupported conclusion is that "the incremental contribution of the proposed activity to cumulative impacts . . . [is] not considered to be significant." AR000163; *see also* AR000151 (Table 7, deeming cumulative effects for aquatic ecosystem as a "Minor Effect (Long Term)").

Rather than giving the hard look NEPA requires, the Corps "merely recite[d] the history of development along the Mississippi coast and then conclude[d] that the cumulative impacts 'have been minimal.'" *Friends of the Earth v. Army Corps*, 109 F. Supp. 2d at 42. Here, the Corps admitted that "[t]hese types of [industrial] developments will continue to be pursued, leading to the potential for more impacts to wetlands and waters of the U.S.," but summarily concluded—with no analysis—that the cumulative impacts of these developments are "not considered to be significant." AR000163. That is impermissible. *See, e.g.*, *Great Old Broads*, 425 F. Supp. 2d at 85 (if an EA "fails to include the requisite cumulative impacts analysis, it cannot be sustained); *Mainella*¸ 459 F. Supp. 2d at 107–08 (D.D.C. 2006) (rejecting an EA for a drilling permit that failed to consider cumulative impacts of fourteen nearby wells); *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 994–97 (9th Cir. 2004) (rejecting EA for failing to evaluate cumulative impacts of timber sales).

2. *The Corps Failed to Identify Areas of Environmental Concern*

a. The Corps failed to analyze impacts from connected actions

The Corps' EA fails to evaluate connected actions of new pipelines and transmission lines for the Plastics Complex that will have significant environmental impacts—including up to 567 acres of additional harm to wetlands and potential impacts to historic resources. AR006334. Under NEPA, an agency acts unlawfully when it "divides connected, cumulative, or similar federal actions into separate projects and thereby fails to address the true scope and impact of the activities that should be under consideration." *Del. Riverkeeper Network v. Fed. Energy Reg. Comm'n*, 753 F.3d 1304, 1313 (D.C. Cir. 2014); *see also* 40 C.F.R. §§ 1508.7, 1508.25(a)(1)–(2). Actions are connected if they "[c]annot or will not proceed unless other actions are taken previously or simultaneously," or are "interdependent parts of a larger action and depend on the larger action for their justification." 40 C.F.R. § 1508.25(a)(1).

Here, the Corps impermissibly failed to analyze the approval of Section 404 permits for transmission lines and pipelines built solely to serve the Plastics Complex. *See* AR002248–249, AR004171–172. The Plastics Complex will require two segments of an electrical transmission line, three natural gas pipelines, and five feedstock pipelines. AR006334–344. Only one of these pieces of infrastructure—a propane pipeline—currently exists; the remaining nine will be new construction. AR006334. The Corps should have but failed to consider these projects together.

For example, in *Delaware Riverkeeper*, the D.C. Circuit required that impacts from four segments of a pipeline upgrade project be analyzed together because none were commercially viable on their own. 753 F.3d at 1313–17; *see also Hammond*, 370 F. Supp. 2d at 253 (agency "improperly segmented its analysis" by failing to address connected actions). Similarly, Formosa Plastics' new infrastructure projects have no independent significance or utility outside of serving the Plastics Complex. AR002248. The project "will require the use of several [new] pipelines" as well as "two new transmission lines," AR002249, most of which will "solely service this facility." AR002248; *and see* AR004171–172, AR004675, AR006334. Yet they were never discussed in the EA.

Worse, the Corps knew early in the process that the Plastics Complex will rely on these infrastructure projects. AR006330–335. A new utility switchyard is included in the project, but inexplicably, new transmission lines that connect to it are not. *See* AR006334, AR006357 ("The final plans for new transmission lines will be provided as an application update . . . when they become available."). Similarly, the EA is silent on impacts from the pipelines that will transport gas and natural gas liquids directly to the Plastics Complex, even though the Corps was aware of these projects. As an example of the significance of these omitted impacts, Formosa Plastics estimated these projects will fill and otherwise harm up to 535 acres of wetlands and 32 acres of

open waters. AR006334. These omissions were neither explained nor substantiated; the Corps' EA is therefore arbitrary and capricious.

b. The Corps failed to examine the effects of transportation

The EA is also unlawful because the Corps completely overlooked the environmental impacts of transportation and its related infrastructure. *See, e.g.*, *Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 931 (D.C. Cir. 2017) (agency violated NEPA because it "averted its eyes altogether" from a relevant environmental concern). Formosa Plastics will "transport products to market by marine vessels, pipelines, rail, or truck." AR000122. To accommodate traffic, Formosa Plastics has already widened Highway 3127 from two lanes to four alongside high-quality forested wetlands, Dkt. 33-1 at 13—a part of the project the EA only mentioned once and left entirely unexamined. AR000114. The project also includes the construction of vessel docks, a rail shipping complex, utility lines, and pipelines. AR000104. "[S]everal vessels per month will dock at the Facility for loading and transportation of ethylene glycol;" "barges will also be utilized to carry liquid end product;" and plastic pellets "will be transported by . . . barges, rail, or trucks." AR004166. However, the EA is arbitrarily silent on the environmental effects of these transportation veins. *See Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 866–67 (9th Cir. 2005) (failure to look at increase in vessel traffic from dock extension was "unreasonable and insufficiently explained").

3. *The FONSI Fails to Make a Convincing Case for Insignificant Impacts*

For the above described inadequacies of the EA, the Corps failed to "'make a convincing case for its finding' of no significant impact." *Nat'l Parks Conserv'n Ass'n v. Semonite*, 916 F.3d 1075, 1082 (D.C. Cir. 2019) [hereinafter "*NPCA*"] (citation omitted); *see* AR000184 (one-paragraph FONSI). "Simple, conclusory statements of 'no impact' are not enough to fulfill an agency's duty under NEPA." *Founds. on Econ. Trends v. Heckler*, 756 F.2d 143, 154 (D.C. Cir.

1985). Indeed, "NEPA would be toothless if agencies could merely issue a conclusory statement that the action did not significantly affect the environment." *Id.* at 146–47. The Corps' EA and FONSI do not support the agency's decision to forego an EIS for this Plastics Complex, which will be one of the largest in the world if built.

B. The Corps Failed to Prepare an EIS Despite Significant Environmental Effects

For the same reasons the EA is deficient, the Corps' failure to prepare an EIS violated NEPA. If an action has effects that *may* be significant, an agency must prepare an EIS before the action is taken. 42 U.S.C. § 4332(2)(C); *Sierra Club v. Peterson*, 717 F.2d at 1415. In such cases, courts have ordered an agency to prepare an EIS. *NPCA*, 916 F.3d at 1089*; Bark v. U.S. Forest Serv.*, 958 F.3d 865, 870–73 (9th Cir. 2020); *Sierra Club v. Marsh*, 769 F.2d 868, 870 (1st Cir. 1985). Here, the action more than meets this threshold for its effects on air and water quality, wetlands, environmental justice, and burial sites; thus the Corps should have prepared an EIS.

Under NEPA, significance is determined by the context and intensity of an agency's action. 40 C.F.R. § 1508.27. The context relates to the "affected region, the affected interests, and the locality," while intensity refers to the severity of the impacts. *Id*. at § 1508.27(a). Intensity hinges on several factors, including the effects on public health and safety, the "[u]nique characteristics of the geographic area," the degree to which the impacts are highly controversial, and cumulative impacts. *Id.* at § 1508.27(b)."Implicating any one of the factors may be sufficient to require development of an EIS." *NPCA*, 916 F.3d at 1082 (citing *Grand Canyon Trust*, 290 F.3d at 347). The Corps' action implicates several NEPA significance factors.

1. *The Context of a Severely Impacted Environmental Justice Community Is Significant*

The environmental context here is significant because the Corps' action will burden a low-income community, where 95 percent of the residents are African American. AR002237; *see*

40 C.F.R. § 1508.27(a) (context examines short- and long-term effects in the locale). At present, the affected area retains its historical rural character of farmland and homes—a reprieve along the 85-mile stretch of Cancer Alley. *See* AR007012–013. The Plastics Complex will transform the landscape and expose an environmental justice community to pollution. "One more factory polluting air and water in an area zoned for industrial use may represent the straw that breaks the back of the environmental camel." *Hanly v. Kleindienst*, 471 F.2d 823, 831 (2d Cir. 1972).

2. *The Project Has Significant Effects on Public Health and Safety*

The Corps must prepare an EIS because air pollution from the Plastics Complex may be significant, and there are substantial threats to public health and safety. *See* 40 C.F.R. § 1508.27(b)(2); *see also California v. Bernhardt,* 2020 WL4001480, at *35 (an agency "cannot discount the localized impacts to people for whom the public health impacts are of clear significance." (citations omitted)). Evidence Plaintiffs submitted demonstrates the Complex's air pollution will be significant—more than doubling nitrous oxide and sulfur dioxide emissions that create smog, and substantially increasing particulate matter and other harmful air pollutants. AR007331; *and see* AR007493. Formosa Plastics' modeling of particulate matter pollution (PM2.5), when combined with background concentrations, will max out air pollution in the area to 99 percent of EPA's limit—leaving no margin to avoid violating air quality standards. AR003037, AR007331. Particulate matter lodges deep into the lungs and causes serious health problems, including heart attacks and asthma; long-term exposure leads to premature death. AR007349–350, AR009228, AR009332, AR010041. The Plastics Complex will also emit 281,760 pounds per year of five known carcinogens (benzene, 1,3-butadiene, acetaldehyde, formaldehyde, and ethylene oxide). AR007493. In addition to causing cancer, these hazardous air pollutants cause reproductive harm and damage respiratory and neurological systems. AR007674–076, AR009274, AR010067–069, AR010088–089. The local community will be

exposed to high concentrations of pollution; for example, studies report high benzene concentrations in the 95th percentile near point sources. AR003025–026, AR007493 (the Plastics Complex will emit 85,620 pounds (nearly 43 tons) of benzene per year), AR010044. As in *California v. Bernhardt,* significant air pollution warrants an EIS. 2020 WL 4001480, at *41.

Additionally, the Plastics Complex will be Louisiana's largest source of greenhouse gas emissions, emitting 13.6 million tons of greenhouse pollution each year. AR007493. This amounts to 0.26 percent of greenhouse pollution for the entire United States from all sectors. *See* AR000126 (calculated from 2016 national data). Such pollution increases ground-level ozone; heat-related mortality; and severe storms that result in death, injuries, and social disruption. AR009895–897, *see also* AR009671 (charting health, environmental, and social effects of climate change). Evidence of an action's contribution to global warming may trigger NEPA's public health intensity factor. *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin*., 538 F.3d 1172, 1222 (9th Cir. 2008).

The Corps must also prepare an EIS because the Plastics Complex threatens public safety by increasing flood risks. As discussed above, record evidence demonstrates that flooding and storm surges will increase. *See supra* at 9-11. Flooding and storm surges could cause flood-related chemical and plastic pellet spills; crowding of evacuation routes; and heightened probability of equipment malfunctions that release toxic chemicals. *See* AR002281–282, AR004192–194, AR004467–608; *San Antonio Waterkeeper*, 2019 WL 2716544, at *8–9.

3. *The Project Affects a Unique Geographic Area*

NEPA requires the Corps to prepare an EIS because its action affects "unique characteristics of the geographic area," namely "wetlands," and "historic or cultural resources." 40 C.F.R. § 1508.27(b)(3). For example, the D.C. Circuit recently required an EIS for the aesthetic and visual impacts that transmission towers would have on historic and cultural

resources of the James River, a nationally significant water trail. *NPCA*, 916 F.3d at 1086–87. The permit's impacts to wetlands also trigger this significance factor here. Wetlands comprise approximately half the property and border two sides of the project boundary, many of which are high-quality forested wetlands of the Barataria-Terrebonne National Estuary, which Congress designated due to its "national significance." *See* 33 U.S.C. § 1330; AR000105, AR000148, AR000151. Direct and indirect harms to these wetlands—special aquatic areas, 40 C.F.R. § 230.41—are thus significant and merit an EIS. *See e.g., Miss. ex rel. Moore v. Marsh,* 710 F. Supp. 1488, 1504 (S.D. Miss. 1989) (holding that Corps' action reducing wetlands would have a significant impact); *Helena Hunter & Anglers v. Tidwell*, 841 F. Supp. 2d 1129, 1135–36 (D. Mont. 2009) (agency failed to properly consider unique geography significance factor for impacts to 4.2 acres of wetlands). According to the Corps' guidelines, "the degradation or destruction of special aquatic sites, such as filling operations in wetlands, is considered to be among the most severe environmental impacts." 40 C.F.R. § 230.1(d). Moreover, the pipelines and utilities built to serve the Plastics Complex will destroy an additional 567 acres of wetlands. AR006334. The Corps should have analyzed these wetlands impacts in an EIS.

Also, the project's potential impacts to at least two historic cemeteries of enslaved people should have triggered the preparation of an EIS. *See supra* at 18 and *infra* at 31–38. The construction of a petrochemical complex atop and aside these cemeteries may sever a delicate link between the impacted African American community and its ancestors.[3] Potential harm to slave cemeteries is significant; indeed, the Plastics Complex is a massive project, and even "the

[3] Louisiana law aims to protect these interests by providing that "once human remains have been interred in a piece of property, that property is forever dedicated as a cemetery." Ryan M. Seidemann, *Requiescat in Place: The Cemetery Dedication and Its Implications for Land Use in Louisiana and Beyond*, 42 Wm. & Mary Envtl. L. & Pol'y Rev. 895, 906–7 (2018).

smallest of endeavors can have enormous consequences." *Pye v. United States*, 269 F.3d 459, 469 (4th Cir. 2001). The Plastics Complex certainly *may* have a significant impact on these unique historic resources thus requiring an EIS. *NPCA*, 916 F.3d at 1087–88 (citation omitted).

4. *The Action's Potential Impacts to Historic Properties Are Highly Controversial*

The action's effects on historic resources are highly controversial under NEPA due to a "substantial dispute [that] exists as to the size, nature, or *effect* of th[is] major federal action." *NPCA*, 916 F.3d at 1083 (citation omitted). Here, the controversy involves the Corps' failure to accurately and independently evaluate the project's impacts on at least two cemeteries. The controversy was brought to its attention during the permitting process, AR000165, AR001211, AR004673, AR005382, and the failure of the Corps to resolve the controversy continued to be raised by an expert organization after the agency issued Formosa Plastics' permit. Dkt. 27-2 (Ex. E) (Coastal Environments, Inc. (CEI) Report). This provides "something more" than public opposition and supports a finding of controversy. *NPCA*, 916 F.3d at 1083 (citations omitted). Courts have found the controversy test is met if evidence reveals flaws in an agency's methods or data. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, No. 16-1534, 2020 WL 3634426, at *3–5 (D.D.C. July 6, 2020) [hereinafter, "*Standing Rock 2020*"]; *Standing Rock 2017*, 255 F. Supp. 3d at 128. The "something more" may be presented by "private organizations." *Standing Rock 2020*, 2020 WL 3634426, at *4–5; *Humane Soc'y of the U.S. v. U.S. Dep't of Commerce*, 432 F. Supp. 2d 4, 19 (D.D.C. 2006) (distinguishing Humane Society's comments from the type of "heckling" rejected under the controversy factor).

In *Standing Rock 2020*, the court found the controversy factor was met because "organizations with subject-matter expertise" raised "concrete objections to the Corps' analytical process and findings," *Standing Rock 2020*, 2020 WL 3634426, at *4–6 (citation omitted), even

though the objections "'post-dated' the Corps' revision efforts." *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*., 440 F. Supp.3d 1, 26 (D.D.C. 2020) (citation omitted). The record here shows CEI alerted agencies that Formosa Plastics' archeological reports missed and mis-located cemeteries, yet the Corps never probed the errors. AR000165–166, AR001211, AR004673, AR005382. Crucially, the CEI Report reveals that the Corps never resolved the controversy. As in *Standing Rock 2020*, "[t]he question is not whether the Corps *attempted* to resolve the controversy, but whether it *succeeded*." 2020 WL 3634426, at *3 (emphases added) (quoting *NPCA*, 916 F.3d at 1085–86). Here, the Corps failed to make a convincing case that it adequately considered or resolved the controversy about the effects of its action on burial sites that CEI brought to its attention. "Congress created the EIS process to provide robust information in situations precisely like this one, where, following an environmental assessment, the scope of a project's impacts remains both uncertain and controversial." *NPCA*, 916 F.3d at 1087–88 (citation omitted).

5. *The Cumulative Effects of the Action Are Significant*

As described *supra* at 20–21, the Plastics Complex is only one among many industrial facilities threatening this African American community. The Corps must prepare an EIS that analyzes the impacts of the Plastics Complex when combined with existing and proposed projects. "Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment." 40 C.F.R. § 1508.27(b)(7). Even if air and water pollution or wetlands and historic property destruction from the Plastics Facility were minor, which they are not, the combined impacts from past, present, and reasonably foreseeable projects are significant and must be examined. *See Am. Rivers*, 895 F.3d at 55 (agency could not ignore "critical parts of the equation" that contributed to a "heavily damaged" ecosystem). Here, as in *NPCA*, the Corps

"failed to make a 'convincing case' that an EIS is unnecessary." 916 F.3d at 1087–88 (citation omitted).

III. The Corps Violated the National Historic Preservation Act

Formosa Plastics' Complex will cover 1,500 acres, AR006903, and threatens historic sites the Corps never properly evaluated—including unmarked cemeteries experts believe contain the remains of enslaved people. AR000107, AR000386. Like NEPA, the NHPA is a "powerful legal mechanism" that "cannot casually be set aside." *Slockish v. U.S. Fed. Highway Admin.*, 664 F. Supp. 2d 1192, 1208 (D. Or. 2009). But that is exactly what the Corps did here: it sidestepped its NHPA duties to identify, evaluate, and avoid harmful impacts to historic resources and issued an unfounded "no effect" determination. Critically, and perhaps most glaringly, the Corps failed to identify the location of—much less evaluate impacts to—the Acadia Cemetery, which is located where Formosa Plastics intends to build. AR005353. The Corps' repeated oversight, mis-plotting, and incomplete surveying of historic sites constitutes significant procedural errors and omissions. The Corps' failures deprived Plaintiffs and these historic resources of the procedural protections the NHPA affords—procedures Congress established to ensure well-informed agency decisionmaking.

A. The NHPA Requires the Corps to "Stop, Look, and Listen"

In enacting the NHPA, Congress expressly "acknowledged our debt to the past." *Maher v. New Orleans*, 516 F.2d 1060, 1060–1061 (5th Cir. 1975). Section 106 requires federal agencies to "stop, look, and listen," *Mont. Wilderness Ass'n v. Fry*, 310 F. Supp. 2d 1127, 1150 (D. Mont. 2004), and "take into account the effect of [the project] on any historic property." 54 U.S.C. § 306108. The NHPA is designed to protect cemeteries and burial places associated with historic events. 36 C.F.R. § 60.4.

The NHPA requires federal decisionmakers to thoroughly investigate potential impacts on historic properties prior to taking final action. The Section 106 process requires agencies to define an area of potential effects, carry out appropriate identification efforts, disclose historic properties within the area, evaluate the potential adverse effects of the federal undertaking to the historic properties, and seek ways to avoid, resolve, minimize, or mitigate any adverse effects before granting permits for a project. 36 C.F.R. §§ 800.4–800.6.

B. The Corps Did Not Properly Define the "Area of Potential Effects"

As an initial matter, the Corps did not properly define the "area of potential effects" where direct or indirect impacts to historic resources may occur. 36 C.F.R. § 800.4; *see also id.* § 800.16(d). As discussed *supra* at 22–24, the Corps omitted several portions of this project from its analysis, including transmission lines and pipelines that will be built solely for the Plastics Complex, affecting miles of land and more than 500 acres of wetlands. AR002248–249, AR004171–172, AR006330, AR006334. The Corps failed to include these routes in the area of potential effects and thus failed to identify historic resources within them.

Furthermore, the Corps erroneously determined the Buena Vista Cemetery is outside the area of potential effects, AR000999, because "the cemetery will be fenced outside of the facility." AR000110. To begin, Formosa Plastics first overlooked and then fenced an inaccurate location for the cemetery, AR005382, AR000340, which the Corps never investigated or explained in its NHPA determination. *See* AR000999. Nor did the Corps explain how fencing protects the cemetery from adverse effects of the Plastics Complex. *See* AR000165. Under NHPA regulations, adverse effects include "[r]emoval of the property from its historic location," 36 C.F.R. § 800.5(a)(2)(iii), which Formosa Plastics states may occur, AR001120, and they include the "[i]ntroduction of visual, atmospheric or audible elements that diminish the integrity of the property's significant historic features." 36 C.F.R. § 800.5(a)(2)(v); *see also Pye*, 269 F.3d

at 469 (in discussing impacts to an African American cemetery, the court noted, "[e]ven if no backhoes will touch either historic area, damage to historic areas can occur in less direct ways. . . . [T]he smallest of endeavors can have enormous consequences if taken improvidently"). Consequently, the Corps violated the NHPA when it failed to include the Buena Vista Cemetery and the ancillary ground-disturbing infrastructure in its area of potential effects.

C. The Corps' "Identification Efforts" Violate the NHPA's Procedural Mandates

The Corps failed to make a "reasonable and good faith effort" to identify historically important cemeteries, 36 C.F.R. § 800.4(b)(1), even after presented with evidence of their existence. Under the NHPA, the agency must carry out appropriate identification efforts, which may include "background research, consultation, oral history interviews, sample field investigation, and field survey." *Id.* The Corps' efforts suffer from three flaws: (1) indiscriminate reliance on Formosa Plastics' error-filled reports; (2) no independent verification or research on historic resources; and (3) a truncated NHPA process that precluded public involvement.

First, the record demonstrates that the Corps rubber-stamped Formosa Plastics' conclusions that historic sites will not be impacted and held an impermissibly passive role. *See, e.g.*, AR000164–165 (Memorandum of Record demonstrates the Corps had almost no direct hand in the NHPA determination), AR001318 (December 18, 2018 internal Corps communication stating "[b]ased on the *provided information*, we will be making a determination of 'no effect to historic properties'"). Judicial review must be more than a "rubber stamp" process in which courts are forced to accept an agency's bare assertions and lack of exercise of its expertise to support its decisions. *See Nat. Res. Def. Council, Inc. v. Daley*, 209 F.3d 747, 755 (D.C. Cir. 2000). While the Corps may use contractors—including those of applicants—to prepare "information, analyses[,] and recommendations," it "remains legally responsible for all required findings and determinations." 36 C.F.R. § 800.2(a)(3). Similarly, consultation with and

concurrence from the State Historic Preservation Officer (SHPO) does not absolve the Corps of its NHPA duties. *See So. Utah Wilderness All. v. Burke*, 981 F. Supp. 2d 1099, 1109 (D. Utah 2013) (noting that consultation with the SHPO is but one requirement, and "[t]here is nothing in the NHPA or Section 106 that excuses the [agency's] failure to comply with the other procedures based on a concurrence from the SHPO.").

Here, the Corps never responded, verified, or investigated the archeological surveys even after learning about the discovery of and subsequent errors Formosa Plastics made locating two cemeteries. *See* AR004673–678, AR005353, AR005382. Before the Corps issued its NHPA determination, the record demonstrates that Formosa Plastics' consultants at least twice overlooked two known historic cemeteries on site believed to contain the remains of enslaved people. AR000864–915, AR005915–996, AR006120–329. Even after a "source" notified the SHPO of Formosa Plastics' oversight of two historic cemeteries—one of which "would cause significant issues for the facility plan," AR005353—the Corps never pursued the truth of what may lie beneath the site.

Second, the Corps failed to "[r]eview existing information on historic properties within the area of potential effects, including any data concerning possible historic properties not yet identified," 36 C.F.R. § 800.4(a)(2), and to "[s]eek information, as appropriate, from . . . other individuals and organizations likely to have knowledge of, or concerns with, historic properties in the area." *Id.* § 800.4(a)(3). There is no record evidence that the Corps conducted any "oral history interviews, sample field investigations, . . . field survey," or anything resembling adequate identification efforts. *Id.* § 800.4(b)(1). This remained true even after the Corps learned of historic cemeteries on site. The NHPA does not tolerate this level of passivity. *See, e.g.*, *Comanche Nation v. United States,* No. CIV-08-849-D, 2008 WL 4426621, at *19 (W.D. Okla.

Sept. 23, 2008) (defendants failed to "stop, look and listen" and instead "merely paused, glanced, and turned a deaf ear to warnings of adverse impact." (citation omitted)).

The Corps did not even seek public input on the cemeteries. The Corps' August 27, 2018 joint public notice announcing a 30-day comment period for the Plastics Complex did not mention the cemeteries' recent discovery, AR004679–680, despite the requirement of the agency's own regulations that its notice include "[a] statement of the district engineer's *current* knowledge on historic properties." 33 C.F.R. § 325.3(a)(10) (emphasis added). The supplemental joint public notice did not remedy this oversight. AR002265. No agency representative at the December 6, 2018 hearing on the matter in Vacherie, Louisiana, mentioned the cemeteries' discovery. AR001987–2125.

The Corps issued an unsupported finding of "No Historic Properties Affected" on January 28, 2019. AR000165–166, AR000997–1000. The determination includes a section titled "Identification and Evaluation" and a statement that staff conducted "[b]ackground research and literature review . . . in November and December of 2018," AR000997, but the record is void of evidence of this research or any identification efforts by the Corps. Rather, the record demonstrates the only basis for the Corps' determination was information Formosa Plastics provided, with sign-off from the SHPO, despite learning once already that this information was incorrect and incomplete. AR000165, AR004673–678, AR005353, AR005382.

Third, the Corps' inadequate efforts frustrated public review that may have illuminated errors and omissions about historic resources. While "[t]he views of the public are essential to informed Federal decisionmaking in the section 106 process," 36 C.F.R. § 800.2(d)(1), the Corps evaded public involvement requirements by issuing a "no effect" finding. *Id*. § 800.4(d)(1). Had the Corps concluded that historic properties "may be affected," *id*. § 800.4(d)(2), the NHPA

would have required the Corps to "provide the public with information about an undertaking and its effects on historic properties and seek public comment and input." *Id.* § 800.2(d)(2); *see also id.* § 800.6(a)(4) (agency "shall provide an opportunity for members of the public to express their views on resolving adverse effects of the undertaking").

Contrary to its "no effect" finding, record evidence demonstrates the existence of "historic properties which *may be* affected by the undertaking." *Id*. § 800.4(d)(2) (emphasis added). After making its "no effect" finding, the Corps at some point learned that Formosa Plastics' consultants were still looking in the wrong places for the cemeteries. AR000165 (the "cemeteries may be located in slightly different locations"). Yet the Corps neither presented this information to the public nor contacted the "source" that certainly was "likely to have knowledge of, or concerns with, historic properties in the area." *Id*. § 800.4(a)(3).

The Corps' failures were not remedied by Formosa Plastics' final report dated five months *after* the Corps' NHPA determination. That report indicates Formosa Plastics' consultants (1) originally mis-plotted the Buena Vista Cemetery and (2) again failed to find the Acadia Cemetery. AR000324–387. The Corps never examined why Formosa Plastics proposed to survey additional areas to locate the Acadia Cemetery—but then, without explanation, decided this was "unnecessary." AR000356 ("More [survey trenches] were originally proposed but it was determined additional trench excavation was unnecessary (Figures 5.2 and 5.3)"). The Corps irresponsibly accepted that Formosa Plastics did not find any human remains and the company's claims that the Acadia Cemetery was likely entirely destroyed. *See* AR000165–166.

The CEI Report illuminates the problems with this conclusion. Dkt. 27-2 (Ex. E). It provides important background information about whether the Corps properly considered the relevant factor of the Acadia Cemetery's correct location in its decision to grant Formosa

Plastics' permit. The Report also explains how Formosa Plastics' consultants failed to identify and disclose two cemeteries on the project site then proceeded to survey the wrong location for the Acadia Cemetery. Dkt. 27-2 at 46–56 (Ex. E). Further, the CEI Report highlights that Formosa Plastics' consultants failed to explain how they chose survey locations for the Acadia Cemetery and explains why further investigation is needed to ensure against adverse impacts. The CEI Report identifies procedural errors the Corps made in relying wholesale on Formosa Plastics' reports for its "no effect" conclusion. And the Corps did so without any transparency or opportunity for public input on this relevant factor. Truncating the NHPA process without public involvement may have contributed to the Corps' failure to consider the accuracy of the Acadia Cemetery's location and evaluation. Even with this information now in hand, the Corps has not re-opened the NHPA consultation process or suspended Formosa Plastics' permit pursuant to 33 C.F.R. § 325.7 (allowing the Corps to reevaluate and "modify, suspend, or revoke a permit"); AR000109–110 (citing same).

In summary, the Corps' willingness to adopt the applicant's flawed archeological reports without any independent verification falls short of the NHPA and APA's mandates. Courts have rebuked an agency's identification efforts where, despite evidence of possible historic resources, the area has not been fully surveyed. For example, the Tenth Circuit held an agency did not "reasonably pursue the information necessary to evaluate" whether a canyon contained cultural resources when information indicated "a sufficient likelihood" of historic resources to "warrant further investigation." *Pueblo of Sandia v. United States*, 50 F.3d 856, 860–62 (10th Cir. 1995). The same is true here. The evidence here shows historic resources on the property—which were mis-plotted and improperly surveyed—yet the Corps did nothing.

IV. The Corps Failed to Comply with the Clean Water Act and Rivers and Harbors Act

The Corps' permit to Formosa Plastics also violated key provisions of the CWA and RHA. Congress enacted the CWA to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To accomplish this goal, the CWA generally prohibits the discharge of any pollutant—including fill material—into waters of the United States unless authorized by a permit. *Id*. §§ 1311(a); 1344(a)–(e). The RHA also makes it unlawful "to excavate or fill" any navigable water without a Corps permit. *Id.* § 403. The Corps sidestepped key requirements designed to ensure environmental protections when authorizing wetlands fill. First, the Corps failed to select the least environmentally damaging practicable alternative. Second, its cursory public interest review brushed aside the project's harms and arbitrarily and capriciously concluded the project would benefit the public.

A. The Corps Failed to Demonstrate that the Project Will Have the Least Damaging Environmental Impact

The CWA prohibits the Corps from issuing a permit "if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem." 40 C.F.R. § 230.10(a). The Corps is under no obligation to accommodate all components of a proposed project. *Shoreline Assocs. v. Marsh*, 555 F. Supp. 169, 179 (D. Md. 1983), *aff'd*, 725 F.2d 677 (4th Cir. 1984).

Here, the Corps failed to ensure it selected the least environmentally damaging practicable alternative. It is undisputed that the project is *not* "water dependent." AR000111; Dkt. 19 at ¶ 118 (Defs' Answer). Therefore the Court must *presume* that less environmentally damaging alternatives are available "unless clearly demonstrated otherwise." 40 C.F.R. § 230.10(a)(3); *see Utahns v. Dep't of Transp*., 305 F.3d 1152, 1186-87 (10th Cir. 2002) ("The test is whether the alternative with less wetlands impact is 'impracticable,' and the burden is on

[the Applicant], with independent verification by the [Corps], to provide detailed, clear and convincing information *proving* impracticability").

The Corps did not demonstrate the absence of less environmentally damaging alternatives. Its selected alternative had the most wetlands (40 percent of the property) and most significant damage to wetlands (61.7 acres) of all alternatives considered, AR000106, AR000278 (alternatives 1 & 2 combined are the preferred alternative), yet the Corps eliminated all others as impracticable *before* ever comparing the potential harm to wetlands. Instead of providing clear and convincing information proving impracticability, and without any independent analysis, the Corps adopted Formosa Plastics' analysis and criteria that precluded otherwise practicable alternatives. This is unlawful. *Sierra Club v. Van Antwerp*, 709 F. Supp. 2d 1254, 1264–68 (S.D. Fla. 2009) (the Corps violated the CWA with an uncritical acceptance of applicant's alternatives report), *aff'd*, 362 Fed. Appx. 100 (11th Cir. 2010).

As one example, the Corps never considered permitting a smaller facility. Had the Corps done so, it could have considered other properties—with fewer wetlands and less environmental harm—that were eliminated primarily because of their size. AR000139–141. Notably, the Complex's construction is planned in two phases. Construction of Phase I alone would yield 64 percent of the total product Formosa Plastics plans to produce, AR006052 (Fig. 1), thus generally meeting project objectives of producing plastic for the global market. Yet the Corps failed to consider an alternative that would reduce the facility footprint by foregoing the Phase II expansion, which consists of a second ethane cracker and utility plant. AR004162, AR006052 (Fig. 1). Neither the Corps nor Formosa Plastics ever explained why Formosa Plastics must build one of the world's largest plastic plants for the project to be practicable, let alone provided clear and convincing information *proving* the impracticability of a smaller facility.

The Corps' failure to evaluate a smaller facility option is like the evaluation the Tenth Circuit found deficient in *Utahns*, 305 F.3d at 1188–89. There the court held that the Corps acted unlawfully when it eliminated practicable alternatives for a proposed freeway, such as a narrower median or right-of-way, because both met the basic project purpose even if they did not allow for all of the amenities or utilities desired by the applicant. *Id*. Here, the Corps never assessed a smaller option, silently acquiescing to Formosa Plastics' unsupported rejection of "smaller plant options . . . [because] the social and economic benefits created by a [f]acility of this size would not be realized." AR005418. The Corps and Formosa Plastics failed to prove that a smaller, less damaging facility is impracticable because of costs, technology, and logistics. *See Utahns*, 305 F.3d at 1166 (alternatives analysis inadequate with "no cost methodology" in the record).

The Corps also failed to consider alternatives to building the marine facility and docks that will destroy rare batture wetlands. The project is not water dependent, AR000111, and the record fails to show the impracticability of using existing roads and rail for transportation of equipment, supplies, and products. Thus, the Corps unreasonably eliminated alternatives that lacked an option to build docks. AR000137–144. The fact that Formosa Plastics would like to build a dock does not compel the Corps to include it in considering alternatives if the project is not water dependent. *See, e.g.*, *City Club of N.Y. v. U.S. Army Corps of Eng'rs*, 246 F. Supp. 3d 860, 872 (S.D.N.Y. 2017) (holding that the Corps' alternatives analysis was faulty because the basic purpose could be met without building a pier).

The Corps also arbitrarily accepted Formosa Plastics' elimination of sites in Ascension Parish, an area that is *not* predominately African American. The conclusory statement that "by this time, six sites located in Ascension Parish had been eliminated," AR000139, fails to demonstrate that alternatives were not practicable. Formosa Plastics eliminated promising sites in

Ascension Parish, claiming that the region would not attain air quality standards in the future, but Ascension Parish in fact kept its attainment status on April 30, 2018, long before the Corps' final decision. AR000139. Practicable alternatives must be analyzed, even if they only become available during the approval process. *All. to Save the Mattaponi v. U.S. Army Corps of Eng'rs*, 606 F. Supp. 2d 121, 129–30 (D.D.C. 2009). In *Mattaponi*, water needs changed and previously rejected alternatives became practicable during the pendency of the permit application. The court held the Corps failed to "explain fully, based on an analysis adequate to the task, why other alternatives are either impracticable or more damaging." *Id* at 130. Here, as in *Mattaponi*, the Corps failed to demonstrate that the Ascension Parish alternatives were unavailable.

B. The Corps' Public Interest Finding Is Arbitrary and Capricious

In conducting a public interest review under the CWA and RHA, the Corps must consider the cumulative effects on aesthetic, historic, environmental, wildlife, floodplain, water, and community welfare values. 33 U.S.C. § 403; 33 C.F.R. § 320.4(a)(1). It must also balance the harms against the benefits and deny the permit if it would be against "the public interest." 33 C.F.R. § 320.4(a)(1). The Corps' public interest determination is arbitrary and unlawful.

The Corps' public interest review consisted of a table with checkboxes indicating if the effects are "detrimental," "neutral," "negligible," or "beneficial." AR000152–158. This cursory review assigned a "neutral" or "negligible" value to nearly every public interest factor, falling well short of the careful, reasoned analysis the law requires. *See* 33 C.F.R. § 320.4(a)(1). The Corps also improperly tipped the scale by disregarding the project's harms.

First, the Corps failed to properly weigh Formosa Plastics' long history of environmental violations. *See Animal Legal Def. Fund v. Perdue*, 872 F.3d 602, 619–20 (D.C. Cir. 2017) (holding that an agency's licensing decision was arbitrary and capricious where the agency relied on a certification of compliance while ignoring the facility's history of non-compliance with

regulatory requirements). The Corps erroneously relied on Formosa Plastics' projected environmental compliance, dismissing concerns because the project will be "properly permitted with the LADEQ air and water permits." AR000154. The Corps acceded to Formosa Plastics' rationale that its history of violations did not reveal a bad track record, but rather showed the company cooperated with regulators, self-reported violations, and agreed to future compliance. This is belied by the evidence. *See* AR000119.

The Corps never even acknowledged Formosa Plastics was deemed a "serial offender" with "enormous" violations of environmental laws. *See San Antonio Waterkeeper*, 2019 WL 2716544, at *8–9. Before the Corps granted the permit, the federal court in that case held Formosa Plastics liable for violating the CWA for discharging billions of plastic pellets into waterways for years from its facility in Point Comfort, Texas. *Id.* The court detailed the severity of the violations stating, "[t]he evidence demonstrates that Formosa Plastics has been in violation of its Permit concerning the discharge of floating solids . . . and that the violations are enormous. . . . Formosa Plastics has also failed to report violations of the CWA to State and/or federal authorities." *Id.* at 25–26. EPA records also show that Formosa Plastics' other plastics plant in Baton Rouge, Louisiana, has been in violation of the Clean Air Act every quarter since 2009 and in violation of the Resource Conservation and Recovery Act every quarter since 2004. AR003021, AR0010037–038. The Corps' failure to properly consider Formosa Plastics' long track record of violating its permits and failing to report violations is arbitrary and undermines its findings. AR000154–156.

Second, the Corps impermissibly discounted all adverse effects and only looked at beneficial economic effects. The law does not allow an "unjustifiably greater weight" to be assigned to the benefits of a project. *Hough v. Marsh*, 557 F. Supp. 74, 86 (D. Mass. 1982)

(striking down public interest review that looked one-sidedly at economic benefits but ignored adverse impacts). The Corps unlawfully played down the environmental and health implications of the Plastics Complex. Public testimony and comments show that the Corps failed to consider important aspects of the problem and overly weighted the purported benefits.

For example, the Corps has not squared its negligible impact findings on aesthetic and historic values with the serious concerns that the project deepens environmental racism, threatens to desecrate the burial sites of enslaved persons, and mars the landscape—as described in the NEPA and NHPA sections above. The Corps claims that landscaping, with a "tree screen," will render the aesthetic impacts negligible, AR000153, but this ignores that the agricultural character of the land will change into a gargantuan industrial complex belching air and noise pollution into an African American community. When paying respects or engaging in quiet contemplation at the graves on the property, if ever allowed access, visitors will experience a backdrop of one of the world's largest petrochemical complexes—with smokestacks, chemical tanks, utility plants, foul smells, and pipelines. This entails nearly complete loss of aesthetic values, which will certainly "mar the beauty," "deny access to or visibility of the resource, or result in changes in odor, air quality or noise levels." 40 C.F.R. § 230.53.

Additionally, the adverse impact on historic values is *not* "neutral because it has been mitigated," AR000155, as the Corps failed to ensure adequate protection of the Acadia Cemetery. *See supra* at 31–38. There is no support for the Corps' conclusions that community welfare, historic, and aesthetic values tip the scales in favor of the public interest.

The Corps also downplayed the pollution from the Plastics Complex. In a sweeping sentence titled General Environmental Concerns, the Corps noted the Complex would result in:

> the addition of more disposable plastics to the environment, output of chemicals through the smoke stack, possible contaminants entering the Mississippi River,

> potential contaminants in the area drainage entering the river and lake systems nearby, potential impacts to fish and wildlife, evacuation hazards, impacts to wetlands, and chemical spill concerns.

AR000154. However, it determined that these concerns are "neutral because the issues have been mitigated," *id.*, even though the record reveals nothing that "mitigated" plastic, air, or water pollution—or related impacts on wildlife and public health. The Corps only required mitigation for direct wetland loss, AR000107, but this will not mitigate the pollution. For example, the Corps failed to consider the vast quantities of the Complex's air and water pollution. *See supra* at 12–16; AR0007493; *Mattaponi*, 606 F. Supp. 2d at 136 (the Corps unlawfully failed to consider the impacts of chronic exposure to water pollution). Plastic pollution is likewise unmitigated—both the direct effects of plastic pellet discharges and indirect plastic pollution from the annual production of 2.4 million tons of ethylene (an amount that could make about a trillion plastic water bottles)—much of which will inevitably end up in landfills and oceans.[4]

Finally, the Corps' neutral finding on the project's harm to wildlife is arbitrary. For example, the Corps found that fish and wildlife values are neutral because the animals "will relocate," AR000155, and claimed the project would have "no effect" on endangered species, AR000146, AR006012; but as described above, this runs counter to evidence in the record. *See supra* at 19–20. In addition, the project site is important migratory bird and bald eagle habitat. The forested area and borrow pits that Formosa Plastics will fill serve as a migratory bird flyway and feeding grounds, and bald eagles have been sighted and may nest in the forested wetlands.

[4] The Corps' token statement "[r]ecycling programs in many areas help to mitigate the disposable plastic issues," AR000154, runs contrary to the fact that plastic overwhelms waste management systems and only 9 percent of plastic is recycled nationally. AR003033, AR007363, AR007885, AR007726.

AR006432–433. The Corps' brief statement that impacts to wildlife will be mitigated is insufficient to support the Corps' public interest finding. AR000155.

The Corps dismissed the many detrimental effects of the project raised in comments and supported by evidence in the record when conducting its public interest review. *See, e.g., Wyo. Outdoor Council v. U.S. Army Corps of Eng'rs*, 351 F. Supp. 2d 1232, 1256 (D. Wyo. 2005) (public interest review impermissibly ignored cumulative impacts). The agency's public interest determination was arbitrary and capricious because the Corps failed to consider important aspects of the problem, failed to adequately explain its decisions, and offered explanations for its decision that run counter to the evidence before the agency. *State Farm*, 463 U.S. at 43.

CONCLUSION

This case is important not only for the residents of St. James, but also for the many low-income and minority communities that bear the unjust burden of multinational fossil fuel conglomerates that come in to communities and transform the land, pollute the air and water, and tell them what is in their interest. Here, the Corps was not the procedural backstop Congress intended when it enacted NEPA, the NHPA, the CWA, and RHA. Its failure to provide a meaningful review of the many impacts of its permit authorization has robbed plaintiffs of their natural and cultural heritage, all to meet "the public's demand for plastic around the world," AR000111, and deepen the global plastic pollution crisis. For the reasons described in this brief, the Court should grant Plaintiffs' motion and vacate the Corps' decision to issue the Plastics Complex's permit. 5 U.S.C. § 706(2); *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1901 (2020) (agency decision violated the APA and "must be vacated"); *Standing Rock 2020*, 2020 WL 3634426, at *3 ("The ordinary practice is to vacate unlawful agency action" (citation omitted)).

Dated: October 1, 2020

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