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	§	
and	§	
ENBRIDGE INGLESIDE OIL TERMINAL, LLC,	§	
Intervenor-Defendant		

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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I. 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 the Enbridge Ingleside Oil Terminal ("the Moda terminal").[1]

Congress intended the National Environmental Policy Act 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 Plaintiffs' Original Complaint states, in this case the public was deprived of these protections. [Doc. 1] The Corps issued a dredge and fill permit allowing a substantial – although it is unclear just how 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 through damage to seagrasses, air quality, cultural resources, and their ability to use the area near the Moda Terminal. The expanded operations and dredging associated with the expansion will continue and exacerbate that damage.

The Corps is charged under NEPA with taking a hard look at environmental impacts of the terminal expansion. The Corps' review was so far from the required hard look that it actually said the expansion was to allow for liquefied natural gas tankers – when there are no LNG facilities at the Moda Terminal.

As set out below, based on the undisputed material facts, the Plaintiffs are entitled to

[1] The permit at issue in this matter was originally issued to Moda Ingleside Oil Terminal, LLC. The terminal was purchased by Enbridge while this litigation was pending. All of the documentation in the Administrative Record references "Moda" or the "Moda Terminal," and for consistency we continue to use that terminology here. "Moda Terminal" is interchangeable with Moda Ingleside Energy Center" and "Enbridge Ingleside Energy Center."

judgment as a matter of law. The proper course is for the Court to reverse the Corps decision to issue the Moda Permit and remand the matter to the Corps for preparation of an Environmental Impact Statement with a full and accurate consideration of impacts and alternatives.

II. GENERAL BACKGROUND

1. The MODA Terminal is the single largest oil storage and export terminal by volume on the Gulf Coast, shipping to destinations including China and Europe.[2]

2. In the three years prior to 2021 Moda increased storage capacity at the terminal from 2.1 million barrels of oil to 11.6 million barrels. An additional 3.5 million barrels of storage is under construction, and the company has permits for another 5.5 million barrels. Exhibit 1. 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. *Id.*

3. On or about January 10, 2020 Moda Ingleside Oil Terminal applied for a dredge and fill permit pursuant to Section 404 of the Clean Water Act, 33 U.S.C. § 1344. The permit application requests that be allowed to further expand the Moda Terminal by taking the following actions:

(a) Dredge 3,900,000 cubic yards from 43 acres of bay bottom to increase the depth of a turning basin in order to allow additional vessel traffic at the terminal. AR 847.

(b) Directly destroy approximately 9 acres of seagrass beds. AR 872.

(c) Construct a new 10,000 square foot dock supporting two berths – 8 and 9 - for Suezmax tankers. AR 847

(d) Construct a sheet pile causeway, pile supported approach, and 21 dolphins to support

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[2] https://www.enbridge.com/about-us/liquids-pipelines/export-terminals

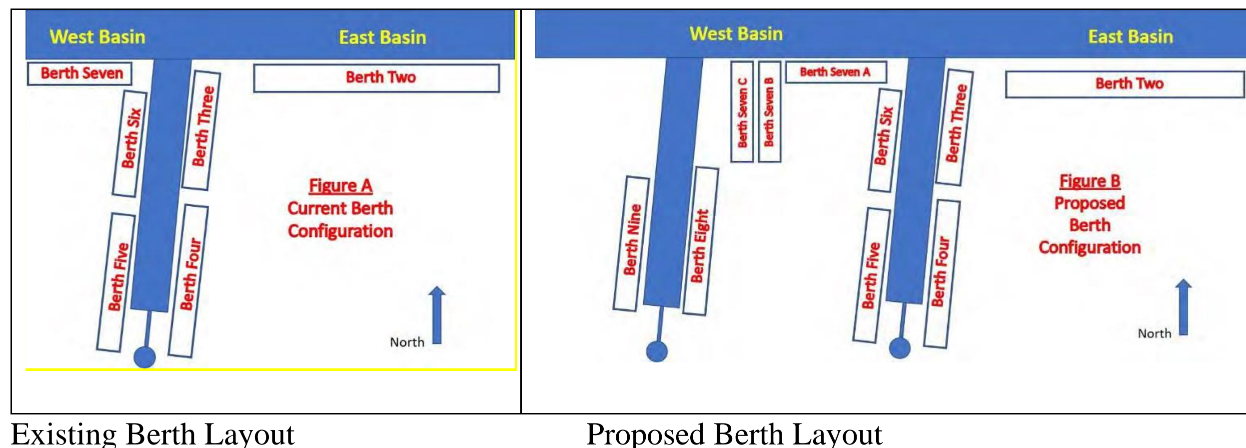
Berths 8 and 9. AR 847.

(e) Construct a new Berth 7 dock barging area in the West Basin consisting of Berths 7A, B, and C, which would allow up to three double barges to dock side by side. AR 846.

(f) Construct a barge loading facility in the uplands adjacent to the three new dock berths. AR 846-47.

(g) Construct an additional 491 feet of bulkhead, a pile supported barge dock and 38 barge dolphins.[3] AR 847.

3. The expansion will increase the capacity of the Moda loading facilities with five additional berths, including two for oil tankers. A schematic of the current and proposed configuration of the Moda Terminal facilities are shown below:



Existing Berth Layout Proposed Berth Layout

AR 447-48.

4. The permit application contains no information about the throughput of crude oil or how many additional tankers and barges are anticipated on a daily or other basis.

5. On February 6, 2020, the Corps of Engineers issued a public notice and opportunity for comments on Moda's proposed permit. AR 757-58.

6. On March 26, 2020 the Corps referred all comments to Moda for a response. AR 595-

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

601. Moda responded that it required additional time to respond to comments, and the Corps determined that it was "most prudent to withdraw [Moda's] Department of the Army Permit Application . . ." AR 593.

7. On or about September 11, 2020, Moda filed a "Response to Comments," reinstating the permit application. AR 386, *et seq.*

8. On April 2, 2021 the Corps issued its Environmental Assessment and Statement of Findings (hereafter the "Moda Expansion EA"). AR 101, *et seq.* In the Moda Expansion EA 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.*" AR 106 (emphasis supplied).

9. The Moda Terminal has no liquefied natural gas ("LNG") facilities.

10. The Moda Expansion EA 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.

III. APPLICABLE LAW

A. Summary Judgment and Standard of Review Under the Administrative Procedure Act

The standard for summary judgment is a familiar one. Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment should be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits or declarations, if any, show that there is no genuine issue as to any material fact and that a moving party is entitled

to judgment as a matter of law. *See* Fed.R.Civ.P. 56.

Challenges to agency decisions under the National Environmental Policy Act ("NEPA") and the Clean Water Act ("CWA") are reviewed under the Administrative Procedure Act, 5 U.S.C. § 701-706 ("APA") 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 "examine the relevant data and 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). *See also*, *Sierra Club v. Van Antwerp*, 709 F. Supp. 2d 1254, 1261 (S.D. Fla. 2009), aff'd, 362 Fed. Appx. 100 (11th Cir. 2010) ("[T]he Court is unable to defer to the Corps' unsupported conclusion.")

APA cases are generally decided on the record before the agency. However, as explained in the Plaintiffs' Motion for Consideration of Extra-Record Evidence filed in this case [Doc. 43] in National Environmental Policy Act cases the Fifth Circuit permits appropriate extra-record

evidence like that submitted with this motion to determine whether the agency adequately considered the environmental impact of a particular project. *E.g.*, *Sierra Club v. Peterson*, 185 F.3d 349, 369–70 (5th Cir. 1999), *vacated on other grounds on reh'g*, 228 F.3d 559 (5th Cir. 2000); *Coliseum Square Ass'n. Inc. v. Jackson*, 465 F.3d 215, 247 (5th Cir. 2006).

B. The National Environmental Policy Act and the Clean Water Act

1. NEPA requires a hard look at environmental consequences, and a full environmental impact statement for federal actions with "significant" effects.

The Plaintiffs' Original 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, Inc.* 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." *Id.* § 1508.13

NEPA regulations define "significance" to "require considerations of both context and intensity." *Id.* § 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." *Nat. Parks Conservation Ass'n v. Semonite,* 916 F.3d 1075, 1077 (D.C. Cir. 2019). Examples of these factors include: the degree to which the possible effects on the human environment are likely to be highly controversial; unique characteristics of the geographic area such as proximity to historic or cultural resources, wetlands, or ecologically critical areas; the degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks; and whether the action is related to other actions with individually insignificant but cumulatively significant impacts. 40 C.F.R. § 1508.27 (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." *Id.* § 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." *Id.* § 1508.7.

(3) Insure the scientific integrity of discussions and analyses, and use reliable data sources. *Id.* § 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.

2. 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).

IV. PLAINTIFFS HAVE STANDING TO BRING THIS SUIT

This Court has jurisdiction pursuant to 28 U.S.C. § 1331, 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).

The declarations submitted with this motion establish each of these elements. Sandra Love Sanchez, Absolem Yetzireh, and Patrick Nye are members of Indigenous Peoples of the Coastal Bend ("Indigenous Peoples"), Karankawa Kadla Tribe of the Texas Gulf Coast ("Karankawa Kadla tribe"), and Ingleside on the Bay Coastal Watch Association ("IOBCWA"), respectively. Exhibits2-4. 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.

Indigenous Peoples' members include members of the Karankawa Kadla tribe. 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. Ex. 2, Sanchez Decl. at ¶¶ 8-11; Ex. 3, Yetzireh Decl. at ¶¶ 19, 21.

The Karankawa consider the land and waters at and adjacent to the site of the Moda Terminal expansion sacred, because of the area's direct link to Karankawa ancestors, who lived in the area for hundreds of years. Sanchez Decl. ¶¶ 6-7, 11; Yetzirah Decl. at ¶¶ . Findings from one of the largest archaeological discoveries on the Texas coast—McGloin's Bluff on the Corpus Christi Bay at the Moda Terminal—confirm that the area is the former site of a large Karankawa encampment, and suggest that the site was such a productive source of fish, it fed about 500 inhabitants. Yetzirah Decl. at ¶¶ 8, 14. Thousands of artifacts have been found in this site, which was also historically a site for sacred rituals. Water is considered both the beginning and the end of life for the Karankawa, and sacred areas near the coast were used as birthing grounds and places of prayer, celebration, and other gatherings. Sanchez Decl. at ¶¶ 6-7, 16; Yetzireh Decl. at ¶¶ 7-8.

The seagrasses that will be damaged by the expanded operations of the Moda Terminal are part of an ecosystem tied to the heritage of native populations like the ancestors of some of the plaintiffs in this matter. They are also a part of an ecosystem that provides aesthetic and recreational value to the area. For example, IOBCWA's standing member lives in close proximity to the site of the Moda expansion, and regularly engages in activities in the area, such as fishing, boating, wildlife viewing—particularly bird watching—and entertaining friends and family members outside and on the edge of the water, including young grandchildren. Exh. 4, Nye Decl. at ¶¶ 10-11.

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).

V. SUMMARY OF THE ARGUMENT

Both NEPA and the U.S. Army Corps of Engineers' regulations for issuing permits under Section 404 of the Clean Water Act require federal agencies to take a "hard look" at the impact of their actions on the human environment before decisions are made. In violation of these requirements, the Corps issued a permit to allow the expansion of the Moda Terminal—the

single largest oil storage and export terminal in the United States—without considering or informing the public of the full direct, indirect and cumulative impacts of the expansion.

The record shows that the Corps' failed to consider the full impacts of the Moda expansion in these key respects:

- Failing to provide information on the risks of accidents and oil spills.
- Failing to analyze current and future impacts on seagrasses.
- Failing to quantify and consider impacts to the neighboring community from air, noise and light pollution.
- Failing to evaluate climate change and its impacts, despite the fact that the Moda Terminal is a major oil export terminal.
- Failing to document cumulative impacts of past, present, and reasonably foreseeable future activities, such as dredging of the Corpus Christi Ship Channel ("CCSC").
- Failing to balance risks and benefits of the expansion without hard data on risks, and in reliance on incorrect assumptions about benefits.
- Failing to consider the unique characteristics of the geographic area and fully evaluate impacts to historic and culturally important resources.
- Failing to prepare a full Environmental Impact Statement despite the clear evidence that the Moda expansion is a major federal action significantly affecting the environment.

Based on the undisputed material facts, the Plaintiffs are entitled to judgment as a matter of law. The Court should reverse the Corps' decision to issue the Moda permit and remand the matter to the Corps for preparation of an EIS with a full and accurate consideration of impacts and alternatives.

VI. THE CORPS VIOLATED NEPA AND THE CLEAN WATER ACT BY FAILING TO TAKE A HARD LOOK – OR ANY LOOK – AT THE RISK OF OIL SPILLS AND OTHER ACCIDENTS

A. Undisputed Material Facts

1. The Corps was specifically requested to include catastrophic pollution planning for the Moda expansion. AR 644, 342.

2. The only reference in the Moda Expansion 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)." AR 126.

3. Section 7.1 of the Moda Expansion EA does not discuss oil spills or accidents. It does not even contain the words "oil spill" or "accident." AR 137-40.

4. The Moda Expansion EA does not 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," AR 128, 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.

5. 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 5, Excerpt of NOAA Chart 11307, Aransas Pass to Baffin Bay, p. 3.

6. On March 15, 2021 an oil tanker lost power while moving through the Port and damaged a pier at the Moda terminal itself. Exhibit 6; Exhibit 4 ¶¶ 16-22.

B. Analysis

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). 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).

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.

Here the Corps' treatment of this issues is a single sentence, with no supporting data, analysis or anything else. The number of tankers and the volume of oil being moved through the Moda Terminal is being expanded, but the record does not even state by how much. The expansion is taking place in an area that has hazards for vessels and has actually seen a tanker accident in the recent past. The 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.

The Court cannot defer to a conclusory statement with absolutely no data or other information supporting it. The Corps failure to give any information at all about the risk of oil spills and accidents was clearly arbitrary and capricious and requires reversal under both the

National Environmental Policy Act and the Clean Water Act.

VII. THE CORPS VIOLATED NEPA AND THE CLEAN WATER ACT BY FAILING TO ASSESS DIRECT, CUMULATIVE AND SECONDARY IMPACTS TO SEAGRASSES FROM CURRENT AND EXPANDED OPERATIONS AT THE MODA TERMINAL

A. Undisputed material facts

1. 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 7, Declaration of Dr. Kirk Cammarata, ¶ 5.

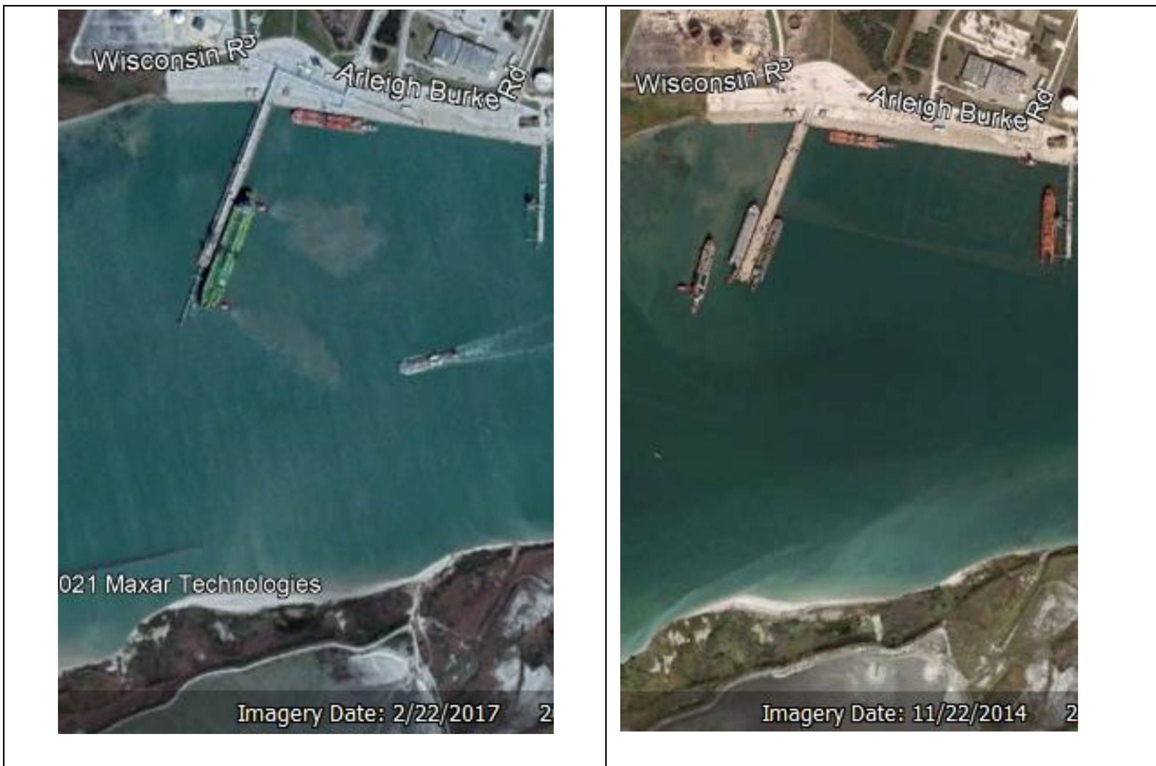
2. Seagrass beds rank with coral reefs and rain forests as some of the most productive habitats on the planet. They provide critical nursery and other habitat for important recreational and commercial fish species, storm protection and coastline stabilization, and provide local economies an estimated value of $19,000 or more per acre annually. Declines in seagrasses are tied to problems with fisheries. Exhibit 7, ¶¶ 2-5.

3. 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. AR 363, 364, 366, Exh. 7 ¶ 4.

4. The barges and tankers that use the Moda terminal maneuver with the aid of multiple heavy tugs. The prop wash generated by these tugs and the tankers themselves causes extreme turbidity. AR 582 (U.S. Fish and Wildlife Service expressing concerns over turbidity shading

occurring during facility operations as a result vessel wake impacts to seagrass beds adjacent to the basins); AR 1083 (Texas Parks and Wildlife Division expressing concerns that turbidity plumes associated with vessel traffic can threaten seagrass growth and survival); Exhibit 8 (IOBCWA submission February 3, 2021); Exhibit 9 (IOBCWA submission April 14, 2021).

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



AR 1083 (identifying satellite images).

6. The image shown below also indicates the actual turbidity associated with tugs and tankers using the Moda Terminal.

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* Cammarata Declaration, Exhibit 7 ¶ 9.

7. In a March 3, 2020 response to the Moda Public Notice the U.S. Fish and Wildlife Service in coordination with Texas Parks and Wildlife Division stated the following:

> Sheet 4 of 13 of the project plans shows an area of seagrasses immediately west of the proposed basin expansion area. The permit application does not address how these seagrass beds would be avoided by the proposed construction, nor, following construction, how the seagrass beds would be protected from operational impacts. Additionally, the Service is concerned that seagrass beds outside of the proposed marine facility, to the east and to the west, could be impacted by the large Suezmax vessels transiting the CCSC to the facility.
>
> The Service remains concerned about the condition and impact to the seagrass due to dredging mobilized sediments that become suspended in the water column and shade or smother seagrasses. The Service recommends that the applicant provide the best management practices to be used to avoid impacts to the seagrasses during construction. Additionally, during operation of the facility, secondary and indirect impacts could occur, from vessel wakes, to both the seagrass beds immediately adjacent to the basins, and along the east side by the approach and departure of these vessels in the CCSC. The Service recommends that the applicant evaluate and develop a plan to protect area seagrass beds from operational impacts in addition to the slope stabilization.

AR 712.

8. The Corps referred the FWS comments to Moda's consultant for a response. AR 595. In response Moda's consultant stated "[t]he existing seagrass beds have persisted for decades adjacent to the existing site which includes regular nearby vessel traffic, including that from within the adjacent Corpus Christi Ship Channel. It is the applicant's engineers' professional judgement (*sic)* that the slope stabilization measures provide adequate protection to avoided seagrass." AR 390.

9. The record contains no information of any kind about the "applicant's engineer" or the basis of that individual's "professional judgment."

10. In September 2020 the FWS responded to the "professional judgment" of the unidentified "applicant's engineer" in part as follows:

> On Page 4 of the PDF sent by USACE, the Applicant stated that the sea grasses are not affected by the traffic and sediment dispersal and therefore no long-term effects need to be addressed. However, Figure 6 in the submitted document, included here as an enclosure, shows the survey of sea grasses at the project location. The seagrasses on the east side adjacent to the location of the barges, are less dense than the eastern side for approximately 400 feet from the point where the bank drops off. This is an example of the effects of sedimentation. Over time the sediment disturbed by barge traffic shades or consistently covers the seagrass, killing it.

AR 366.

11. In comments dated March 5, 2020, the U.S. Environmental Protection Agency ("EPA") stated the following:

> [T]he information provided by the applicant does not appear to adequately reflect consideration of all potential direct, secondary, and cumulative impacts to [wildlife habitat, aquatic ecosystem diversity, stability and productivity, recreation, aesthetics, and economic values] for each of the alternatives considered. The [Public Notice] does not clearly identify the areas of aquatic impacts nor is the quality or value of those impacts fully described. It is unclear if possible environmental losses related the impacts upon aquatic ecosystems, nearby seagrasses and aquatic organisms have been fully evaluated. Seagrasses play critical roles in the coastal environment by providing nursery habitat for estuarine fisheries, serving as a major source of organic biomass for coastal food webs, contributing to the stabilization of shorelines and sediment to reduce coastal erosion and

> improve water clarity, as well as contributing to nutrient cycling and water quality processes.

AR 662.

12. The Corps referred the EPA's comment to Moda's consultant for a response. Moda's consultant did not address impacts to adjacent seagrasses but simply stated "comment noted." AR 395.

13. On September 28, 2020 the EPA stated: "The following is being offered to assist with the development of a defensible permit decision. As it does not appear the applicant has evaluated potential indirect/secondary impacts to the seagrasses adjacent to the proposed facilities, it is recommended efforts incorporate monitoring of potential impacts to nearby seagrasses . . . ." AR 363.

14. The Corps forwarded the FWS' and EPA September 2020 comments to Moda's consultant for a response. In response Moda's consultant did not provide any further baseline information regarding impacts to adjacent seagrasses from current operations of the Moda Terminal. Instead Moda's consultant stated that it would include a five year monitoring plan for seagrasses "with remedial actions to be implemented if a decline in seagrass is documented that is not consistent with natural variations observed at the reference bed." AR 268, 271.

15. Citizen comments to the Corps also documented the turbidity impacts of existing operations. Standing witness Patrick Nye was forced to file a complaint regarding turbidity plumes with the Texas Commission on Environmental Quality. Exhibit 4. The citizen comments provided photographic and sampling evidence that existing operations reduced light penetration and damaged adjacent seagrass beds. *Id.* ; AR 628.

16. The testimony of seagrass expert Dr. Kirk Cammarata documents that seagrasses adjacent to the Moda Terminal are currently being affected by turbidity from operations at the

terminal. Dr. Cammarata is personally familiar with this area. He testifies that imagery is strongly suggestive of significant seagrass decline at the eastern edge of the seagrass beds adjacent to Moda in the period after 2018. Seagrass biomass is lowest at sites near Moda, and increases with distance from Moda. Further, there are more disturbance tolerant species closest to Moda. Exhibit 7. ¶¶ 9-11.

17. Dr. Cammarata has documented using light loggers and personal observation that sediment plumes from operations at the Moda Terminal extend onto nearby seagrass areas and cause an abrupt and stunning decrease in light availability to seagrasses. In addition, he has used sediment traps to document that during docking events at the Moda Terminal there is a gradient of sediment levels with the highest levels adjacent to the terminal. *Id.*

18. In the Moda Expansion EA that was presented to the public the Corps repeated verbatim Moda's consultants' statement that "[t]he existing seagrass beds have persisted for decades adjacent to the existing site which includes regular nearby vessel traffic, including that from within the adjacent Corpus Christi Ship Channel. It is the applicant's engineers' professional judgement *(sic)* that the slope stabilization measures provide adequate protection to avoided seagrass." AR 114. The Corps provided no other analysis or information regarding impacts to seagrasses of existing or expanded operations of the Moda terminal.

19. Section 4.6 of the Moda Expansion EA is titled "Corps' evaluation of the applicant's response." In it the Corps does not address seagrass loss, but states only "[i]n regard to impacts on the general environmental (*sic*), including fish and wildlife, the applicant's response has satisfied those concerns. See also Sections 5.4, 8.3, and 9.6 for further discussion." AR 125. Sections 5.4, 8.3. and 9.6 of the EA do not discuss the status of seagrasses or the impacts of the existing operations at the terminal on seagrasses. Rather, these sections discuss concepts of the

least environmentally damaging practicable alternative (Section 5.4, AR 130), and compensatory mitigation (Section 8.3, AR 140-41 and Section 9.6, AR 145).

B. Analysis

The Corps' failure to assess and consider the impacts of the Moda Terminal Expansion to seagrasses is arbitrary, capricious and contrary to law. NEPA requires a "hard look" at both direct and indirect impacts of the agency action. Indirect effects are those "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).

The turbidity caused by existing operations, and the adverse impacts to adjacent seagrasses are clearly documented in the comments by the expert agencies and in Dr. Cammarata's declaration. Yet rather than assess and consider the impacts from current and increased vessel operations, the Corps simply accepted the statement from an unidentified engineer, with unknown qualifications, that "the slope stabilization measures provide adequate protection to avoided seagrass." AR 114.

The Corps has the discretion to allow the applicant for a permit to provide information and data. However, the Corps must independently evaluate that information and document that independent evaluation in the record. This includes specific identification of the names and qualifications of the persons conducting the independent evaluation. 40 C.F.R. § 1506.5 provides in relevant part as follows:

> (2) The agency shall independently evaluate the information submitted or the environmental document and shall be responsible for its accuracy, scope, and contents.
>
> (3) The agency shall include in the environmental document the names and qualifications of the persons preparing environmental documents, and conducting the independent evaluation of any information submitted or environmental documents prepared by an applicant or contractor, such as in the list of preparers for environmental impact statements

(§ 1502.18 of this chapter). It is the intent of this paragraph (b)(3) that acceptable work not be redone, but that it be verified by the agency.

The Corps' own procedures state that "[i]n all cases, the district engineer should document in the record the Corps independent evaluation of the information and its accuracy, as required by 40 CFR 1506.5(a)." 33 C.F.R. Part 325, Appx. B. *See also Sierra Club v. Lynne,* 502 F.3d 43, (5th Cir. 1974)("NEPA's commands, however, do not permit the responsible federal agency to abdicate its statutory duties by reflexively rubber stamping a statement prepared by others.").

In this case the record shows no independent evaluation of the assertions about seagrass impacts by the unknown "applicant's engineer." The Corps will no doubt argue for deference to the agency, but here there is literally nothing for the Court to defer to. 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).

An agency cannot simply conclude with no reasoned analysis that there will be no environmental impacts caused by the agency action. As the Fifth Circuit has stated, "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.").

Even if agency experts are identified – which of course they were not here – they must supply hard data and not just conclusory statements. *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1150 (9th Cir. 1998) ("Allowing the Forest Service to rely on expert opinion without hard data either vitiates a plaintiff's ability to challenge an agency action or results in the courts second guessing an agency's scientific conclusions. As both of these results are unacceptable, we

conclude that NEPA requires that the public receive the underlying environmental data from which a Forest Service expert derived her opinion.").

This is particularly true when agencies with pertinent expertise have identified the impacts. *Davis v. Mineta* , 302 F.3d 1104 (10th Cir. 2002)("a reviewing court 'may properly be skeptical as to whether an EIS's conclusions have a substantial basis in fact if the responsible agency has apparently ignored the conflicting views of other agencies having pertinent expertise.'") *Ocean Advocates v. United States Army Corps of Engineers* , 361 F.3d 1108 (9th Cir 2004) ("[T]he Corps never explicitly adopted the claim [raised by FWS] that the project could result in an increase in tanker traffic, leaving [the court] to guess whether it took a hard look at, or even considered, this obvious potential impact"). "[W]here comments from responsible experts or sister agencies disclose new or conflicting data or opinions that cause concern that the agency may not have fully evaluated the project and its alternatives, these comments may not simply be ignored. There must be good faith, reasoned analysis in response." *Silva v. Lynn* , 482 F.2d 1282, 1285 (1st Cir. 1973).

In short, the Corps asks the Court and the public to accept, based on no data and a conclusory statement by an unknown person, that the Moda expansion will have no significant adverse impacts to seagrasses. The Corps asks the Court to accept this in the face of record and other admissible evidence clearly showing that there are severe adverse impacts from current operations. This is the definition of arbitrary and capricious.

The Corps may argue that any concerns about seagrass impacts were addressed by the inclusion of a monitoring plan. However, including a monitoring plan is irrelevant to whether the impacts of the Moda expansion were fully disclosed, considered and presented to the public in the Moda Expansion EA. "[T]he very purpose of NEPA's requirement that an EIS be prepared

for all actions that may significantly affect the environment is to obviate the need for speculation by insuring that available data is gathered and analyzed prior to the implementation of the proposed action." *LaFlamme v. F.E.R.C.*, 852 F.2d 389, 400 (9th Cir. 1988) (internal citation and quotation marks omitted).

In *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067 (9th Cir. 2011), the court of appeals explained why studies and monitoring after project approval could not substitute for gathering data and analyzing impacts before approval:

> We recognize the Board's extensive mitigation efforts. However, such mitigation measures, while necessary, are not alone sufficient to meet the Board's NEPA obligations to determine the projected extent of the environmental harm to enumerated resources *before* a project is approved. Mitigation measures may help alleviate impact *after* construction, but do not help to evaluate and understand the impact before construction. In a way, reliance on mitigation measures presupposes approval. It assumes that—regardless of what effects construction may have on resources—there are mitigation measures that might counteract the effect without first understanding the extent of the problem.
> This is inconsistent with what NEPA requires. NEPA aims (1) to ensure that agencies carefully consider information about significant environmental impacts and (2) to guarantee relevant information is available to the public.… . The use of mitigation measures as a proxy for baseline data does not further either purpose. First, without this data, an agency cannot carefully consider information about significant environment impacts. Thus, the agency "fail[s] to consider an important aspect of the problem," resulting in an arbitrary and capricious decision. Second, even if the mitigation measures may guarantee that the data will be collected some time in the future, the data is not available during the EIS process and is not available to the public for comment. Significantly, in such a situation, the EIS process cannot serve its larger informational role, and the public is deprived of their opportunity to play a role in the decision-making process.

Id. at 1084-85

Likewise, in *Nat'l Parks Conservation Ass'n v. Babbitt* , 241 F.3d 722, 733 (9th Cir. 2001) the Court noted that it is impermissible under NEPA for the agency to "increase the risk of harm to the environment and then perform its studies. . . . This approach has the process exactly backwards. Before one brings about a potentially significant and irreversible change to the

environment, an EIS must be prepared that sufficiently explores the intensity of the environmental effects it acknowledges." *See also* 40 C.F.R. §§ 1500.1(b), 1502.5, 1506.1.

Second, simply monitoring in the face of hard proof that resource damage is presently occurring would allow further degradation of this vital habitat to occur before any action is taken. This results in a net loss of this aquatic resources and is directly contrary to the Corps of Engineers mandate under the Clean Water Act requires the Corps to consider the probable impacts of the proposed action, its putative benefits, and weigh all "relevant" considerations to act in the public interest. 33 C.F.R. § 320.4(a). The Corps cannot balance the benefits "which reasonably may be expected to accrue" from the action against the "reasonably foreseeable detriments" without considering "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). *See also Center for Biological Diversity v. Department of the Interior,* 623 F.3d 633, 647 (9th Cir. 2010)("Without an accurate picture of the environmental consequences of the land exchange, the BLM cannot determine if the "public interest will be well served by making the exchange . . . ").

In short, the Corps' failure to take a hard look and inform the public about the direct, indirect and cumulative impacts of the existing and expanded operations at the Moda Terminal to seagrasses is arbitrary and capricious under both the National Environmental Policy Act and the Clean Water Act.

VIII. THE CORPS VIOLATED NEPA BY FAILING TO ASSESS THE IMPACTS ON THE NEIGHBORING COMMUNITY OF NOISE AND LIGHT POLLUTION

A. Undisputed Material Facts

1. Residents of Ingleside on the Bay advised the Corps of the existing impacts from noise and light pollution from large ships, and expressed concern at increases from the

expansion. *E.g.,* AR 644, 341, 628, 1463-65, 1482-83, 1491, 1532, 1533, 1559-60, 1563-64, 1571, 1573.

2. Photo in their comment letters shows how visible the tankers at the *existing* terminal are to the adjacent homes and community. AR 359, 659, 1465.

3. The new pier will bring tanker and barge activities approximately 900 feet closer to the community. AR 1465, 1467.

4. The Moda Expansion EA does not contain any information about the number of additional tankers and barges that will use the expanded terminal. It contains no information about noise or light levels from existing or additional tankers and barges.

5. The Moda Expansion EA states that "[a]pproximately 38 comments regarding different pollution concerns (air, water, light, noise) were received. "We 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)." AR 139.

6. Sections 4.3 through 4.6, 10.5 and 12.1 contain no data or discussion on light or noise pollution from existing and increased numbers of tankers and barges.

B. Analysis

The Moda Expansion EA contains no data or information on light and noise from vessel operations. It does not even disclose to the public the increase in tankers and barges resulting from the proposed expansion. When the Corps referred comments on vessel noise and light impacts to Moda for a response, Moda did not respond. The Corps then made the conclusory statement, backed with no data, analysis or discussion, that noise and light effects on the neighboring community will be "negligible."

Again, the caselaw is substantial and unanimous that these kinds of statements are not a

sufficient basis for a NEPA analysis. "Mere perfunctory or conclusory language will not be deemed to constitute an adequate record" for NEPA purposes. *O'Reilly v. U.S. Army Corps of Engineers,* 477 F.3d at 235*; 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."); *Friends of the Earth, Inc. v. United States Army Corps of Eng'rs,* 109 F.Supp.2d 30, 42 (D.D.C.2000) (finding violation of NEPA where finding of no significant impact was supported by 'no actual analysis, only [a] conclusory statement.'").

Permitting agencies to simply posit a conclusion with no data or analysis would vitiate NEPA's role of informing the public, and would reduce this Court's reviewing role to that of a rubber stamp. *Idaho Sporting Cong. v. Thomas,* 137 F.3d 1146, 1150 (9th Cir. 1998) ("Allowing the Forest Service to rely on expert opinion without hard data either vitiates a plaintiff's ability to challenge an agency action or results in the courts second guessing an agency's scientific conclusions. As both of these results are unacceptable, we conclude that NEPA requires that the public receive the underlying environmental data from which a Forest Service expert derived her opinion.").

The Corps' failure to provide hard data and analysis of light and noise impacts of existing and expanded operations on the neighboring community is arbitrary and capricious and requires reversal.

IX. THE CORPS VIOLATED NEPA BY FAILING TO QUANTIFY AND CONSIDER THE AIR POLLUTION IMPACTS OF INCREASED VESSEL TRAFFIC.

A. Undisputed material facts

1. Neighbors including the plaintiffs advised the Corps that air quality is a significant concern, and requested analysis of effects, including from vessels, on the adjacent community.

AR 644, 628, 341-42.

2. The Corps referred these comments to Moda for a response. Moda responded as follows: "With regards to air pollution generated by additional vessels berthing, the applicant's facility actually reduces pollutants that enter the air by reducing the time spent nearshore. Also, loading at the facility eliminates the longer voyage into the Inner Harbor of the CCSC."AR 407.

3. The Moda Expansion EA contains no data on the air pollution impacts of increased numbers of tankers and barges using the terminal, and no data on how many tankers and barges will use the terminal.

4. The Corps' only statement in the Moda Expansion EA regarding air pollution impacts from tankers and barges is the following: "Approximately 38 comments regarding different pollution concerns (air, water, light, noise) were received. We 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)." AR 139.

B. Analysis

The Corps treatment of air emissions from increased tanker and barge traffic provides only a two sentence, conclusory statement with no supporting data or analysis. To the extent that the Corps relies on the Moda assertion that "the applicant's facility actually reduces pollutants that enter the air by reducing the time spent nearshore," there is no data associated with that conclusory statement. The expansion of the terminal is purportedly to allow more and larger tankers to use the Moda Terminal, but the EA also contains no data on what kind or how many tankers will use the expanded terminal. Whether the increased number of vessels will result in more or less air pollution requires hard data on vessel numbers and actual emission rates, rather than conclusory assertions.

The Corps' failure to provide any hard data or analysis on this issue is arbitrary and capricious and requires reversal.

X. THE CORPS VIOLATED NEPA AND THE CLEAN WATER ACT BY ASSERTING WITHOUT HARD DATA OR ANALYSIS THAT BENEFITS OF THE EXPANSION OUTWEIGH THE RISKS.

A. Undisputed Material Facts

1. 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."AR 138.

2. The Moda Expansion AR contains no information of any kind the type of vessel using the terminal or the number of tankers and barges or the like.

3. The Moda Terminal can already accommodate Suezmax tankers, while the Moda Expansion EA states that the expansion is necessary to allow these tankers:"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." AR 139.

4. The Moda Expansion EA states that "[t]he project would also benefit the needs and welfare of the general public by increasing the supply and availability of energy." AR 138.

5. The Moda Terminal is an oil export terminal, and the Moda Expansion EA contains no data or analysis showing that the public's needs and welfare will benefit, or that the supply and availability of energy will increase from exporting more oil overseas.

6. As set out in this motion, the Corps did not provide data on or analyze numerous risks and costs to the public, including impacts to seagrasses, effects on adjacent property owners of noise and light pollution, climate change, and risk of oil spills and accidents.

B. Analysis

NEPA requires a "full and fair" treatment of risks and benefits. 40 C.F.R. § 1502.1; *see also id.* § 1500.1 (information in NEPA document "must be of high quality"); *id.* § 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 such as oil spills, impacts on adjacent property owners, and indirect impacts to seagrasses. The EA states that the expansion will have economic benefits for the applicant because it will allow the use of Suezmax tankers, but in fact the facility already accommodates Suezmax tankers. There is no indication or quantification of what the economic benefits for the applicant would.

The Corps also provides no actual data or analysis on the supposed benefits to the public. The Moda Expansion EA contains no information about the number of tankers that will use the expanded port, and only a single conclusory sentence that the public will benefit from "increasing the supply and availability of energy." As noted the Moda terminal is an oil export terminal. How expanding oil exports will increase the supply and availability of energy to the American public at best requires some data and analytical underpinnings.

The Corps' failure to provide any reasoned analysis on the balancing of costs and benefits also violates the Clean Water Act, 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).

XI. THE CORPS VIOLATED NEPA AND THE CLEAN WATER ACT BY FAILING TO ANALYZE AND CONSIDER CLIMATE CHANGE AND ITS IMPACTS, EVEN THOUGH THE EXPANSION CAN BE EXPECTED TO EXACERBATE CLIMATE CHANGE.

A. Undisputed Material Facts

1. The Court may reasonably take 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/.

2. The MODA Terminal is the single largest oil storage and export terminal in the United States, shipping to destinations including China and Europe.

3. In the three years prior to 2021 Moda increased storage capacity at the terminal from 2.1 million barrels of oil to 11.6 million barrels. An additional 3.5 million barrels of storage is under construction, and the company has permits for another 5.5 million barrels. Exhibit 1. 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 10.

4. The only mention of climate change in the Moda Expansion EA is the following:

> Climate Change. The proposed activities within the Corps federal control and responsibility likely will result in a negligible release of greenhouse gases into the atmosphere when compared to global greenhouse gas emissions. Greenhouse gas emissions have been shown to contribute to climate change. Aquatic resources can be sources and/or sinks of greenhouse gases. For instance, some aquatic resources sequester carbon dioxide whereas others release methane; therefore, authorized impacts to aquatic resources can result in either an increase or decrease in atmospheric greenhouse gas. These impacts are considered de minimis. Greenhouse gas emissions associated with the Corps federal action may also occur from the combustion of fossil fuels associated with the operation of construction equipment, increases in traffic, etc. The Corps has no authority to regulate emissions that result from the combustion of fossil fuels. These are subject to federal regulations under the Clean Air Act and/or the Corporate Average Fuel Economy (CAFE) Program. Greenhouse gas emissions from the Corps action have been weighed against national goals of energy independence, national security, and economic

development and determined not contrary to the public interest.

AR 139.

B. Analysis

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).

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. 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 complete lack of any data or analysis on this point is unmistakably arbitrary and capricious.

The Corps' assertion that it need only evaluate a very narrow set of greenhouse gas emissions directly associated with activities within its control is contrary to the law. In *Columbia Riverkeeper v. U.S. Army Corps of Engineers,* 2020 WL 6874871 (W.D. Wash. Nov. 23, 2020), the District Court considered a situation directly analogous 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.

Columbia Riverkeeper is consistent with the consensus in the federal courts that in their NEPA documents action agencies must fully consider climate change impacts including the downstream greenhouse gas emissions of fossil fuel related projects.

In *Food & Water Watch v. FERC*, 28 F.4th 277 (D.C. Cir. 2022) the Court of Appeals rejected an argument that the end use and greenhouse gas emissions of gas in a pipeline approved by the Federal Energy Regulatory Commission was not foreseeable. The FERC's Environmental Assessment was invalidated and the matter remanded for the agency to either quantify and consider downstream carbon emissions, or explain in more detail why it could not do so. *Id.* at 289.

350 Mont. v. Haaland, No. 20-35411, 2022 U.S. App. LEXIS 8918 (9th Cir. Apr. 4, 2022) invalidated an Environmental Assessment that failed to address the greenhouse gas emissions from combustion of coal from a mine expansion. The EA in that case was far more substantial than the Corps' here, and actually contained a considerable discussion of climate change and emissions from the project. The failure to assess emissions from end use of the coal, however, invalidated the finding that the impacts of the expansion would be "insignificant:"

> Our conclusion that the 2018 EA failed to provide a convincing statement of reasons to explain why the Mine Expansion's impacts are insignificant begins with Interior's own uncontested summary of the scientific evidence concerning the cause and effects of climate change. The EA describes the consequences of climate change as "profound," and explains researchers' broad consensus that "the magnitude of climate change beyond the next few decades will depend primarily on the amount of GHGs (especially CO2) emitted globally." The only question is the extent of this project's contribution to the problem. *See* 42 U.S.C. § 4332(C); 40 C.F.R. § 1508.13; 40 C.F.R. § 1508.27 ("'Significantly' as used in NEPA requires considerations of . . . intensity," and intensity "refers to the severity of impact.").23 By relying on an opaque comparison to total global emissions and failing to account for combustion-related emissions in its domestic calculations, the 2018 EA hid the ball and frustrated NEPA's purpose.

Id. at *31-32. The *350 Montana* court concluded that the agency's FONSI did not "measure up to the 'high quality' and '[a]ccurate scientific analysis' that NEPA's implementing regulations demand of environmental information produced by agencies." *Id.* at *32.

Likewise, *Inupiat v. BLM,* 555 F.Supp. 3d 739 (D. Ak. 2021) invalidated a oil and gas project that failed to address greenhouse gas emissions from foreign consumption of oil. 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.

These cases follow the numerous other cases finding that climate change impacts from sources associated with a project 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 Mgmt,* 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. Aug. 3, 2021)(FERC failed to adequately analyze emissions from Brownsville LNG terminals).

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.

XII. THE CORPS VIOLATED NEPA AND THE CLEAN WATER ACT BY FAILING TO DOCUMENT AND CONSIDER THE CUMULATIVE IMPACTS OF PAST AND REASONABLY FORESEEABLE FUTURE ACTIVITIES.

A. Undisputed Material Facts

1. Section 6.8 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 . . . ." AR 136. Section 8.0 actually discusses mitigation rather than cumulative impacts, but Section 9.0 is headed "Consideration of Cumulative Impacts." AR 140, 142.

2. Section 9.4 of the EA states that "[k]ey issues of concern in this watershed are water quality and loss of special aquatic sites. The applicant's proposed project will not exacerbate any of these concerns." AR 144. Like the rest of the EA, this section does not address turbidity from vessel operations and its impact on adjacent seagrass beds, which are a special aquatic site.

3. With respect to past and present actions outside the Corps' regulatory control, the Moda Expansion EA states only that "[p]ast and present actions, outside the Corps jurisdiction, that have been constructed include infrastructure, commercial and residential developments, parks and recreational areas, and industrial areas." AR 144. The EA contains no data or other information to assess impacts of these actions.

4. Section 9.0 the Corps' limited review of actions within its jurisdiction to a review of its own regulatory database of projects to five years in the past and its estimates to five years in the future. AR 143.

5. Section 9.4 of the Moda Expansion EA generally describes the nature of the projects within the Corps jurisdiction and that impacts to 89 acres of waters of the U.S. have been authorized within the past five years. AR 143-44.

6. With respect to reasonably foreseeable future actions other than the project itself, the EA states only the following:

> Reasonably foreseeable future actions within this watershed include 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. The need for these actions is expected to be driven by market demands, population increases, and economics. The impacts or expected impacts from these other actions are possible pollution associated with oil and gas exploration and transportation, upland habitat losses and disturbance; temporary impacts to water quality, development pressure on aquatic areas requiring Corps permits, and increases in human populations as the area becomes more developed.

AR 145.

7. The Moda Expansion EA provides no quantifiable information or data about the expected impacts of the generally described future activities.

8. The Corps is in the process of preparing an Environmental Impact Statement on the Port of Corpus Christi Authority Channel Deepening Project. Exhibit 11. 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.

B. Analysis

A valid NEPA analysis must "[c]onsider 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.

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). In *Texas Comm. on Nat. Res. v. Van Winkle*, 197 F. Supp. 2d 586, 619 (N.D. Tex. 2002) the court found that a discussion of cumulative impacts

fails to satisfy NEPA if "[t]he future projects that were mentioned were only discussed in conclusory terms," and those statements "do not equip a decisionmaker to make an informed decision about alternative courses of action, or a court to review the [agency's] reasoning.".

There is no regulation or other authority that allows the Corps to restrict its consideration of cumulative impacts and reasonably foreseeable future impacts to five years in the past and five years in the future. This in itself is arbitrary and capricious.

The Corps also plainly has information about the past and reasonably foreseeable future projects within its jurisdiction, but there is no quantified or specific information about the things. The massive Corpus Christi Ship Channel Project, which will have its own EIS, plainly has quantifiable information. The failure to consider cumulative effects from past and reasonable foreseeable future projects clearly justifies reversal and remand for preparation of an EIS. Likewise, simply stating that there have been impacts from other actions outside the Corps' control, without providing any objective or quantifiable information on those impacts, is arbitrary and capricious.

The failure to adequately consider the impacts of the Moda expansion together with the impacts of other actions also violates the Clean Water Act and its implementing regulations. 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). Here the Corps has both underestimated the negative impacts of the Moda expansion on seagrasses and also failed to provide sufficient information about other activities. The Corps acknowledges that special aquatic sites and water qualities are concerns in the watershed, but provides no information about how past and probable future

activities have caused impacts to those resources.

XIII. THE MODA EXPANSION WILL HAVE SIGNIFICANT IMPACTS ON THE ENVIRONMENT, AND AN ENVIRONMENTAL IMPACT STATEMENT IS REQUIRED.

An Environmental Assessment is examined "with two purposes in mind: to determine whether it has adequately considered and elaborated the possible consequences of the proposed agency action when concluding that it will have no significant impact on the environment, and whether its determination that no EIS is required is a reasonable conclusion." *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1215 (9th Cir. 2008). Based on the multiple failures to comply with NEPA set out above, 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. AR 1463-67, 1471-1598. 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 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." AR 119, 363. The U.S. Fish and Wildlife Service made the same observation on indirect impacts to seagrasses, as did others. AR 366, 364. 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. While there is a mitigation plan for direct destruction of seagrasses, there was none for the indirect operational impacts. The FWS also stated that more mitigation for direct impacts should be required. AR 583, 366.

The effects of the proposed expansion are "highly uncertain," 40 C.F.R. § 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 light and noise impacts on the neighboring community, the possibility of oil spills, and not least its clear connection to climate change. *Id.* at § 1508.27(2).

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 essentially deferred to the applicant's assertion that no EIS was required. AR 125. The EA then refers to Section 10.1.2 for further discussion, but this section only discusses threatened and endangered species. AR 146. Once again, it is clear that the Corps did not take a "hard look" at either impacts or the EA itself.

XIV. CONCLUSION

This Court should find that plaintiffs are entitled to judgment as a matter of law. The proper course is for the Court to vacate the Corps' permit decision, and remand the matter to the Corps for preparation of an EIS with a full and accurate consideration of impacts and alternatives.

Respectfully submitted this 9th day of June, 2022.

/s/ Robert B. Wiygul
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CERTIFICATE OF COMPLIANCE

In the June 9, 2022 status conference in this matter the Court advised that word limits would be waived for this motion.

/s/ Robert B. Wiygul
ROBERT B. WIYGUL

CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing document was filed electronically (via CM/ECF) on June 9, 2022.

/s/ Robert B. Wiygul
ROBERT B. WIYGUL