UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

INDIGENOUS PEOPLES OF THE COASTAL BEND; KARANKAWA KADLA TRIBE OF THE TEXAS GULF COAST; and INGLESIDE ON THE BAY COASTAL WATCH ASSOCIATION,	§	
Plaintiffs,	§	
v.	§	**CIVIL ACTION NO. 2:21-cv-00161**
UNITED STATES ARMY CORPS OF ENGINEERS; Lieutenant General Scott A. Spellmon in his official capacity; Brigadier General Christopher G. Beck in his official capacity; and Colonel Timothy R. Vail in his official capacity,	§	
Defendants.	§	

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

The plaintiffs in this matter are organizations whose members who have deep and abiding spiritual, economic and geographical connections to Corpus Christi Bay, its natural resources, and the immediate area near Moda Midstream, LLC's Ingleside oil export terminal ("the Moda terminal").

Congress intended the National Environmental Policy and the U.S. Army Corps of Engineers' (hereafter "the Corps") regulations for issuing permits under Section 404 of the Clean Water Act to protect the public by requiring federal agencies to take a "hard look" at the impact of their actions on the human environment before decisions are made.

As the complaint states, in this case the public was deprived of these protections. [Doc. 1] The Corps issued a dredge and fill permit, Exhibit 1, allowing a substantial expansion of the Moda terminal without considering or informing the public of the full direct, indirect and cumulative impacts of the expansion. This terminal is the largest single export terminal in the United States, and already causes damage to the plaintiffs and their members. The expansion and dredging associated with it will exacerbate that damage.

A preliminary injunction to preserve the status quo is necessary to protect the Plaintiffs and the public until the case can be heard on the merits. The Plaintiffs request that the Court enjoin the Corps from approving any dredging or construction activity until the merits of the case can be decided.

STATEMENT OF FACTS

A. Corpus Christi Bay is vital to Texas indigenous culture, fisheries and the state and local economy.

The Coastal Bend bay system contains three major estuaries — Aransas, Corpus Christi/Nueces, and Upper Laguna Madre—which together were designated by EPA as an

"Estuary of National Significance." According to the Corpus Christi Bay National Estuary Program, Corpus Christi/Redfish/Nueces Bays contain nearly 9 percent of all Texas seagrass beds. Texas recognizes seagrass beds as a critical natural resource, and has an extensive state effort to protect them. Exhibit 2, Declaration of Dr. Kirk Cammarata, ¶ 5.

Seagrass beds rank with coral reefs and rain forests as some of the most productive habitats on the planet. They provide critical nursery and other habitat for important recreational and commercial fish species, storm protection and coastline stabilization, and provide local economies an estimated value of $19,000 or more per acre annually. Exhibit 2, ¶¶ 2,5.

Seagrass health is directly tied to the quality of light in an estuary. Lower light penetration results in less photosynthesis and an overall decline in seagrass health and density. Light penetration is directly tied to activities like dredging or operation of large commercial vessels that suspend sediment and increase turbidity. In short, seagrasses can't take muddy water. Exhibit 2, ¶ 4.

These seagrasses are part of an ecosystem tied to the heritage of native populations like the ancestors of some of the plaintiffs in this matter. The Karankawa are an indigenous people who inhabited a large area from Galveston Bay to Baffin Bay, south of Corpus Christi. Though popular sources have incorrectly described the Karankawa as extinct, Karankawa descendants are returning to their homeland and revitalizing the culture through connections with their ancestors.

Findings from one of the largest archaeological discoveries on the Texas coast—McGloin's Bluff on the Corpus Christi Bay at the Moda terminal—suggest the site of the Moda terminal was so productive, it fed about 500 inhabitants. Thousands of artifacts have been found in this site, which was historically the site for sacred rituals. Water is considered both the

beginning and the end of life for these indigenous peoples. Exhibit 3, Declaration of Love Sanchez, ¶¶ 6-7; Exhibit 4, Declaration of Absolem Yetzireh, ¶¶ 7-8, 19.

Plaintiffs believe the Court may also properly take judicial notice that Corpus Christi Bay today is a vital commercial and recreational fishing resource, and helps support a recreational economy that is vital both to the citizens of the area and the state of Texas as a whole.

B. The Moda terminal accounts for almost one fourth of U.S. oil exports, and has quadrupled its capacity in recent years.

The MODA Ingleside Energy Center is the single largest oil export terminal by volume on the Gulf Coast, shipping to destinations including China and Europe. In the past three years Moda has increased storage capacity at the terminal from 2.1 million barrels of oil to 11.6. An additional 3.5 million barrels of storage is under construction, and the company has permits for another 5.5 million barrels. Exhibit 5. An industry publication indicates that from January 2020 to February 2021 the Moda Terminal exported an average of about 780,000 barrels per day, representing about 24% of total U.S. crude oil exports. Exhibit 6.

C. The Moda terminal already impacts water quality and the neighboring community, and the expansion would substantially increase the size of the tanker and barge facilities.

The terminal presently has three berths for oil tankers. Exhibit 7, p. 12 (page references to exhibits are to the pdf page number including the cover sheet). These berths currently service three kinds of oil tankers that can accommodate 750,000, 1 million, and 2.2 million barrels of oil respectively: Aframax, Suezmax, and Very Large Crude Carriers (VLCCs). The terminal also has two turning basins, barge docking facilities and the onshore storage facilities described above.

The barges and tankers that use the Moda terminal maneuver with the aid of multiple heavy tugs. As shown below, the massive prop wash generated by these tugs and the tankers

themselves causes extreme turbidity.

Tugs jockey the French-flagged, Very Large Crude Carrier *Anne* at the Moda Ingleside Energy Center at the mouth of the Corpus Christi Ship Channel. Private-equity-backed Moda Midstream LLC owns and operates the terminal, which can load such outsize tankers and has 2.1 million barrels of storage capacity, with an additional 10 million under construction. The export terminal is already one of the largest in the U.S. (Source: EnCap Flatrock Midstream)

Image at https://www.hartenergy.com/exclusives/private-equitys-growing-role-180245, last visited August 11, 2021. *See also* Exhibit 2, ¶ 9.

Neighbors from Ingleside on the Bay have documented and informed the Corps of water, noise and light pollution from the existing Moda terminal. Exhibit 8, Declaration of Patrick Nye, ¶ 11; infra p. 19-20.

As described in the permit application, Moda seeks to expand the terminal in six ways:

1. Dredge 3,900,000 cubic yards from 43 acres of bay bottom to increase the depth of a turning basin. The dredging will directly destroy approximately 9 acres of seagrass beds. This dredging is specifically described in the permit application as allowing *additional* Suezmax tankers and barges at the terminal.

2. Construct a new 10,000 square foot dock supporting two berths – 8 and 9 - for

Suezmax tankers.

3. Construct a sheet pile causeway, pile supported approach, and 21 dolphins to support Berths 8 and 9.

4. Construct a new Berth 7 dock barging area in the West Basin. Berths 7A, B, and C would allow up to three double barges to dock side by side.

5. Construct a barge loading facility in the uplands adjacent to the three new dock berths.

6. Construct an additional 491 feet of bulkhead, a pile supported barge dock and 38 barge dolphins.[1] Exhibit 7, pp. 7-8.

A schematic of the current and proposed configuration of the Moda terminal facilities are shown below:

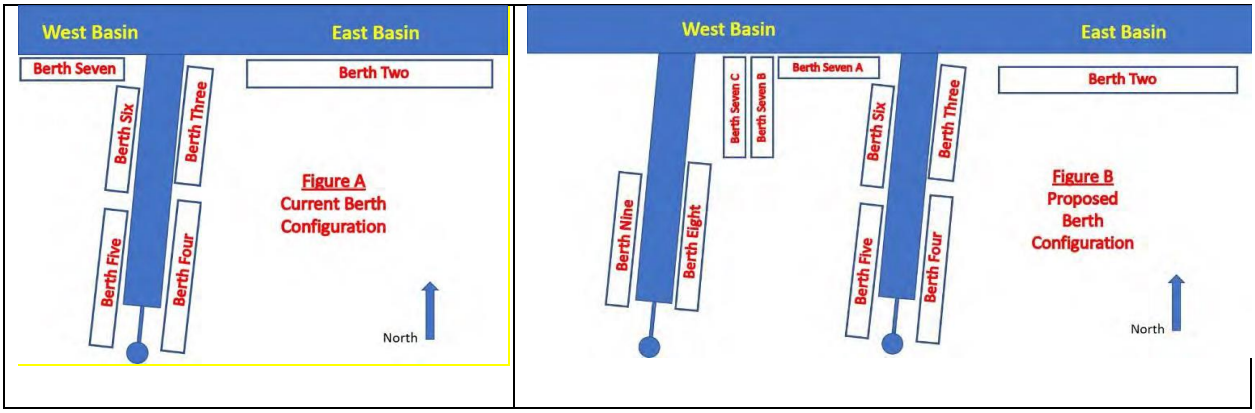

Exhibit 1, pp 31-32.

The expansion will increase the capacity of the MODA loading facilities with five additional berths, including two for oil tankers. Although the permit application contains no information about the throughput of crude oil or the number of tankers and barges serviced, the expansion will apparently increase the terminal's capacity to export oil substantially.

D. <u>The Corps stated that the Moda expansion is to accommodate larger vessels to transport liquefied natural gas, even though Moda is an oil terminal.</u>

[1] A dolphin is an isolated structure for berthing and mooring of vessels.

Moda's application describes the purpose and need for the expansion project in extremely general terms:

> The purpose of and the need for the proposed project is to provide the maritime infrastructure necessary to accommodate the increasing demand by existing and committed, future customers at the Moda Ingleside Oil Terminal in a logistically safe and efficient manner.

Exhibit 7, p. 8.

In its Environmental Assessment and Statement of Findings (hereafter the "Moda Expansion EA"), by contrast, the Corps stated the basic and overall project purposes as "[t]o dredge additional bay area and construct mooring structures to provide adequate depth and area for the berthing *of deeper-draft ships that will be used to transport liquefied natural gas*" and "to provide adequate water depth and area for *the deeper-draft vessels that will be used to transport liquefied natural gas.*" Exhibit 9 p. 7 (emphasis supplied). The February 6, 2020 public notice for the permit stated that "[t]he purpose and need of the project is to provide the maritime infrastructure necessary to accommodate the increasing business and larger ships using the Moda Ingleside Oil Terminal." Exhibit 10, p. 3.

The Moda terminal does not appear to provide any facilities for liquefied natural gas exports. The reference to liquefied natural gas may have been inattention, but it is indicative of the Corps' failure to take a "hard look" at Moda's proposal. In other parts of the Moda Expansion EA the Corps also seems to indicate that Suezmax tankers cannot access the terminal without the proposed dredging. *E.g*. Exhibit 9 p. 46 ("The applicant has proposed to conduct dredging in open-water bay area for only the minimum amount needed to provide access for Suezmax vessels to the applicant's facility."). It is unclear whether the Corps was aware that Suezmax and VLCC's currently use the Moda terminal.

E. The Moda Expansion EA contains no information about the number of tankers, types of tankers, projected quantity of oil exports, impacts to water quality from operations, or other key aspects of the expansion.

The Moda Expansion EA describes the volume of dredging, piers and docking structures, but contains no information about the volume of oil expected to be loaded and transported, the loading facilities for the tankers, or even the number and types of barges, tankers or other craft that are expected to use the expanded terminal facilities on a daily, annual or other basis. Without this information, it is impossible to evaluate direct and indirect impacts to the environment. The EA also provides no information to allow evaluation of Moda's assertions about the need for the expansion.

F. The Environmental Protection Agency, U.S. Fish and Wildlife Service and others warned that effects on seagrass beds, a special aquatic site, were not adequately evaluated.

The U.S. Environmental Protection Agency ("EPA") and the U.S. Fish and Wildlife Service ("FWS") both initially stated that the permit should be denied as presented. These expert resource agencies found the indirect and secondary impacts on seagrasses were not adequately described, and the mitigation proposed for directly destroying seagrasses was not adequate. Exhibit 9, p. 19, Exhibit 11, EPA Comments, Exhibit 12, FWS Comments. Other resource agencies as well as Plaintiff Ingleside on the Bay Coastal Watch raised similar concerns. *See infra* pp. 16-17. The Corps did not address this issue, but instead referred it to MODA's outside contractor for a response. After receiving the contractor's response, the EPA again stated that it did not appear that Moda had evaluated potential indirect/secondary impacts to adjacent seagrasses. Exhibit 13. The FWS disputed the Moda contractor's statement that there were no long term effects on seagrasses. Exhibit 14.

STANDARD OF REVIEW

Challenges to agency decisions under the National Environmental Policy Act and the

Clean Water Act are reviewed under the Administrative Procedure Act, 5 U.S.C. § 706, to determine whether the decision was "arbitrary, capricious, or contrary to law." Under this standard, a reviewing court does not substitute its judgment for that of the agency, but must "studiously review the record to ensure that the agency has arrived at a reasoned judgment based on a consideration and application of the relevant factors." *Sabine River Auth.v. U.S. Dep't of Interior*, 951 F.2d 669, 678 (5th Cir. 1992); *O'Reilly v. U.S. Army Corps of Engineers*, 477 F.3d 225, 230 (5th Cir. 2007) ("[T]his restriction does not turn judicial review into a rubber stamp. In conducting our NEPA inquiry, we must make a searching and careful inquiry into the facts and review whether the decision ... was based on consideration of the relevant factors and whether there has been a clear error of judgment."). An agency must "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicles Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co*, 463 U.S. 29, 43 (1983).

When an agency does not use any method and makes only generic statements, the Court cannot "defer to a void." *Or. Natural Desert Ass'n v. Bureau of Land Mgmt.*, 531 F.3d 1114, 1142 (9th Cir.2008).

APA cases are generally decided on the record before the agency. However, as explained in the Motion for Consideration of Extra-Record Evidence filed contemporaneously with this motion, in National Environmental Policy Act cases the Fifth Circuit permits appropriate extra-record evidence like that submitted with this motion.

APPLICABLE LAW

A. NEPA requires a full environmental impact statement for federally permitted projects with "significant" effects.

The Complaint in this matter states claims under both the National Environmental Policy Act and the Clean Water Act. Doc. 1, *passim.* NEPA, 42 U.S.C. §§ 4321–4370, is our "basic

national charter for protection of the environment." 40 C.F.R. § 1500.1(a). NEPA requires that federal agencies "take a 'hard look' at the environmental consequences before taking action." *Baltimore Gas and Elec. Co. v. Natural Resources Defense Council*, 462 U.S. 87, 97 (1983). NEPA's "look before you leap" principle ensures that an agency, "in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts." *Robertson v. Methow Valley Citizens Counc.*, 490 U.S. 332, 349 (1989). Equally important, NEPA's disclosure requirements foster meaningful public participation in the decision making process. *Id.*

If an agency action has adverse effects that may be significant they must be analyzed in an Environmental Impact Statement ("EIS.") *E.g., State of Louisiana v. Lee*, 758 F.2d 1081, 1086 (5th Cir. 1985) (agency action that "may cause a significant degradation of some human environmental factor" requires an EIS.). An agency may prepare a "concise public document" called an Environmental Assessment to determine if impacts are significant. 40 C.F.R. § 1508.9. If the agency properly determines that impacts are not significant and an EIS is not necessary, a Finding of No Significant Impact ("FONSI") must "briefly present...why an action . . . will not have a significant effect on the human environment." 40 C.F.R. § 1508.13

NEPA regulations define "significance" to "require considerations of both context and intensity." 40 C.F.R. § 1508.27. This regulation sets out ten factors to consider in determining intensity and significance. "Implicating any one of the factors may be sufficient to require development of an EIS." *National Parks Conservation Association v. Semonite*, 916 F.3d 1075, 1077 (D.C. Cir. 2019). Many of these factors are present in this case, as explained in detail below.

NEPA's implementing regulations and the case law further implement the statute's

protective role, requiring agencies like the Corps to:

(1) Consider direct *and indirect* effects of their decisions "which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R. § 1508.8(b).

(2) Consider the direct, indirect, and cumulative impacts of "past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." 40 C.F.R. § 1508.7.

(3) Insure the scientific integrity of discussions and analyses, and use reliable data sources. 40 C.F.R. § 1500.1. Conclusory statements without data are insufficient. *E.g., O'Reilly v. U.S. Army Corps of Engineers*, 477 F.3d 225, 235 (5th Cir. 2007).

The Corps also has its own implementing regulations for NEPA, which cite several types of actions that normally require an EIS, including "proposed changes in projects which increase size substantially." 33 C.F.R. § 230.6.

B. Section 404 of the CWA requires a broad analysis of the public interest and environmental risks of projects.

The requirements of CWA § 404 in some respects overlap with NEPA, with one significant difference: NEPA establishes *procedures* intended to inform decision makers and involve the public, and § 404 of the CWA also puts strict *substantive* limits on issuance of permits. *Greater Yellowstone Coal. v. Flowers*, 359 F.3d 1257, 1273 (10th Cir. 2004). These standards are intended to achieve the law's sweeping goal to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a); 40 C.F.R. § 230.1(a). Permits that have more than minimal adverse effects, or otherwise don't meet the CWA's substantive standards, cannot be issued. 33 U.S.C. § 1344(e)(1); 40 C.F.R. § 230.1(c).

The Corps is prohibited from approving a project "unless it can be demonstrated that such

a discharge [from the project] will not have an unacceptable adverse impact either individually or in combination with known and/or probable impacts of other activities affecting the ecosystems of concern." 40 C.F.R. § 230.1(c). 33 C.F.R. § 320.4(a) requires the Corps to consider the probable impacts of the proposed action, its putative benefits, and weigh all "relevant" considerations. *Id*. The Corps must balance the benefits "which reasonably may be expected to accrue" from the action against the "reasonably foreseeable detriments." *Id*. Regulations explicitly require close consideration of "secondary" effects, defined as "effects on an aquatic ecosystem that are associated with a discharge of dredged or fill materials, but do not result from the actual placement of the dredged or fill material." 40 C.F.R. § 230.11(h). The Corps must deny a permit if it finds that it is not in the "public interest." 33 C.F.R. § 320.4(a).

SUMMARY OF THE ARGUMENT

NEPA requires that the Corps of Engineers take a "hard look" at the environmental consequences of its permitting actions. Unfortunately the Moda Expansion EA is premised on errors and unsupported statements, beginning with the assertion that the purpose of the expansion is for liquefied natural gas ships. The decision to permit the expansion violates NEPA and the Clean Water Act in at least the following respects:

- Failing altogether to document and assess the risks of oil spills and accidents
- Failing to document and consider the direct and indirect impacts on water quality and seagrasses, a special aquatic site
- Failing to consider impacts of noise, air and light pollution on the neighboring community
- Failing to properly document and weigh costs and benefits of the expansion
- Failing to document and consider cumulative impacts from the expansion and other past, present and reasonably foreseeable projects
- Failing to consider the impacts of climate change associated with the Moda

expansion

Each of these failures resulted in the arbitrary decision that the Moda expansion would have no significant impact on the human environment. This is not the "hard look" that Congress intended to inform the public and agency decision making, and the Plaintiffs are likely to prevail on the merits of their claims that the Moda Expansion EA is inadequate, an EIS is required, and the requirements of the CWA were not met. The Plaintiffs have likewise demonstrated the other elements necessary for injunctive relief preserving the status quo pending a decision on the merits.

ARGUMENT

A movant for a preliminary injunction must show: "(1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest." *Robinson v. Hunt Country, Texas*, 921 F.3d 440, 451 (5th Cir. 2019) (citations omitted).

A. Plaintiffs are likely to prevail on their challenges under NEPA and the CWA.

1. *The Plaintiffs have Article III standing.*

This Court has jurisdiction pursuant to 33 U.S.C. § 1333, and the Plaintiff organizations have Article III standing. "Associational standing is a three-part test: (1) the association's members would independently meet the Article III standing requirements; (2) the interests the association seeks to protect are germane to the purpose of the organization; and (3) neither the claim asserted nor the relief requested requires participation of individual members." *Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 587 (5th Cir. 2006) (citing *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)).

With respect to the first part of the *Hunt* test, at least one member of one of the plaintiffs must have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision," *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018) (quotation omitted).

Patrick Nye, Love Sanchez, and Absolem Yetzireh are members of Ingleside on the Bay Coastal Watch, Indigenous People of the Coastal Bend, and Karankawa Kadla Tribe of the Texas Gulf Coast respectively. Exhibits 2, 3, 8. Each attests at length to a close personal, spiritual and geographical connection to the area that will be affected by the Moda terminal expansion; that his or her experience will be damaged by the increased industrialization of this area and damage to adjacent resources; and that the organization to which they belong has a purpose in keeping with the requests in this suit.

As the Supreme Court has stated, "environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 183 (2000)(internal quotation marks omitted). "The procedural injury implicit in agency failure to prepare an EIS—the creation of a risk that serious environmental impacts will be overlooked—is itself a sufficient 'injury in fact' to support standing, provided this injury is alleged by a plaintiff having a sufficient geographical nexus to the site of the challenged project [such that they can] expect [ ] to suffer whatever environmental consequences the project may have." *Sabine River Auth. v. U.S. Dep't of Interior*, 951 F.2d 669, 674 (5th Cir. 1992). The injury stated by these declarants is far more than the required "identifiable trifle." *Save Our Cmty. v. U.S. E.P.A.*, 971 F.2d 1155, 1161 (5th Cir. 1992).

Their injury is imminent and directly caused by the Moda permit, since that permit will lead directly to destruction of seagrass beds, disruption of habitat, and further industrialization. The injury is redressable by the relief sought since complying with NEPA and the Clean Water Act and taking the requisite "hard look" could cause the agency to change its position on approving the expansion as proposed. *Sierra Club v. FERC*, 827 F.3d 59, 67 (D.C. Cir. 2016)(remedying procedural violation could cause the agency to change its position).

2. *The Corps violated NEPA and the CWA by failing to assess risks from oil spills, leaks and accidents.*

The consideration of reasonably foreseeable direct and indirect effects required by NEPA includes unlikely but serious events like accidents and oil spills. *See, e.g., Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 867–68 (9th Cir. 2005); *Sierra Club v. Sigler*, 695 F.2d 957, 968–75 (5th Cir. 1983) (Corps violated NEPA in issuing a permit for a dredging project by failing to analyze worst-case scenario of oil tanker spill).

The Corps was specifically requested to include catastrophic pollution planning and oil spill risks for the Moda expansion. Exhibit 9 p. 26; Exhibit 15 pp. 32, 54, 72. Given the references to oil tankers in other parts of the EA, the Corps' statement that the project was to accommodate liquefied natural gas tankers may have been inattention. Nonetheless, the only reference in the EA to oil spills is that "[p]otential detrimental effects due to this project, such as oil spills, have been evaluated in our General Interest review and found to be of negligible, or less, concern (See Section 7.1)." Exhibit 9 p. 26. Section 7.1 does not discuss spills or accidents.

The Moda Expansion EA does not even state the basic information necessary to evaluate risks of oil spills and accidents. It references "Suezmax and other supermax design oil tankers," and that the new dock is required to accommodate "two additional Suezmax vessels," Exhibit 9 pp. 28, 29, but says nothing about the number of tankers and barges that are or will be using the

facility, their route, time of residence, volume handled or other information necessary to determine the risks of spills and accidents.

There are certainly risks to be considered. The National Oceanic and Atmospheric Administration advises particular caution for the area at Aransas Pass and the Lydia Ann Channel, noting that "[s]ituations resulting in collisions, groundings, and close quarters passing have been reported by both shallow and deep-draft vessels." Exhibit 16, Excerpt of NOAA Chart 11307, Aransas Pass to Baffin Bay, p. 3. In fact, on March 15, 2021 an oil tanker lost power while moving through the Port and damaged a pier at the Moda terminal itself. Exhibit 17; Exhibit 8 ¶¶ 16-22. The greatly expanded onshore facilities are also vulnerable to hurricanes and other disruptions which can cause spills and accidents, and there is no discussion of these related issues.

Ocean Advocates v. U.S. Army Corps of Eng'rs, *supra*, is directly on point. There the Corps gave only a cursory conclusion that extension of a refinery dock "should result in a reduction in the chances for oil spills." The Court of Appeals found that cursory statements "cannot possibly qualify as a fully informed and well-reasoned basis for failing to give more careful attention to the potential for increased traffic." *Id.* at 865-66. The court went on to state that "[i]ncreased tanker traffic elevates the risk of oil spills -- an undeniable and patently apparent risk of harm to Puget Sound." *Id.* at 868. As in that case, the Court cannot defer to a conclusion with no data.

An impact is "reasonably foreseeable" if a "person of ordinary prudence would take it into account in reaching a decision." *City of Shoreacres v. Waterworth*, 420 F.3d 440, 453 (5th Cir. 2005). Accidents and oil spills are clearly something a person of ordinary prudence would take into account for the expansion and operations of the MODA terminal. Plaintiffs are likely

to prevail on this point.

3. *The Corps violated NEPA and the CWA by failing to consider the direct and indirect impacts of the project and operation of the MODA terminal on seagrasses, which are a special aquatic site.*

The MODA project will directly destroy approximately 9 acres of seagrass beds, and the Corps had ample evidence of turbidity from vessel operations at the existing terminal damaging adjacent seagrass beds.

As early as March 2019 the Texas Parks and Wildlife Department specifically referenced the satellite images below showing the prop wash occurring at the MODA site, and the potential for damages to seagrass:

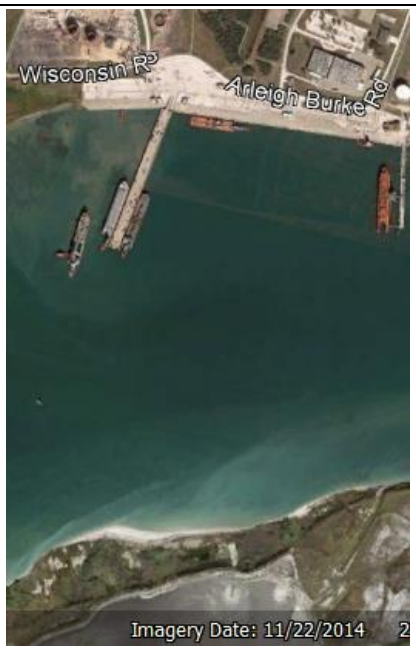

Exhibit 18 at 3.

As stated above the FWS stated that seagrasses adjacent to barge areas at the terminal are less dense, and "[t]his is an example of the effects of sedimentation. Over time the sediment disturbed by barge traffic shades or consistently covers the seagrass, killing it." Exhibit 14. The EPA stated "it does not appear the applicant has evaluated potential indirect/secondary impacts

to the sea grasses adjacent to the proposed dock facilities . . . .” Exhibit 13.

Plaintiff Ingleside on the Bay Coastal Watch as well as other commenters specifically advised the Corps that silt from dredging is already degrading the seagrasses and the area along the Ingleside on the Bay shoreline. *E.g.*, Exhibit 15, p. 24, 72, 103 (water depths at adjacent pier have shrunk 12 inches due to silting).

In February 2021 and April 2021, Ingleside on the Bay Coastal Watch provided the Corps with further data and specific instances of prop wash from the MODA facility, data on reduced light penetration in the adjacent seagrass beds correlated with prop wash from the MODA terminal, and data showing that seagrass samples exhibited healthier growth away from the terminal. Exhibit 19. This figure was included with the April submission:

The Ingleside on the Bay Coastal Watch submissions included the research performed by Dr. Cammarata for Ingleside on the Bay, and discussed further in his declaration. These confirm the decline in seagrasses adjacent to the Moda Terminal in the immediate past, and the direct and indirect impacts of current operations on seagrasses. Exhibit 2, ¶¶ 9-11.

The Corps’ only response was to quote Moda’s contractor: “The existing seagrass beds

have persisted for decades adjacent to the existing site which includes regular nearby vessel traffic, including that from within the adjacent CCSC. It is the applicant's engineers' professional judgment that the slope stabilization measures provide adequate protection to avoided seagrass". Exhibit 9, p. 15. Dr. Cammarata explains that this is incorrect. Exhibit 2, ¶ 12.

The Corps rejected expert agency concerns and actual information on water quality and seagrass impacts in deference to a conclusory statement from an anonymous engineer for Moda. This is directly contrary to the Fifth Circuit's mandate that in NEPA documents "bare assertion[s]" are "simply insufficient." *O'Reilly v. U.S. Army Corps of Engineers*, 477 F.3d 225, 235 (5th Cir. 2007); *see also N. Carolina Wildlife Fed'n v. N. Carolina Dep't of Transp.*, 677 F.3d 596, 602 (4th Cir. 2012) ("Conclusory statements that the indirect and cumulative effects will be minimal or that such effects are inevitable are insufficient under NEPA."). In addition, the Corps is afforded no deference in matters outside its area of expertise. *Center for Biological Diversity v. Bernhardt*, 982 F.3d 723, 740 (9th Cir. 2020). Finally, there is no indication that the Corps independently evaluated the information submitted by the anonymous engineer, and did not include his or her name and qualifications. 40 C.F.R. § 1506.5(2-3).

This is the definition of arbitrary and capricious, and Plaintiffs are likely to prevail.

4. *The Corps violated NEPA and the CWA by failing to quantify and consider impacts on the neighboring community from air, noise and light pollution.*

Residents of Ingleside on the Bay advised the Corps of the existing impacts from noise, air and light pollution from the existing Moda terminal, and expressed concern at increases from the expansion. *E.g*, Exhibit 15 pp. 5, 7, 32, 40, 50, 85, 86, 90, 104, 117, 125, 128. A photo in their comment letters shows how visible the existing terminal is to the adjacent. *Id.* at 21. The new pier will bring oil and vessel activities approximately 900 feet closer.

The EA does not even disclose how the expansion will affect terminal operations, including light, noise and air pollution, but makes the conclusory statement – using essentially the same language used by Moda - that these quality of life impacts will be "[n]egligible" because the project will be "confined to an existing commercial marine facility." Exhibit 9 at 18, 40. The Corps states that "[w]e found the potential effects from the project regarding these concerns to be negligible (see Sections 4.3 through 4.6, 10.5, and 12.1)." Exhibit 9 p. 40. However, none of these sections discuss actual light or noise pollution from operations.

Again, the Corps simply makes conclusory assertions in the face of uncontroverted evidence of impacts. Plaintiffs are likely to prevail on this issue.

5. *The Corps violated NEPA and the CWA by asserting that the benefits of the expansion outweigh the risks without any hard data or evaluation of the risks, and in reliance on incorrect assumptions about the benefits and the environmental impact.*

The Moda Expansion EA states generally that "the proposed work would have economic benefits for the applicant since the applicant would be able to accommodate Suezmax vessels for the export of petroleum products." Exhibit 9 p. 39. It contains no information of any kind about what the expansion will entail in terms of the type of vessel using the terminal, the number of ships, or the like. The terminal can already accommodate Suezmax tankers, while the Corps seems to assume that the expansion is necessary to allow these tankers. Exhibit 9 p. 40 ("The work will provide upgrades to the marine facility that will allow it to accommodate the new Suezmax vessels and so compete with other upgraded facilities."). There is no evidence showing that the general public will benefit by exporting more oil overseas; to the contrary, climate change impacts negatively impact the local and global public.

NEPA requires a "full and fair" treatment of risks and benefits. 40 C.F.R. § 1502.1; *see also* § 1500.1 (information in NEPA document "must be of high quality"); § 1502.23 (cost-benefit analysis). In a case on point, the Fifth Circuit invalidated a Corps EIS for a port project

that "painted a rosy picture" of the economic benefits but totally ignored the risk of oil spills associated with those benefits. *Sierra Club v. Sigler*, 695 F.2d 957, 976 (5th Cir. 1983). *See also Van Abbema v. Fornell*, 807 F.2d 633, 640-42 (7th Cir. 1986) (economic analysis used inaccurate data, unexplained assumptions, and outdated reports). In this case just as in *Sigler* the Corps ignored risks of oil spills and other negative impacts.

The Corps' failure to provide any reasoned analysis also violates the CWA, which prohibits impacts to wetlands unless the Corps finds that "the benefits of the proposed alteration outweigh the damage to the wetlands resource." 33 C.F.R. § 320.4(b)(4). Plaintiffs are likely to prevail on their claim that the Corps violated the CWA and NEPA by balancing the unquantified economic benefits of the expansion while ignoring the clear costs.

6. *The Corps violated NEPA and the CWA by failing to discuss climate change and its impacts, even though a reasonably foreseeable impact of the Moda expansion is use of oil which will exacerbate climate change.*

The United States Supreme Court declared in 2007 that "the harms associated with climate change are serious and well recognized." *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497, 499 (2007). NEPA requires federal agencies to analyze indirect effects, which are "caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R § 1508.8(b). For fossil fuel related projects, including transportation infrastructure, climate change impacts from upstream and downstream sources are reasonably foreseeable and must be considered in NEPA analysis. *Center for Biological Diversity v. Bernhardt*, 982 F.3d 723, 735 (9th Cir. 2020); *Sierra Club v. FERC*, 867 F.3d 1357, 1372 (D.C. Cir. 2017) (reasonably foreseeable that gas transported will be burned and contribute to climate change); *Utah Physicians for a Healthy Environment v. Bureau of Land Management*, 2021 WL 1140247 (D. Utah 2021)(agency calculated the socioeconomic benefits of the project but not the socioeconomic costs of greenhouse gas emissions). *See also Vecinos Para El*

Bienestar v. FERC, 2021 WL 3354747 (D.C. Cir. August 3, 2021)(FERC failed to adequately analyze emissions from Brownsville LNG terminals).

One of the most recent decisions invalidated an Environmental Impact Statement for an oil and gas project that failed to address greenhouse gas emissions from foreign consumption of oil. *Inupiat v. BLM*, 2021 U.S. Dist. LEXIS 155471 (D. Alaska August 18, 2021). In that case the Bureau of Land Management had actually made a greenhouse gas emissions analysis, but the district court rejected the assertion that this analysis could not properly evaluate foreign emissions. *Id.* at 44-45.

The Moda terminal accounts for some 24% of total U.S. oil exports, but the Moda Expansion EA addresses climate change in a single general paragraph addressed only to those activities within the Corps' direct control. Exhibit 9 at 40-41. It is unknown how much more oil Moda will export after this expansion, but plainly it is an amount that is significant in world terms. The lack of any realistic analysis is clearly arbitrary.

The Corps' failure to address these issues in a realistic way is particularly arbitrary given the well-known and increasing evidence of climate change damage to not just the Texas coast, but the entire world. The Court may properly take judicial notice that fossil fuel use is a primary driver of climate change, and that it is currently impacting and will in the future impact the Texas coast, the nation and the world. *E.g.*, U.S. Global Change Research Program, Fourth National Climate Assessment (2018), available at https://nca2018.globalchange.gov/.

The Corps' assertion that it need only evaluate a very narrow set of greenhouse gas emissions directly associated with the project is legally wrong. In *Columbia Riverkeeper v. U.S. Army Corps of Engineers*, 2020 WL 6874871 (W.D. Wash. November 23, 2020), the District Court considered a situation similar to the one here: the Corps declined to consider greenhouse

gas emissions outside Washington and part of Oregon in permitting a facility to ship methanol to Asia. The court rejected this argument out of hand:

> The Corps assertion that these greenhouse gas emissions are outside their jurisdiction does not relieve it of its duty to take a "hard look." "The fact that climate change is largely a global phenomenon that includes actions that are outside of the agency's control does not release the agency from the duty of assessing the effects of its actions on global warming within the context of other actions that also affect global warming." *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin., 538 F.3d 1172, 1217 (9th Cir. 2008)*(*internal quotation marks and citations omitted*).

Id. at 13.

The Corps' failure to consider the climate change impacts of oil exports is another example of its arbitrary and capricious failure to take a "hard look" at the consequences to the human environment of the MODA expansion.

7. *The Corps violated NEPA and the CWA by failing to document cumulative impacts of past and reasonably foreseeable future activities.*

Section 6.7 of the Moda Expansion EA references Section 8.0 "[f]or a discussion on the factual determinations regarding the cumulative and secondary effects that the proposed work would have on the ecosystem . . . ." Exhibit 9 at 37. Section 8.0 actually discusses mitigation, but Section 9.0 is headed "Consideration of Cumulative Impacts."

In Section 9.0 the Corps' limited review of its own regulatory database of projects to five years in the past and estimated five years in the future, a limitation that is cited to any statute or regulation. Exhibit 9 p. 44. Section 9.0 states generally that there have been major dredging projects and other development in the area, but provides no information about them other than that 89 acres of waters of the United States have been impacted in the past five years. With respect to reasonably foreseeable future actions, the EA provides no facts other than "continued residential development, construction of new or expansion of several existing commercial marine terminals

associated with liquefied natural gas processing facilities, expansion of the Port of Corpus Christi facilities, the La Quinta Gateway Project, the CCSC Improvement Project, and pending Corps permits for large dredge or fill activities." Exhibit 9 p. 46.

This information is clearly available. For example, the Corps is in the process of preparing an Environmental Impact Statement on the Port of Corpus Christi Authority Channel Deepening Project. Exhibit 20. According to the Corps, this project is "to accommodate transit of fully loaded Very Large Crude Carriers" and would create approximately 46 million cubic yards of new work dredged material from 1,778 acres. *Id.* p. 4. It will deepen the channel to some 80 feet. Yet no specific information about the Ship Channel Project appears in the Moda Expansion EA.

A valid cumulative impacts analysis must include "the impacts or expected impacts from these other actions; and [] the overall impact that can be expected if the individual impacts are allowed to accumulate." *Del. Riverkeeper Network v. Fed. Energy Regul. Comm'n*, 753 F.3d 1304, 1319 (D.C. Cir. 2014). As with other impacts, for cumulative impacts, "some quantified or detailed information is required" to satisfy NEPA. *Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372, 1379(9th Cir. 1998); *Texas Comm. on Nat. Res. v. Van Winkle*, 197 F. Supp. 2d 586, 619 (N.D. Tex. 2002) ("The future projects that were mentioned were only discussed in conclusory terms.").

The failure to consider cumulative effects from past and reasonable foreseeable future projects clearly justifies reversal and remand for preparation of an EIS, and the Plaintiffs are likely to prevail on this issue.

8. *The effects of the Moda expansion on the human environment are significant, and an EIS is required.*

Based on the multiple failures to comply with NEPA, the Corps' EA was plainly

inadequate to demonstrate a "hard look" at environmental consequences. The evidence also demonstrates that the impacts of the expansion are "significant" within the meaning of NEPA and a full EIS must be prepared.

First, the expansion is clearly "highly controversial" under 40 C.F.R. § 1508.27(4). The Corps received approximately 80 comment letters from the general public, many of them asking for a full EIS. Exhibit 15. Many of these comments pointed out the significance of the Moda site to indigenous peoples like the Karankawa, and the possibility of damage to important cultural sites.

The Environmental Protection Agency specifically stated in its comments on the project that "it was not readily evident as to the alternatives evaluated, options considered to avoid and minimize aquatic impacts to the maximum extent practicable, and whether secondary/cumulative impacts were considered." Exhibit 13. The U.S. Fish and Wildlife Service made the same observation on indirect impacts to seagrasses, as did others. When other federal agencies who act as the stewards of the resources at issue criticize the decision that clearly indicates a project is "highly controversial." *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 985 F.3d 1032, 1043 (D.C. Cir. 2021). "[A]n EIS is perhaps especially warranted where an agency explanation confronts but fails to resolve serious outside criticism, leaving a project's effects uncertain." *Id.*

The expansion proposal is also significant based on "unique characteristics of the geographic area such as…wetlands…or ecologically critical areas." 40 C.F.R. 1508.27(3). The expansion will directly and indirectly impact seagrasses, a protected special aquatic site. The site is also culturally important to the Karankawa descendants. While there is a mitigation plan for direct destruction of seagrasses, there was none for indirect operational impacts. The FWS also

stated that more mitigation for direct impacts should be required. Exhibit 9 p. 20-21, 22.

The effects of the proposed expansion are "highly uncertain," *id.* 1508.27(5) in large part because Moda supplied no information about vessel traffic and other critical issues. The expansion is "related to other actions" like the expansion of the Corpus Christi ship channel, which in itself will have a significant impact on the environment. *Id.* 1508.27(7).

It "affects public health or safety" in its impacts on the neighboring community, the possibility of oil spills, and not least its clear connection to climate change.

Each of these factors demonstrates a finding of significance under 40 C.F.R. § 1508.27 and demonstrates that a full EIS is required. The Corps nonetheless simply deferred to the applicant's assertion that no EIS was required. Exhibit 9 p. 26. The EA refers to Section 10.1.2 for further discussion, but this section actually discusses threatened and endangered species. *Id.* p. 47. Once again, it is clear that the Corps did not take a "hard look" at either impacts or the EA itself.

This Court should find that plaintiffs are likely to prevail on the merits, vacate the permit decision, and remand for preparation of an EIS.

B. Plaintiffs will suffer irreparable harm without an injunction.

To qualify for a preliminary injunction, Plaintiffs must show "some concrete injury or environmental harm resulting from Defendants' actions" that is both actual and imminent. *W. Ala. Quality of Life Coal. v. U.S. Fed. Highway Admin.*, 302 F. Supp. 2d 672, 683-84 (S.D. Tex. 2004). "Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable." *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987).

For example, numerous courts have found that the loss of trees constitutes irreparable

injury, even where they constitute a relatively small part of a larger ecosystem. *Sierra Club v. Block*, 614 F. Supp. 134, 137 (E.D. Tex. 1985) ("the loss of a significant number of trees constitutes an irreparable harm, at least to the extent that decades are required to replace the lost trees and their accompanying undergrowth."). In *Callaway*, the Fifth Circuit found that the loss of trees along a river could constitute irreparable harm, even though the total acreage affected was relatively small. *Callaway*, 489 F.2d at 575–576.

Plaintiffs easily meet this standard. The Corps permit allows construction and dredging. Once the seagrass beds and bay bottoms are dredged, seagrasses will not grow. The dredged material cannot be put back into place, and the water will be too deep. Exhibit 2, ¶ 4.

The Plaintiffs also note that once a project is completed, the Corps has argued that a case is moot. *Bayou Liberty Ass'n, Inc. v. U.S. Army Corps of Engineers*, 217 F.3d 393, 397 (5th Cir. 2000) *("*Now that the construction on the retail complex has been substantially completed . . . there would be no meaningful relief for [plaintiff]."*)* Lack of injunctive relief may effectively mean that the Plaintiffs will be deprived of their right to petition for redress.

C. <u>The balance of harms weighs in favor of an injunction.</u>

If irreparable injury to the environment is probable, the balance of harms will usually favor issuance of an injunction. *Amoco*, 480 U.S. at 542. Environmental destruction is irreversible, and "[o]nce [] acres are logged, the work and recreational opportunities that would otherwise be available on that land are irreparably lost." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1137 (9th Cir. 2011). On the other side of the balance, there is no harm to the Corps from an injunction vacating a permit while this case proceeds. *Sierra Club v. Norton*, 207 F. Supp. 2d 1310, 1341 (S.D. Ala. 2002) ("The proposed injunction threatens little tangible harm to the governmental entities named as defendants in this action."). Compliance with federal environmental law is more than "merely a 'speed bump' on the road to a

predetermined destination." *Blanco v. Burton*, No. CIV.A. 06-3813, 2006 WL 2366046, at *17 (E.D. La. Aug. 14, 2006). As to the Corps, the balance of equities weighs strongly in plaintiffs' flavor.

D. The public interest weighs in favor of a preliminary injunction.

"The public interest is always served by requiring compliance with Congressional statutes." *ADT v. Capital Connect, Inc.*, 145 F. Supp. 3d 671, 700 (N.D. Tex. 2015) (citations omitted); *American Rivers v. U.S. Army Corps of Engineers*, 271 F. Supp.2d 230, 261 (D.D.C.2003) (public interest weighs in favor of protecting environment over avoiding economic harms.); *Sierra Club v. Norton*, 207 F. Supp. 2d 1310, 1342 (S.D. Ala. 2002) ("[T]he public interest, as identified by Congress in passing NEPA and the ESA, favors informed agency decision-making.").

E. The Court should set a nominal bond.

Federal courts generally decline to impose anything more than a minimal bond in cases of this nature in order to avoid frustrating public-interest litigation. *E.g*, *Western Watershed Project v. Bernhardt*, 391 F. Supp.3d 1002, 1026 (D. Or. 2019); *Sierra Club v. Norton*, 207 F.Supp.2d 1310, 1342 (S.D. Ala. 2002)($1,000); *People ex rel. Van de Kamp v. Tahoe Regional Plan*, 766 F.2d 1319 (9th Cir. 1985) (no bond); *Wilderness Society v. Tyrrel*, 701 F. Supp. 1473 (E.D. Cal. 1988), rev'd on other grounds, 918 F.2d 813 (9th Cir. 1990) ($100). The Plaintiffs respectfully submit that only a nominal bond should be required in this matter.

CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that their motion for a preliminary injunction be granted, and that the Court grant such other relief as is appropriate. The Moda Expansion Permit requires Corps approval of a survey of seagrass beds before any dredging can take place. Exhibit 1, p. 3, Special Condition 4. The Plaintiffs move the Court to

enjoin this and any other approvals, and to take such further action as is necessary to protect the Court's jurisdiction pending a decision on the merits.

Respectfully submitted this 24th day of August, 2021.

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