IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SAN ANTONIO BAY ESTUARINE WATERKEEPER, TEXAS CAMPAIGN FOR THE ENVIRONMENT; TURTLE ISLAND RESTORATION NETWORK; EARTHWORKS, ENVIRONMENTAL INTEGRITY PROJECT Plaintiffs, v. MICHAEL L. CONNOR, in his official capacity, & U.S. ARMY CORPS OF ENGINEERS Defendants.	Case No. **COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

INTRODUCTION

1. This is a complaint for declaratory and injunctive relief. Plaintiffs San Antonio Bay Estuarine Waterkeeper, Texas Campaign for the Environment, Turtle Island Restoration Network, Earthworks, and the Environmental Integrity Project (collectively "Waterkeepers") bring this action in connection with federal actions associated with the Matagorda Ship Channel dredging project (the "Project"), a federal channel deepening and expansion project near Port Lavaca, Texas. Defendant U.S. Army Corps of Engineers ("Corps"), under the direction of Assistant Secretary of the Army for Civil Works Michael L. Connor, has authorized the Project, with construction scheduled to begin in the next few months. The construction and operation of the Project threatens the Waterkeepers' environmental and economic well-being by increasing pollution in Matagorda Bay and surrounding waterways, destroying habitats necessary for species important to the Waterkeepers members' livelihoods, and facilitating the development of a crude oil transportation terminal that will threaten the economic and environmental health of Matagorda Bay and the Gulf region more broadly.

2. This complaint raises three claims. First, Waterkeepers challenge the Corps' failure to comply with the National Environmental Policy Act ("NEPA"), the nation's cornerstone environmental law for the public disclosure and consideration of environmental information. For major federal actions with serious environmental impacts, like this one, NEPA requires that the environmental impact statement ("EIS") fully disclose all of the potential environmental risks and harms of the Project, as well as alternatives that may cause less harm. However, the Corps' Final EIS for the Project, released in August 2019, ignored entire categories of environmental concerns and failed to disclose the full range of harms and risks. Second, Waterkeepers challenge the Corps' failure to supplement its EIS after significant new circumstances and information substantially changed the Project, triggering the duty to prepare a Supplemental EIS to assess the impact of those changes. Instead of undertaking a Supplemental EIS as required by NEPA, the Corps is instead preparing to begin construction of the Project.

3. Third, Waterkeepers challenge the Corps' compliance with the Clean Water Act ("CWA"). For federally authorized dredging projects, like this one, the Corps must comply with the requirements established in the Act's Section 404(b)(1) Guidelines, including determining with proper justification that the discharge and disposal of dredged material will not cause or contribute to significant degradation of waterbodies, such as Matagorda Bay, and that the chosen project alternative minimizes potential adverse impacts. Here, the Corps failed to make the requisite determinations. The Project will dredge through a mercury-contaminated Superfund Site, yet the Corps did not undertake additional testing as required under the 404(b)(1) Guidelines for dredged material with known contamination. The Corps did not establish that the existing information was sufficient to evaluate the environmental impacts of the discharge, nor did it justify why it did not require additional testing, in violation of the Guidelines. Instead, in

response to public comments about the risks of resuspending buried mercury from the dredging, the Corps only agreed in the Final EIS to do additional sediment testing in coordination with the U.S. Environmental Protection Agency ("EPA") after the Final EIS was issued and the Project was authorized. The Corps also significantly underestimated or ignored the extent of harms to important fisheries, aquatic habitats, and human health. The Corps' failure to justify its determination that the Project would not cause significant degradation of Matagorda Bay and failure to minimize adverse impacts violates the Clean Water Act.

4. Waterkeepers seek a declaration that the Corps violated NEPA by issuing an invalid Final EIS and by failing to prepare a Supplemental EIS before authorizing construction on the Project to proceed. Waterkeepers further seek a declaration that the Corps violated the Clean Water Act by failing to comply with the 404(b)(1) Guidelines with respect to disposal of dredged material. Because of these legal violations, Waterkeepers seek an order vacating existing authorizations for the Project pending full compliance with federal law. If necessary, Waterkeepers may seek preliminary injunctive relief to prevent irreparable environmental harm pending the resolution of this case.

JURISDICTION AND VENUE

5. This case states claims under the Administrative Procedure Act, 5 U.S.C. § 701 *et seq*. ("APA"), which authorizes a federal court to find unlawful and set aside any final agency action that is "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law." *Id*. § 706. Jurisdiction arises under 28 U.S.C. § 1331 (federal question jurisdiction); § 2201 (declaratory relief); and § 2202 (injunctive relief).

6. Venue in this district is appropriate under 28 U.S.C. § 1391(e) because it is the district in which the defendants reside, in which two of the plaintiffs reside, and the district in which "a substantial part of the events or omissions giving rise to the claim occurred."

PARTIES

A. Plaintiffs

7. San Antonio Bay Estuarine Waterkeeper ("SABE Waterkeeper") is a volunteer-run, local affiliate of the national Waterkeeper Alliance and is an unincorporated association organized under the laws of Texas. SABE Waterkeeper was started in 2012 as a project of Calhoun County Research Watch, a 501(c)(3) non-profit organization. SABE Waterkeeper's mission is to protect Lavaca Bay, Matagorda Bay, and San Antonio Bay and to educate the public about these ecologically important estuarine systems. SABE Waterkeeper promotes the preservation of local wetlands and waterways for fishing and other recreational uses, such as swimming and other watersports, to further the appreciation of these beautiful natural resources. SABE Waterkeeper members regularly monitor these bays and nearby waterways for pollution and report violations to governmental agencies to seek clean up and enforcement. SABE Waterkeeper seeks to restore fishing in Lavaca, Matagorda, and San Antonio Bays and support the families that depend on it. Matagorda Bay historically had a thriving fishing, shrimping, and oystering industry that has sharply declined in part due to industrial pollution. Despite the setbacks, the fishing community is fighting hard to survive. There are about 200 fishing families in Seadrift, Port O'Connor, and Port Lavaca who depend on oyster and shrimp for their livelihoods.

8. SABE Waterkeeper has members who live near, recreate in, eat seafood from, and derive their livelihoods from the waters of Matagorda and Lavaca Bays. The Corps' actions to deepen and widen the Matagorda Ship Channel injure and threaten future injuries to SABE Waterkeeper members. SABE Waterkeeper members have legally protected economic, health, recreational, and aesthetic interests and have reasonable concerns that the dredging of the ship channel will threaten their health, livelihoods, and well-being. SABE Waterkeeper members'

injuries are fairly traceable to the Corps' failure to fully assess the environmental impacts of the Project, to properly test for contaminants, and to consider and select a project alternative with less harmful effects. These injuries are actual, direct, concrete, and irreparable, as money damages cannot adequately remedy these injuries once they occur.

9. For example, Diane Wilson is a fourth-generation fisherwoman from Seadrift, Texas and the co-founder and Executive Director of SABE Waterkeeper. She has spent 30 years fighting to protect Matagorda and Lavaca Bays from industrial pollution and habitat degradation. Following in the footsteps of her parents and her grandparents, Ms. Wilson worked in Lavaca Bay, Matagorda Bay, and San Antonio Bay for forty years as a commercial fisherwoman, shrimper, oysterman, crabber, net maker, and as a manager at a fish house. Though she has retired from those professions, she continues to rely on the fishing trade in these bays as a net builder and mender in the shrimping industry. The bays not only support her financially, they are also precious to her. Ms. Wilson cares deeply about the aesthetic beauty and the environmental health of these bays, wetlands, and shores, and the wildlife dependent on those resources. Ms. Wilson recreates weekly in and around Lavaca, Matagorda, and San Antonio Bays including walking on the beaches, kayaking, and swimming with her family, and she plans to continue this recreation in the weeks to come. She regularly swims with her children and grandchildren in Matagorda Bay at Magnolia Beach.

10. In 2019, SABE Waterkeeper and Ms. Wilson won a CWA citizen suit against Formosa Plastics for illegally dumping plastic pellets and powder into Lavaca Bay, based on thousands of physical samples and photos collected by SABE Waterkeeper's members. The suit led to a historic settlement, of which $20 million was dedicated to developing sustainable fishing cooperatives to support and revitalize the local fishing industry. Ms. Wilson and SABE

Waterkeeper have been instrumental in forming the Matagorda Bay Fishing Cooperative Committee, which is dedicated to supporting fishing families in Matagorda Bay. Those revitalization efforts are threatened by the creation of a major new shipping channel that would pollute Matagorda Bay with mercury, destroy important fisheries' habitats, and risk major oil spills.

11. As part of her work with SABE Waterkeeper, Ms. Wilson routinely visits Lavaca Bay and Cox Bay near the Matagorda ship channel and the Seahawk Terminal, the oil export terminal that would be expanded as a result of the ship channel expansion, to observe whether plastics have been discharged from the Formosa Plastics facility in Point Comfort. Ms. Wilson visits areas near Formosa's stormwater and wastewater outfalls for several hours, sometimes as many as five hours, by kayak, motorboat, or on foot one to three times a week. Ms. Wilson began visiting many of these sites as early as 2016 and will continue to visit them to monitor Formosa's ongoing compliance with the Consent Decree entered in *San Antonio Bay Estuarine Waterkeeper, et. al., v. Formosa Plastics, Texas et. al.*, No. 6:17-cv-00047 (S. D. Texas, Dec. 9, 2019). Ms. Wilson plans to continue these recreational and work activities in the area unless the bays are so degraded that it is not possible to sustain these activities.

12. Texas Campaign for the Environment ("TCE"), a 501(c)(3) non-profit corporation organized under the laws of the State of Texas, is a membership organization dedicated to informing and mobilizing Texans to protect their health, their communities, and the environment. TCE works to promote strict enforcement of anti-pollution laws designed to stop or clean up air, water, and waste pollution. TCE has approximately 35,000 Texas members, including members living in the region of this proposed dredging project.

13. TCE has members who live near, recreate on, eat seafood from, and derive their livelihoods from the waters of Matagorda and Lavaca Bays. The Corps' actions to deepen and widen the Matagorda Ship Channel will injure and threaten future injuries to TCE members. TCE members have legally protected economic, health, recreational, and aesthetic interests and have reasonable concerns that the dredging of the ship channel will threaten their health, livelihoods, and well-being. TCE members' injuries are fairly traceable to the Corps' failure to fully assess the environmental impacts of the ship channel dredging project, to properly test for contaminants, and to consider and select a project alternative with less harmful effects. These injuries are actual, direct, concrete, and irreparable, as money damages cannot adequately remedy these injuries once they occur.

14. For example, Mauricio Blanco is a member of SABE Waterkeeper and TCE who lives in Port Lavaca and has made a living shrimping and oystering in Matagorda and Lavaca Bays for approximately 30 years. He owns 10 commercial oyster and shrimping boats that operate in the bays in the Coastal Bend. Mr. Blanco and his crews harvest oysters from reefs in Lavaca Bay and Matagorda Bay when they are open for commercial oystering, in places such as Gallinipper Reef, Indian Point Reef, Sand Point Reef, Pipeline Reef, Mitchell's Reef, and Rhodes Point Reef, plus hundreds of acres of scattered cluster of oysters on the bay bottom that would be harmed by the ship channel expansion and dumping of sediment in proposed new placement areas. Cox Bay, which is within the Lavaca Bay system, is an important area for shrimp harvests, and each year, Mr. Blanco spends between five and six weeks shrimping in Cox Bay. Mr. Blanco has definite plans to continue fishing, shrimping, and/or oystering in these areas in the future as long as he is able to, unless the bays become so degraded that it is not possible to sustain his health or livelihood. Mr. Blanco is concerned that the dredging of the bay

will interfere with his livelihood and threaten his health and well-being, along with the health and well-being of his family and the local fishing community, by for example, destroying oyster reefs and other important fisheries habitats in Matagorda Bay, resuspending mercury from the Superfund site which could contaminate the seafood or cause the public to not want to eat seafood that may have been exposed to mercury that Mr. Blanco's business relies upon, increasing ship traffic and the risks of oil spills, and increasing air pollution. Mr. Blanco does not believe that oyster mitigation will remedy the loss of oyster reefs from the Project because new reefs will take many years to reach maturity for oyster harvesting and he has seen previous efforts to create new oyster reefs in Matagorda Bay that did not re-create reefs that were as deep or productive as the long-standing existing oyster reefs. Mr. Blanco knows first-hand the devastating consequences of oil spills for those who rely on the sea to make a living because he used to hold a commercial oystering license for Louisiana oysters, until the 2010 Deepwater Horizon oil spill made oystering there economically infeasible.

15. Another member of both SABE Waterkeeper and TCE, Curtis Miller, owns and operates Miller Seafood Company in Port Lavaca, Texas. Miller Seafood Company was started in the mid-1960's by Mr. Miller's grandfather and sells shrimp and oysters harvested from the surrounding bays, including Lavaca and Matagorda Bays. A small businessman, Mr. Miller also owns four commercial fishing boats that he occasionally works on but are mostly crewed by paid staff. These commercial boats shrimp and oyster in the bays near Port Lavaca. The Miller family has witnessed harmful changes to fishing, shrimping, and oystering from industrial expansion in the Port Lavaca and Point Comfort area. Mr. Miller spends between 50 and 60 hours a week at Miller Seafood Company in Port Lavaca. In his personal time, he fishes on Matagorda and Lavaca Bays one to two times a month. During these trips, he often fishes at Mitchell's Reef,

which is located about half a mile from the Matagorda Ship Channel and just over two miles from the Seahawk terminal. Mr. Miller suffers from asthma and other respiratory issues. Mr. Miller has definite plans to continue his family fishing and seafood businesses as well as his recreational activities in the area, unless the bays become so degraded that it is not possible to sustain these activities. The dredging of the Matagorda Ship Channel, to accommodate larger crude tankers exporting oil from the Seahawk facility, will harm Mr. Miller's recreational, economic, and health interests by, for example, destroying oyster reefs and other important fisheries habitats in Matagorda Bay, resuspending mercury from the Superfund site which could contaminate the seafood or cause the public to not want to eat seafood that may have been exposed to mercury that Mr. Miller's business relies upon, increasing ship traffic and the risks of oil spills, and increasing air pollution in the areas he works and recreates.

16. Turtle Island Restoration Network ("TIRN") is a nonprofit corporation with its principal place of business in Olema, California, and a satellite office in Galveston, Texas. TIRN educates the public and promotes greater awareness of the protection, enhancement, conservation, and preservation of the world's marine ecosystems, and the protection of endangered, threatened, and vulnerable marine and anadromous species, including sea turtles, sharks, whales, and bluefin tuna. TIRN has saved hundreds of thousands of sea turtles and other marine species through hands-on conservation and monitoring, policy change, agency advocacy, and consumer change campaigns. With their members, volunteers, interns, and staff, TIRN engages in multiple activities to protect, advocate, educate and enhance the scientific knowledge of marine species, including threatened and endangered species.

17. TIRN recognizes that Matagorda Bay is an important ecological bay along the central coast of Texas. TIRN has members, volunteers, and staff who live near the Texas Gulf

Coast and recreate along and on Matagorda Bay and nearby waterways, including members who enjoy the natural beauty of the area, recreational activities, and looking for and viewing wildlife and sea turtles in the Matagorda Bay area. TIRN's members plan to continue these activities, and the Corps' actions to deepen and widen the Matagorda Ship Channel injure and threaten future injuries to TIRN's members. TIRN members have legally protected recreational and aesthetic interests and have reasonable concerns that the dredging of the ship channel will threaten these interests. TIRN members' injuries are fairly traceable to the Corps' failure to fully assess the environmental impacts of the ship channel dredging project to aquatic ecosystems and wildlife, including endangered and threatened species like sea turtles, to properly test for contaminants, and to consider and select a project alternative with less harmful effects. These injuries are actual, direct, concrete, and irreparable, as money damages cannot adequately remedy these injuries once they occur.

18. TIRN's staff work to support the protection and understanding of the distribution of sea turtles in Matagorda Bay and throughout the Texas Gulf Coast. TIRN has invested substantial staff time and other organizational resources into agency advocacy, educating the public, and compiling information about sea turtle populations in the region related to the proposal to expand the Matagorda Bay shipping channel. However, that work has been frustrated by the Corps' failure to comply with NEPA and the CWA through timely and adequate disclosure of pollution impacts and environmental risks of dredging in an aquatic Superfund site contaminated with mercury. TIRN has significant concerns about the environmental impact of the Project, which would mobilize contaminated sediment, destroy fisheries habitats, harm endangered and threatened sea turtles, and facilitate expansion of fossil fuel infrastructure that would exacerbate climate change.

19. TIRN's Gulf Program Director, Joanie Steinhaus, based in Galveston, Texas, has invested considerable staff time to the Project. Ms. Steinhaus' background is in animal health management, advocacy, and environmental education along the Texas Gulf Coast. On behalf of TIRN, Ms. Steinhaus has visited Matagorda Bay to meet with agency officials and local stakeholders and advocate for enhanced public participation and compliance with environmental laws. She has also researched the latest data about sea turtle populations in the region including: abundance of sea turtle using this area for migration, number of sea turtle nests, and number of turtles that were impacted by cold stunning during winter freeze events. She has completed community outreach, organized rallies, and presented educational programs to the general public on the endangered sea turtles and other marine wildlife in the Gulf of Mexico and Texas bays. She has expressed her concerns regarding the Project to the Texas Commission on Environmental Quality and sent email alerts to TIRN's members to keep them informed on the proposed project.

20. This ongoing work would not be necessary if the Corps had complied with NEPA and the CWA by fully and adequately evaluating and disclosing risks of dredging in the contaminated area. Because it did not, TIRN's organizational resources—including Ms. Steinhaus' staff time—have not been available for other high priority projects. For example, TIRN is working on tracking other Corps permits for projects in the Gulf states, stopping petrochemical buildout including pipelines, export and LNG facilities, reduction of marine debris, microplastic research, and protection of marine sanctuaries and endangered species. However, TIRN has not been able to fully attend to this work in the Gulf because its organizational resources have been used to address the Corps' violations of law in the Project. Moreover, if the Project moves forward as authorized without the additional review and

protections required by NEPA and the CWA, TIRN anticipates it will devote additional organization time and resources to monitoring, researching and/or rescuing sea turtles harmed by the Project instead of its other priorities along the Texas Gulf Coast.

21. Earthworks, a 501(c)(3) non-profit corporation headquartered in Washington, D.C., is dedicated to protecting communities and the environment from the adverse impacts of mineral and energy development while promoting sustainable solutions. Earthworks stands for clean air, water and land, healthy communities, and corporate accountability. Earthworks works for solutions that protect both the Earth's resources and our communities. Earthworks has approximately 45,000 members nationally.

22. Earthworks has three staff who work in Texas and has maintained long-standing programmatic connections to the state for over 11 years. In April 2021, Earthworks and a broad coalition of Gulf Coast community leaders launched the Stop Fossil Fuels Exports campaign, which seeks to address the climate crisis and prevent more pollution and health harms in frontline environmental justice communities by stopping new fossil fuel export facilities and banning oil and gas exports. The campaign features some of Earthworks' members in the Matagorda Bay region and has included actions to urge the Corps and EPA to perform the environmental reviews this complaint seeks.

23. Earthworks has members in Texas whose aesthetic, recreational, commercial, and health interests would be adversely affected by this dredging project. For example, one member currently resides in Houston and has spent time recreating, fishing, and crabbing in Matagorda Bay, and regularly enjoys seafood from the bay and adjacent waters. This member plans to continue participating in these activities but is concerned about the risks of mercury contamination and other environmental damage from the dredging project. Earthworks'

members plan to continue these activities, and the Corps' actions to deepen and widen the Matagorda Ship Channel injure and threaten future injuries to this member and other Earthworks members. Earthworks members have legally protected recreational and aesthetic interests and have reasonable concerns that the dredging of the ship channel will threaten these interests. Earthworks members' injuries are fairly traceable to the Corps' failure to fully assess the environmental impacts of the ship channel dredging project to aquatic ecosystems and wildlife, including endangered and threatened species like sea turtles, to properly test for contaminants, and to consider and select a project alternative with less harmful effects. These injuries are actual, direct, concrete, and irreparable, as money damages cannot adequately remedy these injuries once they occur.

24. The Environmental Integrity Project ("EIP") is a 501(c)(3) non-profit organization based in Washington, D.C., with an office in Austin, Texas. EIP is dedicated to ensuring the effective enforcement of state and federal environmental laws to protect public health and the environment. EIP's mission is to empower communities and protect public health and the environment by investigating polluters, holding them accountable under the law, and strengthening public policy.

25. EIP was founded to advocate for the effective enforcement of our nation's anti-pollution laws. EIP works primarily, though not exclusively, on industrial sources of pollution such as fossil fuel power plants, oil refineries, chemical plants, and oil and gas facilities. EIP collects and disseminates information through technical reports, online maps and databases, social media, and press releases, and engages in advocacy to reduce pollution, including lobbying, organizing, and litigation.

26. EIP has invested substantial staff time and other organizational resources into reviewing and commenting on the proposal to expand the Matagorda Bay shipping channel and the Max Midstream crude oil export terminal that is associated with it. However, that work has been frustrated by the Corps' failure to comply with NEPA and the CWA through timely and adequate disclosure of pollution impacts and environmental risks of dredging in an aquatic Superfund site contaminated with mercury. EIP has significant concerns about the environmental impact of the dredging project, which would mobilize contaminated sediment, destroy fisheries habitats, and facilitate expansion of fossil fuel infrastructure.

27. EIP staff member Lauren Fleer, who formerly was employed by the U.S. Army Corps of Engineers, has devoted significant staff time to the Project, approximately 340 hours over the past 11 months. Ms. Fleer's expertise is in environmental site assessment, environmental sampling, and site remediation. On behalf of EIP, Ms. Fleer has spent considerable time assessing and making public critical information about the Project's environmental harms—information that the Corps should have made available under its NEPA and CWA obligations but has not. For example, Ms. Fleer has spent many hours engaging in Freedom of Information Act ("FOIA") requests to the Corps and EPA to obtain information on sediment quality and sampling protocols. EIP also funded an approximately $10,000 study on mercury risks from the dredging project and publicized that study to highlight the risks that the Corps has failed to adequately disclose and consider. Ms. Fleer has travelled to Matagorda Bay to meet with government officials, obtain information from the Port and other parties, and advocate for more testing and scrutiny of the risks of dredging. She plans to travel there again to meet with community members and gather information about the Project.

28. This ongoing work would not be necessary if the Corps had complied with NEPA and the CWA by fully and adequately evaluating and disclosing risks of dredging in the contaminated area. Because it did not, EIP's organizational resources—including Ms. Fleer's staff time and funds used for the mercury study—have not been available for other high priority projects. For example, EIP has many clients and partners advocating against fossil fuel development and for effective enforcement of environmental laws in the Houston, and Corpus Christi metro areas as well as in the Permian Basin counties of West Texas. However, EIP has not been able to fully attend to this work because its organizational resources have been used addressing the Corps' violations of law in the Matagorda Bay project. If the Project moves forward as authorized without the additional review and protections required by NEPA and the CWA, EIP would have to devote additional organization time and resources to monitoring pollution and compliance with environmental laws from the Project instead of its other priorities in Texas.

B. Federal Defendants

29. Michael L. Connor is the Assistant Secretary of the Army for Civil Works and is responsible for overseeing the U.S. Army Corps of Engineers Civil Works program. Mr. Connor was appointed by President Biden and sworn in on Nov. 29, 2022. He is sued in this official capacity.

30. The U.S. Army Corps of Engineers is an agency of the United States government, and a division of the U.S. Army, which is part of the U.S. Department of Defense. It is headquartered in Washington, D.C.

STATUTORY AND REGULATORY BACKGROUND

I. THE NATIONAL ENVIRONMENTAL POLICY ACT

31. NEPA, 42 U.S.C. §§ 4321 *et seq.*, is our "basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a).[1] It makes environmental protection a part of the mandate of every federal agency. 42 U.S.C. § 4332(1).

32. NEPA seeks to ensure that federal agencies take a "hard look" at environmental concerns. One of NEPA's primary purposes is to ensure 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 Council,* 490 U.S. 332, 349 (1989). NEPA also "guarantees that the relevant information [concerning environmental impacts] will be made available to the larger audience," including the public, "that may also play a role in the decision-making process and the implementation of the decision." *Id.*

33. NEPA requires agencies to fully disclose all of the potential adverse environmental impacts of its decisions before deciding to proceed. 42 U.S.C. § 4332(C). NEPA also requires agencies to use high quality, accurate scientific information and to ensure the scientific integrity of the analysis. 40 C.F.R. §§ 1500.1(b), 1502.24.

[1] NEPA's longstanding implementing regulations were amended in 2020. *See* Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,304 (July 16, 2020). As the challenged EIS was initiated prior to their effective date, however, the prior NEPA regulations govern here. *Id*. at 43,339 (2020 revisions apply to NEPA processes that commence after the effective date of the regulations). Moreover, the current administration is engaged in a process to restore the previous regulations. *See, e.g.,* National Environmental Policy Act Implementing Regulations Revisions, 87 Fed. Reg. 23,453 (April 20, 2022).

34. If an agency action has adverse effects that are "significant," they need to be analyzed in an environmental impact statement ("EIS"). 40 C.F.R. § 1501.3.

35. NEPA's governing regulations define what "range of actions, alternatives, and impacts [must] be considered in an environmental impact statement." 40 C.F.R. § 1508.25. This is in part what is known as the "scope" of the EIS. The EIS must consider direct and indirect effects. The direct effects of an action are those effects "which are caused by the action and occur at the same time and place." 40 C.F.R. § 1508.8(a). The indirect effects of an action are those 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).

36. An agency must also analyze and address the cumulative impacts of a proposed project. 40 C.F.R. § 1508.25(c)(3). Cumulative impacts are the result of any past, present, or future actions that are reasonably certain to occur. Such effects "can result from individually minor but collectively significant actions taking place over a period of time." 40 C.F.R. § 1508.7.

37. Under NEPA regulations applicable to this Project, an agency must prepare a Supplemental EIS if it "makes substantial changes in the proposed action that are relevant to environmental concerns; or there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9.[2] The Corps' NEPA regulations similarly require a Supplemental EIS "whenever significant impacts resulting from changes in the proposed plan or new significant information, criteria, or

[2] The CEQ modified its regulations in 2020 but did not meaningfully change the long-standing Supplemental EIS standard. 40 C.F.R. § 1502.9(d) (2020). Indeed, the updated regulations are *more* explicit about the need for an agency to document its decision *not* to prepare a Supplemental EIS. *Id.* § 1502.9(d)(4).

circumstances" arise. 33 C.F.R. § 230.11(b); *see also* 46 Fed. Reg. 18026, Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations No. 32 (March 23, 1981) ("[I]f there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts, a supplemental EIS must be prepared for an old EIS so that the agency has the best possible information to make any necessary substantive changes in its decisions regarding the proposal.").

II. THE CLEAN WATER ACT

38. Congress passed the CWA, 33 U.S.C. § 1251 *et seq*., "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).

39. The CWA prohibits the discharge of dredged material into waters of the United States unless the discharge complies with the requirements in Section 404 of the Act. 33 U.S.C. §§ 1311(a), 1344; *see* 33. C.F.R. § 336.1(a) (Section 404 of the Act "governs the discharge of dredged or fill material into waters of the U.S.").

40. For federal dredging projects sponsored by the Corps and authorized by Congress, the Corps does not need to issue itself a 404 permit if it demonstrates in the EIS submitted to Congress that the project will comply with the Section 404(b)(1) Guidelines. 33 U.S.C. § 1344(r) (exempting federal projects from permitting requirements for discharges of dredged materials under the Act if information about the effects of the discharges, including the 404(b)(1) Guidelines, is included in an EIS that is submitted to Congress); 33 C.F.R. § 336.1(a); *see* 40 C.F.R. § 230 *et seq*. (codifying 404(b)(1) Guidelines in regulations developed by EPA in conjunction with the Corps).

41. The 404(b)(1) Guidelines generally prohibit the discharge of dredged material if "there is a practicable alternative to the proposed discharge which would have less adverse

impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences." 40 C.F.R. § 230.10(a).

42. The 404(b)(1) Guidelines mandate that "no discharge of dredged or fill material shall be permitted which will cause or contribute to significant degradation of the waters of the United States." 40 C.F.R. § 230.10(c). The agency's "findings of significant degradation related to the proposed discharge shall be based upon appropriate factual determinations, evaluations, and tests" as delineated in the Guidelines. *Id.* Effects that can contribute to "significant degradation" include, *inter alia*, "significantly adverse effects of the discharge of pollutants on" (1) "human health or welfare, including… effects on… fish, shellfish, wildlife, and special aquatic sites," (2) "life stages of aquatic life and other wildlife… including the transfer, concentration, and spread of pollutants," (3) "loss of fish and wildlife habitat," or (4) "recreational, aesthetic, and economic values." *Id.* § 230.10(c)(1-4).

43. The Corps "shall determine in writing the potential short-term or long-term effects of a proposed discharge of dredged or fill material on the physical, chemical, and biological components of the aquatic environment," 40 C.F.R. § 230.11, including "the degree to which the material proposed for discharge will introduce, relocate, or increase contaminants." *Id.* § 230.11(d).

44. To make these determinations, the Corps first evaluates whether additional testing of the material to be dredged is needed. It must examine the extraction site "to assess whether it is sufficiently removed from sources of pollution to provide reasonable assurance that the proposed discharge material is not a carrier of contaminants." 40 C.F.R. § 230.60(b). If this evaluation provides reasonable assurance that such contaminants are not contained in the dredge material, "the required determinations pertaining to the presence and effects of contaminants can

be made without testing." *Id.* § 230.60(a). "[E]ven if tests are not performed, the permitting authority must still determine the probable impact of the operation on the receiving aquatic ecosystem. Any decision not to test must be explained in the determinations made under § 230.11." *Id.* § 230.60(d).

45. If the Corps determines that the dredged material is likely to be a carrier of contaminants and none of the exceptions apply, the Guidelines provide guidance for the Corps to determine the appropriate testing procedures for evaluating potential effects on water quality and aquatic organisms and for comparing contaminants and biological habitats at the dredging site and the disposal sites. *Id.* §§ 230.60, 230.61.

46. The 404(b)(1) Guidelines require the Corps to take steps to "minimize potential adverse impacts of the discharge on the aquatic ecosystem," *Id.* § 230.10(d), including *inter alia*, "locating and confining the discharge to minimize smothering of organisms," *id.* § 230.70, containing the discharge to prevent sources of pollution, *id.* § 230.72, and avoiding disposal sites with unique habitats. *Id.* § 230.75.

FACTUAL BACKGROUND

I. MATAGORDA BAY'S ECONOMIC AND ECOLOGICAL SIGNIFICANCE

47. Matagorda Bay is the third largest estuary on the Texas coast and rich in natural resources. Located on the Central Flyway, one of the most important bird migration routes in North America, Matagorda Bay includes numerous state and wildlife refuges. It is home to several species protected under the federal Endangered Species Act, including five species of sea turtle and fourteen species of birds.

48. For generations, Matagorda Bay and surrounding bays have supported a thriving fishing economy, with commercially significant harvests of oysters, shrimp, crabs, and finfish. In the 1920s, Matagorda Bay led the nation in shrimp exports. Industrial pollution in the bay,

among other things, has caused fishing harvests to fall, and fishing related employment has dropped.

49. One of the most important habitat types in Matagorda Bay is its seagrass beds that provide feeding and nursery habitat for numerous fish, shellfish, invertebrate, waterfowl, and countless other species. Seagrass beds also reduce erosion and dampen the impacts of currents and waves on coastal zones. Seagrass habitats in coastal Texas have been in decline due to pollution and habitat modification, leading to significant state and federal expenditures to protect and restore them.

50. Another critically important habitat in Matagorda Bay are oyster reefs. These rocky habitats are scattered throughout the bay and provide habitat not just for commercially valuable shellfish but many other species as well. Oyster reefs also attenuate wave energy and erosion, thus protecting other habitats. Like seagrass beds, oyster reefs have been in long-term decline in Matagorda Bay, leading to considerable efforts to protect and restore them.

II. THE PROPOSAL TO EXPAND THE MATAGORDA BAY SHIPPING CHANNEL

51. Congress originally authorized navigation improvements in Matagorda Bay under the Rivers and Harbors Act. 61 Cong. Ch. 382, June 25, 1910, 36 Stat. 630. The authorization provided for an eight-mile-long navigation channel to Port Lavaca, Texas, measuring seven feet deep and 80 feet wide. *Id.* at 649.

52. Subsequent Congressional enactments authorized both the lengthening and deepening of the channel. For example, in 1958, Congress enacted P.L. 85-500, which authorized and appropriated funds for deepening the existing shallow draft channel to 38 feet deep and 300 feet wide.

53. Starting in 1948, the Aluminum Company of America ("Alcoa") aluminum refining/smelting facility in Matagorda Bay discharged mercury into the bay in the area in and

around the ship channel. Since 1988, an area of Lavaca Bay has been closed to fishing because of high levels of mercury in finfish and crabs. Years of mercury contamination led EPA to add the Alcoa Point Comfort/Lavaca Bay site to the Superfund National Priorities List in 1994. 59 Fed. Reg. 8,794 (February 23, 1994). EPA oversees ongoing remedial actions at the site to address mercury contamination, including long-term monitoring of sediments, fish, and crab.

54. In 1970, Congress authorized the Corps to "review the operation" of constructed projects and to report to Congress with recommendations on modifying them. PL 91-611, codified at 33 USC 549a. These reviews are known as "Section 216 studies."

55. In 2009, under this authority, the Corps completed a Final EIS for the Matagorda Ship Channel Improvement Project to assess the impacts of widening and deepening the channel. However, Congress never authorized the project.

56. In late 2015, Congress passed legislation that significantly changed the economic landscape governing crude oil shipping. Prior to 2015, federal law significantly restricted the export of U.S.-sourced crude oil to most other nations. In 2015, Congress lifted the "export ban" on crude oil, and exports of crude oil from the United States increased in every subsequent year.

57. In December 2016, the Corps published a notice in the Federal Register that it intended to prepare a draft feasibility study and EIS for the Matagorda Ship Channel "to assess the social, economic and environmental effects of widening and deepening" the channel. 81 Fed. Reg. 94,352 (Dec. 23, 2016). The announcement stated that "[m]odifications to the existing 26-mile-long navigation channel are needed to reduce transportation costs and increase operational efficiencies of maritime commerce movement through the channel." In January 2017, the Corps, along with the project's non-federal sponsor, the Calhoun Port Authority, initiated a public scoping meeting to address these concerns.

58. The Corps released a Draft EIS in May 2018 and solicited public comment. 83 Fed. Reg. 19,737 (May 4, 2018). The Draft EIS assessed different configurations for deepening and widening the channel to accommodate larger vessels.

59. During both the scoping phase and the Draft EIS comment phase, the Corps received multiple comments expressing concerns about the mobilization of mercury and other toxins, as the project would dredge through the Alcoa Superfund site. Many of these comments asked for additional sediment sampling and analysis. The comments also pointed out that the Draft EIS underestimated habitat impacts on wetlands, oysters, and seagrasses, and they questioned the adequacy of the Corps' vague mitigation plans.

60. The Corps released the Final EIS in August 2019. Like the Draft EIS, the Final EIS primarily focused on the economic and environmental tradeoffs of different channel depth and width configurations.

61. The central problem statement identified in the Final EIS was the significant changes in physical and economic conditions since the ship channel was completed. Specifically, cargo vessels had increased in size; the channel was inaccessible to vessels with more than a 38-foot draft. Additionally, the channel bottom width of 200 feet limited access to the channel to a single vessel at a time.

62. Under the preferred alternative identified in the Final EIS, over 21 million cubic yards of sediment would be dredged to expand the ship channel, including over 2.5 million cubic yards from the Closed Area of the Alcoa Superfund Site to widen and deepen the channel and create a new turning basin.[3] The dredged sediment would be deposited in various placement

[3] For comparison, this is enough mud and sand to bury 36 football fields ten feet deep or fill 2,560 Olympic-sized swimming pools.

areas, some in the Gulf of Mexico and some in other places in Matagorda Bay, including 14 million cubic yards in "new unconfined" placement areas to the southwest of the ship channel. FEIS at 109-110.

63. The Final EIS estimated that the dredging would take approximately 4 years, and that the channel itself would have a "project design life" of 50 years.

64. The Final EIS asserted that the deepening of the channel would not increase the amount of crude oil and other material that moved through Matagorda Bay. FEIS at 64, 120 ("Increased throughput via the [channel] is not projected to occur as a result of a deepening."). Instead, the Final EIS concluded that essentially the same, modest amount of oil would continue to be transported, albeit in fewer ships. *Id*. at 91, 121 ("the total number of vessels could decrease and transportation costs could be reduced…"); FEIS App. A at 34 (the "increase in vessel capacity results in fewer vessel trips being requited to transport the forecasted cargo"). The Final EIS stated that "channel improvements would not induce additional growth including additional traffic, noise, or lighting compared to the future without-project condition." *Id*. at 121 (emphasis added); *see also* FEIS App. A at 25 (applying modest AEO growth forecast to existing baseline of 2.6 million tons/year).

65. The Final EIS noted the significant uncertainty attendant to the 2015 lifting of the federal crude export ban and acknowledged that the United States was poised to become a major exporter of crude. FEIS at 21. Yet, the FEIS did not examine the possibility of significant increases in crude export from ports accessible via the Matagorda Ship Channel.

66. In part based on the findings above, the Final EIS also concluded that impacts to recreational and commercial fisheries would be "temporary and minor." FEIS at 122.

67. As to oyster beds, the Final EIS concluded that about 130 acres of oyster beds would be destroyed during dredging, which it identified as "unavoidable impacts" that "constitute a significant adverse effect." *Id.* at 123. In response to comments stating this acreage was significantly underestimated, the Corps agreed to conduct oyster surveys after the EIS was finalized "to get an accurate measure of acreage impacted by placement" of dredged sediment. FEIS App. B, Enclosure 5. The Final EIS acknowledged there may also be "[i]ndirect effects to oyster reef habitat" but did not quantify the amount of oyster reefs that could be destroyed as a result. FEIS at 123.

68. As mitigation for oyster reef impacts, the Corps proposed to create 130 acres of "new" oyster reef at unidentified locations in Matagorda Bay. *Id.* The Final EIS observed that "it is unknown how long the process may take" but guessed that 2 years was a "good estimate" of the time for the new reefs to become productive. *Id.* "[S]election of potential mitigation sites and modeling of benefits will be conducted" later in the process. *Id.* at 150. The Final EIS also proposed two acres of marsh mitigation sites, which would remain in Matagorda Bay only "to the extent practicable." *Id.*

69. As to the placement of dredged material, the Final EIS included a Dredged Material Management Plan ("DMMP") as an appendix to the primary document, that identified both upland and aquatic sites for disposal for the millions of tons of sediment dredged to deepen the channel.

70. The Final EIS included a CWA Section 404(b)(1) Short Form Evaluation concluding that the Project would comply with Section 404(b)(1) Guidelines. FEIS App. B, Enclosure 6.

71. The Corps' 404(b)(1) evaluation consisted of a five-page checklist. *Id.* at 1-5. Based on the checklist, the Corps concluded that the Project "will not cause or contribute to significant degradation of waters of the U.S." and "appropriate and practicable steps have been taken to minimize potential adverse impacts of the discharge on the aquatic ecosystem," citing to FEIS Appendix B, Section 4.9.3 ("Water Quality") for both conclusions. *Id.* at 1.

72. The Corps' 404(b)(1) evaluation listed all categories of impacts under the "technical evaluation factors" as "not significant" or "not applicable," except for wetlands, which it checked as "significant." *Id.* at 1-2. For example, the Corps checked "Not Applicable" for "vegetated shallows," which are defined in the 404(b)(1) Guidelines as "permanently inundated areas that under normal circumstances support communities of rooted aquatic vegetation, such as turtle grass or eelgrass…." *Id.*; 40 C.F.R. § 230.43(a).

73. The Corps checked the box "Yes" in the 404(b)(1) Short Form Evaluation (3.b. – Evaluation of Dredged or Fill Material) listing three reasons from the 404(b)(1) Guidelines for not performing additional testing for contaminants, without explaining which exception it believed applied or including any justification for the reason this box was checked. FEIS App. B, Enclosure 6 at 3.

74. The Water Quality Section of the Final EIS included one paragraph about impacts to water quality from known mercury in sediments that would be dredged by the Project: "While the project will not involve dredging in the areas that have highest mercury concentrations, there will be some amount of resuspension of sediment associated with the construction dredging process, and there is some concentration of mercury in sediments. However, no significant change in ambient or sediment mercury concentrations are expected." FEIS App. B, Section 4.9.3.

75. In response to concerns about toxicity of sediments from the Alcoa superfund site, the Final EIS promised to "coordinate with EPA prior to the widening and deepening of the ship channel to develop a sediment sampling and analysis plan." FEIS 162. The Final EIS did not specify whether the Corps would re-evaluate or modify the proposal to ensure compliance with NEPA and the CWA after conducting additional sampling for mercury and other contaminants.

76. On November 15, 2019, Lt. Gen. Todd Semonite transmitted the final EIS to Congress with a letter recommending authorizing a proposal to modify the Matagorda Ship Channel. The proposal included deepening the channel to -49 feet Mean Lower Low Water ("MLLW"), creating a new turning basin, and extending the entrance channel by 13,000 feet. The plan would require relocating 16 pipelines. In this letter to Congress, Lt. Gen. Semonite concluded that the project "is technically sound, environmentally and socially acceptable, cost effective, and economically justified."

77. The proposal was to cost $218 million, of which roughly one third was to be paid by the Port of Calhoun, and two-thirds by the United States. The Project's annual benefits and costs were estimated at over $35 million and over $15 million, respectively, with a benefit-to-cost ratio of 2.26 to 1.

78. Congress authorized the Matagorda Ship Channel Project as part of the 2020 Water Resources Development Act. *See* Consolidated Appropriations Act of 2021, PL 116-260, sec. 401.

III. CHANGED CIRCUMSTANCES IN THE BAY TRIGGER A CALL TO REVISIT THE ENVIRONMENTAL REVIEW FOR THE PROJECT.

79. In October 2021, SABE Waterkeeper, TCE, and other organizations sent formal correspondence to the Corps regarding the Project. The focus of this letter was a number of changed circumstances and new information that warranted revisiting the conclusions of the

2019 Final EIS with a Supplemental EIS. The letter focused on three key issues: the development of a major new crude oil export hub in reliance on the deepened channel; new information about impacts associated with mercury contamination from the Alcoa site; and new information relating to the Project's impacts on key aquatic habitats.

80. The October 2021 Request for a Supplemental EIS followed a previous request for a Supplemental EIS by the Matagorda Bay Foundation in April 2021 raising many of the same issues as Waterkeepers. Another letter in April 2021 to President Biden from 81 fishing communities and environmental and human rights organizations (including Plaintiffs SABE Waterkeeper, TCE, Earthworks, and TIRN), urged the President to revoke authorization for the proposed Matagorda Ship Channel deepening project and requested a Supplemental EIS.

A. The Max Midstream Crude Export Hub

81. After the Final EIS was published, a newly incorporated company, Max Midstream, LLC, announced plans to develop infrastructure at Port Calhoun in reliance on the deepened channel to create a major global crude oil export hub, one that would provide an additional export alternative to ports elsewhere in Texas. The company purchased a pipeline that would connect the Port with existing and planned oil production sites in the state. The company announced plans to spend $1 billion to develop the Seahawk Terminal at the Port to reach a capacity of 20 million barrels of crude oil a month (roughly 666,000 barrels per day) exported through the terminal. The Port of Calhoun director stated in the media that the project "will transform our port into a major oil-exporting center." Media reports further indicated that Max Midstream would be funding the dredging project in full, including the full 2/3 federal cost share.

82. The October 2021 Waterkeeper letter also highlighted new information and federal policies related to climate change since the Final EIS. The Biden administration has

identified the "urgency" of addressing the climate crisis to avoid "a dangerous, potentially catastrophic, climate trajectory." *See* Exec. Order 14,008, *Tackling the Climate Crisis at Home and Abroad*, 86 Fed. Reg. 7619 (Jan. 27, 2021). The Executive Order called for putting "the climate crisis at the forefront" of national planning, including among other things, "promoting the flow of capital towards climate-aligned investment and away from high-carbon investments." *Id*.

83. Opening a major new infrastructure avenue for the export of fossil fuels raises serious climate implications. With a publicly announced intention to handle 666,000 barrels of crude oil per day, the Project would be a major new conduit for crude oil. If this oil is burned, as it would presumably be, it would generate 100 million tons of carbon dioxide annually, a significant source of greenhouse gases ("GHGs") under any metric. Moreover, such emissions would be in place for the Project's design life of fifty years—i.e., through 2070, and long past any reasonable date by which GHG emissions should have been substantially phased out.

84. Because the Final EIS was issued prior to the announcement of this Project, the EIS contained no information about any of the impacts associated with its development.

85. Waterkeeper sent a follow up letter to the Corps in December 2021 that included three expert reports related to the expansion of crude exports in Matagorda Bay. First, experts Ian Goodman and Bridget Rowan challenged erroneous economic assumptions in the Final EIS and documented how the new information relevant to the Max Midstream oil export terminal upended its conclusions. The report further documented major changes in the oil export market subsequent to the issuance of the Final EIS. The report also challenged the model used by the Corps to develop the Final EIS, HarborSim, which included a simplifying assumption that volumes of crude oil would remain static, limiting the variables that could change to only the

size and frequency of vessels carrying that fixed volume of oil. As the report documented, "[t]hese simplifying assumptions are no longer valid in the current economic context."

86. A second expert report, by Stockholm Environmental Institute Senior Scientist Peter Erickson, discussed the climate implications of opening up a new major source of crude oil exports on the Texas Gulf coast. The paper examined constraints that prevented additional production in Texas to meet international demand and documented how a new export terminal would open up production of new low-cost oil, lowering market prices and increasing consumption of this fossil fuel. The paper estimated that the impact of expanded exports of 560,000 barrels/day of crude oil would have a "net" impact of 190,000 barrels/day in additional consumption—nearly 70 million barrels of additional oil consumption annually. Applying the government's own social cost of carbon metric to this induced consumption yielded an estimate of almost $3 billion in climate-related damages annually. None of this information was discussed or disclosed in the Final EIS.

87. A third expert report, by oil transport experts Nuka Research, documented what this dramatic increase in crude oil movement through Matagorda Bay would mean for the environmental health of the bay. The tenfold increase in crude oil shipments through the bay above Final EIS estimates, the report found, "will increase the risk of oil spills over the current-day baseline and well beyond the EIS projections, although the EIS did not include an oil spill risk assessment." The report also documented other serious impacts associated with the increase in vessel traffic movements, observing that "navigational hazards, fishery impacts, underwater noise, erosion from ships' wakes, and increased air emissions" remained unassessed in the Final EIS.

B. Mercury Contamination

88. The Final EIS briefly acknowledged but did not quantify or meaningfully evaluate the probable impacts of mercury contamination on water quality from the dredging through contaminated sediments and placement of dredged materials before concluding that "no significant change in ambient or sediment mercury concentrations are expected" from the dredging project. FEIS App. B at 34. The Corps only promised to perform sediment testing after the Final EIS based on concerns about the presence of mercury in sediment and the Alcoa Superfund site. *Id.* at 35; FEIS at 132, 162.

89. In its October 2021 letter, Waterkeepers documented two recent sources of new information, issued after the Final EIS, about the potential for the release of mercury into the environment and food chain from the dredging project. These sources contradicted and undermined the EIS's conclusions that "no significant change" in mercury concentrations are expected from the Project.

90. The first source of significant new information about mercury contamination and the dredging project was a study dated September 30, 2021, by scientists at the Harte Research Institute at Texas A&M Corpus Christi ("the Montagna Study"). The study evaluated the health and environmental impacts of the dredging project, including the potential for mobilization of mercury into the ecosystem and food chain and compared these impacts to the Corps' analysis and conclusions in the Final EIS. The study compared the proposed ship channel expansion to the known areas of mercury contamination in sediments and oysters in Lavaca Bay based on the last comprehensive sampling collection from 2002. Because this sampling was almost 20 years old and conditions had changed, the Montagna study recommended that a "new [mercury] concentration assessment should be conducted to accurately assess the current location and concentration of the [mercury] in Lavaca Bay."

91. Using the existing data, the Montagna study then evaluated the risks of mercury mobilization from the dredging project based on the unique characteristics of the sediments in Lavaca Bay and made the following conclusion: "Considering that in Lavaca Bay there are high sedimentation rates, low remixing, and high methylation after dredging, it is likely that mobilization of the [mercury] will be high."

92. The Montagna study also evaluated an important new impact related to mercury and dredging not considered at all in the Final EIS – the potential for microplastics to "play a significant role … in relation to contaminant transport (i.e. mercury and PAHs) and food webs" and "alter food web dynamics due to dredging." Microplastics can act as "contaminant transport vectors" because "[m]etals have been shown to adsorb onto microplastics at concentrations that are several orders of magnitude higher than in the surrounding water, thus increasing the potential exposure to aquatic organisms." This contamination risk is a particular concern here because Lavaca and Matagorda Bays have "abnormally high amounts" of microplastics due to illegal releases of billions of plastic pellets from the nearby Formosa Plastics facility. The dredging of the ship channel would exacerbate the risk of microplastics spreading contaminants because dredging is a "resuspension event" that could "reintroduce contaminated plastics into the water column where they may once again come into contact or be ingested by estuarine organisms or disperse/transport the plastic and associated contaminants to somewhere else in the environment."

93. The second source of new information identified in Waterkeepers' October 2021 letter was EPA's Five-Year Review of the Superfund site, issued in August 2021. In this recent review of the progress of the actions to remediate mercury contamination at the Superfund site, EPA concluded that progress was being made to protect human health and the environment

except for "persistent elevated" mercury levels in fish and crabs in the closed areas of Lavaca Bay. As a result, EPA concluded the Superfund site was protective of human health and the environment in the short term, but that several actions "must be taken for the remedy to be protective over the long term."

94. Notably, EPA "recognizes the potential for negative impacts to the site" from the Matagorda Ship Channel dredging project and concluded that it was "likely" that the expansion of the ship channel "could affect ongoing remedial actions." Therefore, one of the actions that EPA found "must be taken" to ensure the Superfund site is protective of human health and the environment in the long term is "to determine if these dredging and removal activities will affect the ongoing remedial actions."

95. On November 12, 2021, Plaintiff EIP, joined by SABE Waterkeeper, sent an additional letter critiquing the Corps' recently released sediment sampling plan. The letter documented that the number of samples was too few and the sampling locations too shallow for the plan to support a factual determination about the water quality impacts of dredging and the placement of dredged material. For example, the letter explained that surface sediment samples were not sufficient to characterize mercury contamination from dredging because studies from the EPA and others had recognized that the highest mercury levels could exist at depth. The letter provided detailed analysis of the Corps' Clean Water Act 404(b)(1) obligations and explained why the plan did not satisfy them.

96. The November 2021 letter also attached an expert report by marine toxicologist Dr. Jessica Dutton of Texas State University explaining why the Corps' sediment sampling plan was inadequate to evaluate the potential for the proposed project to cause adverse impacts to

water quality, biota, fisheries, and human health, and recommending additional sampling and testing that should be done to evaluate these impacts.

97. In February 2022, Waterkeepers submitted another letter with newly published sediment sampling data from Alcoa that supported a need for a Supplemental EIS because it "found mercury levels six times higher than EPA's remedial action objective for the Superfund Site in subsurface sediments adjacent to the proposed project dredging area." In particular, 10 of the Alcoa study's 54 samples exceeded 0.5 mg/kg mercury, the Superfund remedial action objective for open water. 15 sediment samples had mercury concentrations exceeding 0.25 mg/kg, the Superfund remedial action objective for fringe marsh habitat. EPA established these target cleanup goals because it determined that levels exceeding them posed an "unacceptable risk" to the health of fish and humans.

98. The February 2022 letter also attached an additional expert report by Dr. Jessica Dutton addressing the risk of mercury contamination from the dredging project in light of the new data and other new information released since the Final EIS. Dr. Dutton's report concluded that the recent Alcoa data contradicted the Final EIS's conclusion that mercury contamination would not significantly impact water quality and found that "dredging and sediment disposal in the [Alcoa superfund site] will resuspend buried mercury contaminated sediments, which is likely to increase ambient mercury concentrations in the surface sediment and water column." The report further documented the ways that the Corps' proposed sediment sampling and analysis plan was "inadequate" to prevent significant risk of environmental and public health harm. Ultimately, the report concluded that there "will very likely be long-term adverse impacts to water quality, biota, fisheries, and human health from the resuspension of mercury from the dredging project," contradicting the findings of the Final EIS.

C. Oyster Reefs and Seagrass Habitats

99. The October 2021 Waterkeeper letter documented significant new information about the extent of the dredging project's harms to important oyster reefs and seagrass beds that contrasted dramatically with the impacts identified in the Final EIS.

100. For oyster reefs, the Montagna study concluded that 838.63 acres of oyster reefs will be harmed by the ship channel dredging project, compared to the 129.2 acres estimated in the Final EIS. The difference stems from the fact that the Corps' estimate included only the direct impacts to oyster reef habitat that will be dredged during the construction of the channel. In contrast, the Montagna study's acreage included impacts to oyster reefs both in the path of "the new channel" and those that will be covered in sediment by dredging spoil placement areas. The acreage of oyster reefs in placement areas were included because sedimentation events can lead to "catastrophic loss of oyster reefs" and "result in death by smothering or hypoxia or hypoxia/anoxia, decreased fitness because of diminished reproductive energy allocation, or poor health due to immunologic stress."

101. Corps officials have acknowledged in meetings with the public that the Corps knew the oyster reef estimates were underestimated in the Final EIS. Despite this acknowledgment, the EIS proposed compensatory mitigation only for 130 acres of oyster reefs. The Corps' significant undercounting of oyster reefs impacted by the Project means that the mitigation and associated costs presumed for the Project are also significantly underestimated and undervalued.

102. Second, the Montagna study demonstrated that the Final EIS ignored the loss of seagrasses altogether. The Montagna study concluded that at least "1017.39 acres of seagrass are predicted to be affected by dredging operations spoil placement," by mapping seagrass habitat from Texas Parks and Wildlife Division and National Oceanic and Atmospheric Administration

datasets with the new dredging spoil placement areas. By contrast, the Final EIS determined there would be "no anticipated impacts" to seagrasses (also called submerged aquatic vegetation, or SAV) from the Project, because there were "no known occurrences of submerged aquatic vegetation (SAV)" in the project area. The Final EIS did not explain why it didn't use the available datasets from state and federal government agencies that were used by the Montagna study.

103. Moreover, the estimate of 1,017 acres of seagrasses from the Montagna study is itself likely an undercount of total seagrass losses from the Project because it is "likely that additional seagrass loss will occur" from the indirect effects of the dredging and placement areas. The Montagna study explained that "[s]eagrasses are highly sensitive to changes in water quality, sediment loading, and other inputs that accumulate due to the alteration of coastal water bodies" and that seagrasses can be directly harmed by being "physically removed or buried" from dredging and indirectly harmed due to light reduction and changes in water quality from dredging activities.

104. Waterkeepers met with officials from the Corps Headquarters and Galveston District on several occasions after sending its letters and expert reports. On December 28, 2021, Assistant Secretary Connor formally responded to Waterkeepers' request for a Supplemental EIS. The letter stated that the Corps would continue to work with the Environmental Protection Agency "to review the concerns" identified in the letter, and that if this work revealed any "significant changes" in the Project, a supplemental EIS would be undertaken. These promises were confirmed anew during a site visit and meeting on March 17, 2022 in Port Lavaca between Corps Deputy Assistant Secretary Jaime Pinkham, Corps District Commander Colonel Vail,

EPA Deputy Assistant Secretary Carlton Waterhouse, EPA Region 6 Administrator Dr. Earthea Nance, and other Corps and EPA staff members.

105. Despite these assurances, the Corps has indicated that it will move ahead with Project implementation. Corps staff have stated in public meetings and at the March site visit that the Galveston District is over 90% done with design plans for the first segment of the Project and plans to issue requests for bids to dredge the first part of the channel in July 2022. No decision has been made on a Supplemental EIS to Waterkeepers' knowledge.

106. After the March site visit, EPA officials coordinated with the Corps and Alcoa Corporation to develop additional sampling and testing requirements for the dredging project. No plans for additional sampling or testing have been made available to Waterkeepers to date.

CLAIMS FOR RELIEF

I. FIRST CLAIM FOR RELIEF: THE CORPS FAILED TO PREPARE A SUPPLEMENTAL EIS AS REQUIRED BY NEPA

107. Plaintiffs incorporate by reference all proceedings paragraphs.

108. As the U.S. Supreme Court has held, "[i]f there remains major federal action to occur, and if the new information is sufficient to show that the remaining action will affect the quality of the human environment in a significant manner or to a significant extent not already considered, a supplemental EIS *must* be prepared. *Marsh v. Oregon Nat'l Resources Counc*., 490 U.S. 360, 374 (1989) (emphasis added) (internal quotation marks omitted)

109. NEPA supplementation is needed wherever there is "major federal action" that remains to be carried out. *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 73 (2004). Major federal action remains on this Project as this is a Corps' project to expand a federally-maintained navigation channel and the Project is not yet completed. The Project is in the Pre-Engineering and Design phase, and Corps' officials have stated they are conducting additional sampling and

surveys and creating plans, in anticipation of putting out the first bid for dredging in mid-summer of 2022.

110. As Plaintiffs documented in their letters and expert reports to the Corps, a Supplemental EIS is required here. The Project has both substantially changed and there are "significant new circumstances and information" associated with the expansion of the Port's oil export hub and data on mercury contamination and the destruction of important aquatic habitats. For example, the Final EIS does not mention, let alone analyze, the dramatic increase in crude oil vessel traffic through this sensitive and important ecosystem. Moreover, the opening up of a major new crude export site via the federally deepened channel raises a number of serious concerns about greenhouse gas emissions and national climate policies that need to be examined in a Supplemental EIS. Additionally, more crude oil traffic unquestionably increases the risk of oil spills and vessel traffic safety. Similarly, increased vessel traffic poses safety risks to other commercial users of Matagorda Bay and recreational activities like fishing and boating. Moreover, the resuspension of mercury above EPA's remedial action levels and the loss of over 800 acres of oyster reefs and over 1000 acres of seagrasses could significantly harm endangered species, fisheries, and the marine ecosystem in the project area.

111. The Corps elected not to pursue a Supplemental EIS, in violation of NEPA. That decision was arbitrary, capricious, and contrary to law in violation of the Administrative Procedure Act. 5 U.S.C. § 706(2)(a).

II. SECOND CLAIM FOR RELIEF: THE CORPS' EIS IS ARBITRARY AND CAPRICIOUS AND VIOLATES NEPA

112. Plaintiffs incorporate by reference all preceding paragraphs.

113. NEPA ensures that federal agencies will consider "detailed information concerning significant environmental impacts" when deciding whether to move ahead with

government permitted or funded actions. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989) (citing 42 U.S.C. § 4331). Ensuring an agency discloses key environmental impacts and tradeoffs "gives the public the assurance that the agency has indeed considered environmental concerns." *Id*. The ultimate objective is not just better information—it is better decisions: by infusing environmental information into government decisions, NEPA promotes sound decision-making. 40 C.F.R. § 1500.1.

114. An EIS is arbitrary and capricious, in violation of the APA, where the agency "has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co*., 463 U.S. 29 (1983).

115. The Corps' Final EIS violated NEPA and the APA. For example, the Final EIS got key facts, like the number of acres of oyster reefs and seagrass destroyed by the Project, plainly incorrect. It failed to disclose and consider the true impacts of dredging through mercury-contaminated sediments and offered a terse and unsupported conclusion that impacts will be insignificant. It used a model that failed to account for the possibility that the volume of oil moving through the port would change in response to greater capacity. It provided only the vaguest outline of a mitigation plan, and that plan did not come close to mitigating for all known impacts. It failed to address detailed comments from state and federal agencies like the Texas Parks and Wildlife Department and the U.S. Fish and Wildlife Service that questioned its assumptions and conclusions.

116. Furthermore, the Final EIS provided a detailed cost-benefit analysis to conclude that the Project's benefits outweighed the cost of the Project by a ratio of 2.26 to 1. However, that cost-benefit analysis ignored entire categories of costs, including risks of spills, climate impacts, the full loss of seagrass and oyster beds, and other important categories.

117. The Corps' reliance on a flawed and incomplete Final EIS was arbitrary, capricious, and contrary to law in violation of the Administrative Procedure Act. 5 U.S.C. § 706.

III. THIRD CLAIM FOR RELIEF: THE CORPS' EIS FAILS TO COMPLY WITH THE SECTION 404(B)(1) GUIDELINES AND VIOLATES THE CLEAN WATER ACT

118. Plaintiffs incorporate by reference all preceding paragraphs.

119. For federal dredging projects sponsored by the Corps and authorized by Congress, the Corps does not need to issue itself a Section 404 "dredge and fill" permit if it demonstrates compliance with the Section 404(b)(1) Guidelines in the EIS. 33 C.F.R. § 336.1(a); 33 U.S.C. §§ 1344(r).

120. The Corps' Final EIS failed to demonstrate that the Project complied with the 404(b)(1) Guidelines. For example, the Corps did not determine the probable impact on the aquatic ecosystem from dredging through areas with a known history of mercury contamination nor did it justify why it did not require additional testing before authorizing the Project. The Corps' EIS significantly underestimated or ignored the extent of harms to important fisheries, aquatic habitats, and human health. The Corps failed to minimize adverse impacts, failed to justify its determination that the Project would not cause significant degradation of Matagorda Bay, and failed to evaluate practicable alternatives that would have less adverse environmental impacts than the proposed action, as required by the 404(b)(1) Guidelines.

121. The Corps' Final EIS failed to comply with the 404(b)(1) Guidelines, in violation of Section 404 of the Clean Water Act. 33 U.S.C. § 1344(r). The Corps' decision to discharge

dredged material from the Matagorda Ship Channel into waters of the U.S. was unlawful under the Clean Water Act § 301, 33 U.S.C. § 1311, and the Final EIS was arbitrary, capricious, and contrary to law in violation of the Administrative Procedure Act. 5 U.S.C. § 706.

PRAYER FOR RELIEF

Plaintiffs respectfully request that this Court:

1. Declare that the Corps violated NEPA by failing to prepare a Supplemental EIS on the Matagorda Ship Channel Project;

2. Declare that the Corps violated NEPA by preparing an inadequate Final EIS on the Matagorda Ship Channel Project;

3. Declare that the Corps violated the Clean Water Act by failing to comply with the Section 404(b)(1) Guidelines in the Final EIS;

4. Vacate the Final EIS and all Corps' decisions made in reliance on the Corps' NEPA and Clean Water Act documentation;

5. Enjoin the Corps from proceeding with any action in furtherance of the Matagorda Ship Channel Project, including but not limited to construction bids, including preliminary injunctive relief if necessary;

6. Retain jurisdiction over this matter to ensure that the Corps complies with the law;

7. Award Plaintiffs reasonable fees, costs, expenses, and disbursements, including attorneys' fees, associated with this litigation; and

8. Grant Plaintiffs such further and additional relief as the Court may deem just and proper.

Respectfully submitted this 25th day of May, 2022.

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