**UNITED STATES DISTRICT COURT**
**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.*

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.*

Case No. 2:21-cv-00161

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**ENBRIDGE INGLESIDE OIL TERMINAL, LLC'S COMBINED OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND CROSS-MOTION FOR SUMMARY JUDGMENT**

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... iii

INTRODUCTION ..... 1

BACKGROUND ..... 1

STANDARD OF REVIEW ..... 3

LEGAL BACKGROUND ..... 4

I. The National Environmental Policy Act ..... 4

II. The Clean Water Act and the Rivers and Harbors Act ..... 5

III. Extra-Record Evidence ..... 6

SUMMARY OF THE ARGUMENT ..... 7

ARGUMENT ..... 9

I. The Corps met its obligations in addressing issues related to allegedly increased vessel traffic, including oil spill risks and air, light, and noise impacts ..... 9

A. Plaintiffs failed to adequately raise concerns regarding oil spill risk and environmental effects associated with increased vessel traffic during the public comment period. ..... 10

1. In APA cases, including those raising NEPA claims, parties may not seek judicial review of issues that were not timely raised in comments with sufficient clarity to apprise the agency of the concern. ..... 10

2. Plaintiffs did not preserve their current claims of oil spill risks. ..... 13

3. Plaintiffs did not preserve their claims relating to the relationship between increased vessel traffic and air, light, and noise pollution ..... 16

B. Given the scope of its review of the Project under Appendix B and Public Citizen, the Corps adequately discussed oil spill, air, light, and noise impacts. ..... 17

C. Plaintiffs' concerns about the impacts of increased vessel traffic were adequately addressed by the Corps. ..... 26

1. The Corps sufficiently analyzed oil spill risks. ..... 29

2. The Corps sufficiently analyzed air pollution. ..... 31

3. The Corps sufficiently analyzed light and noise pollution. ..... 32

II. The Corps adequately considered impacts to seagrasses. .... 33

A. The Corps took a hard look at seagrass issues. .... 33

B. Plaintiffs' procedural critiques of the Corps' seagrass analysis are meritless. .... 38

1. The Corps appropriately relied on Enbridge's expert. .... 39

2. Plaintiffs' arguments concerning "monitoring" misread the record and misconstrue the governing law. .... 42

3. The Corps appropriately considered all seagrass-related comments. .... 44

C. The Cammarata declaration should be disregarded, and in any event does not demonstrate that the Corps' decision was arbitrary or capricious. .... 46

III. The Corps' discussion of beneficial and detrimental effects complied with NEPA and the Clean Water Act. .... 48

A. Plaintiffs' summary-judgment arguments fail. .... 48

B. Defendants are entitled to summary judgment on claims pleaded in the Complaint but not briefed by Plaintiffs. .... 52

IV. The Corps appropriately considered climate change. .... 53

V. The Corps adequately analyzed potential cumulative impacts. .... 59

VI. The Corps reasonably determined that no EIS was necessary. .... 63

VII. Summary judgment is appropriate for Plaintiffs' unbriefed claims about the statement of purpose and need and the alternatives analysis. .... 67

A. The Corps appropriately evaluated the purpose of the Project. .... 67

B. The Corps' alternatives analysis satisfied NEPA and the Clean Water Act. .... 69

VIII. In the event the Court finds merit in any of Plaintiffs' claims, it should invite further briefing on the appropriate remedy. .... 72

CONCLUSION .... 73

CERTIFICATE OF COMPLIANCE .... 74

CERTIFICATE OF SERVICE .... 75

## TABLE OF AUTHORITIES

**Cases:** **Page(s)**

*350 Montana v. Haaland*,
29 F.4th 1158 (9th Cir. 2022) .......... 55

*All. for the Wild Rockies v. Brazell*,
No. 3:12-CV-00466-MHW, 2013 WL 6200199 (D. Idaho Nov. 27, 2013) .......... 28

*Allen v. Pa. Eng'g Corp.*,
102 F.3d 194 (5th Cir. 1996) .......... 47

*Allied-Signal, Inc. v. U.S. Nuclear Reg. Comm'n*,
988 F.2d 146 (D.C. Cir. 1993) .......... 72

*Am. Forest & Paper Ass'n v. EPA*,
137 F.3d 291 (5th Cir. 1998) .......... 12

*Am. Wildlands v. Kempthorne*,
530 F.3d 991 (D.C. Cir. 2008) .......... 7

*Atchafalaya Basinkeeper v. U.S. Army Corps of Eng'rs*,
894 F.3d 692 (5th Cir. 2018) .......... 4, 59, 61

*Bair v. Cal. Dep't of Transp.*,
982 F.3d 569 (9th Cir. 2020) .......... 45

*Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*,
462 U.S. 87 (1983) .......... 4

*BCCA Appeal Grp. v. EPA*,
355 F.3d 817 (5th Cir. 2003) .......... 10, 11

*Bering Strait Citizens for Responsible Res. Dev. v. U.S. Army Corps of Eng'rs*,
524 F.3d 938 (9th Cir. 2008) .......... 51

*Birckhead v. FERC*,
925 F.3d 510 (D.C. Cir. 2019) .......... 56

*Boyd v. State Farm Ins. Cos.*,
158 F.3d 326 (5th Cir. 1998) .......... 47

*Camp v. Pitts*,
411 U.S. 138 (1973) .......... 6

*Cent. & S. W. Servs. Inc. v. EPA*,
220 F.3d 683 (5th Cir. 2000) .......... 72

*Citizens Against Burlington, Inc. v. Busey*,
938 F.2d 190 (D.C. Cir. 1991) .......... 68, 70

*City of Alexandria v. Slater*,
198 F.3d 862 (D.C. Cir. 1999) .......... 31

*City of Auburn v. U.S. Gov't*,
154 F.3d 1025 (9th Cir. 1998) .......... 38

**Cases—Continued:** **Page(s)**

*City of Bos. Delegation v. FERC*,
897 F.3d 241 (D.C. Cir. 2018) ........ 29

*City of Dallas v. Hall*,
562 F.3d 712 (5th Cir. 2009) ........ 63

*City of Shoreacres v. Waterworth*,
420 F.3d 440 (5th Cir. 2005) ........ 6, 37, 71

*Coliseum Square Ass'n, Inc. v. Jackson*,
465 F.3d 215 (5th Cir. 2006) ........ 64

*Columbia Riverkeeper v. U.S. Army Corp of Eng'rs*,
No. 19-6071 RJB, 2020 WL 6874871 (W.D. Wash. Nov. 23, 2020) ........ 58

*Commonwealth of Ky. ex rel. Beshear v. Alexander*,
655 F.2d 714 (6th Cir. 1981) ........ 11, 15

*Ctr. for Biological Diversity v. Bernhardt*,
982 F.3d 723 (9th Cir. 2020) ........ 55

*Ctr. for Biological Diversity v. U.S. Army Corps of Eng'rs*,
941 F.3d 1288 (11th Cir. 2019) ........ 20, 22, 24

*Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*,
202 F. Supp. 2d 594 (W.D. Tex. 2002) ........ 5

*Ctr. for Cmty. Action & Env't Justice v. Fed. Aviation Admin.*,
18 F.4th 592 (9th Cir. 2021) ........ 58

*Dep't of Transp. v. Public Citizen*,
541 U.S. 752 (2004) ........ *passim*

*Druid Hills Civic Ass'n, Inc. v. Fed. Highway Admin.*,
772 F.2d 700 (11th Cir. 1985) ........ 28

*Env't Integrity Project v. EPA*,
969 F.3d 529 (5th Cir. 2020) ........ 3

*Fath v. Tex. Dep't of Transp.*,
924 F.3d 132 (5th Cir. 2018) ........ 4, 59, 61

*Fla. Power & Light Co. v. Lorion*,
470 U.S. 729 (1985) ........ 6

*Food & Water Watch v. FERC*,
28 F.4th 277 (D.C. Cir. 2022) ........ 56, 57

*Friends of Se.'s Future v. Morrison*,
153 F.3d 1059 (9th Cir. 1998) ........ 68

*Friends of the Earth v. Hintz*,
800 F.2d 822 (9th Cir. 1986) ........ 68

**Cases—Continued:** **Page(s)**

*Fritiofson v. Alexander*,
772 F.2d 1225 (5th Cir. 1985) ... 61

*Fuel Safe Wash. v. FERC*,
389 F.3d 1313 (10th Cir. 2004) ... 46

*Girling Health Care, Inc. v. Shalala*,
85 F.3d 211 (5th Cir. 1996) ... 7

*Glass Packaging Inst. v. Regan*,
737 F.2d 1083 (D.C. Cir. 1984) ... 11, 15

*Gouger v. U.S. Army Corps of Eng'rs*,
779 F. Supp. 2d 588 (S.D. Tex. 2011) ... 72

*Gulf Coast Rod Reel & Gun Club, Inc. v. Patterson*,
No. 3:13-CV-126, 2015 WL 10097622 (S.D. Tex. Dec. 4, 2015) ... 46

*Gulf Coast Rod, Reel & Gun Club, Inc. v. U.S. Army Corps of Eng'rs*,
676 F. App'x 245 (5th Cir. 2017) ... 47, 70

*Harris v. United States*,
19 F.3d 1090 (5th Cir. 1994) ... 47

*Hayward v. U.S. Dep't of Labor*,
536 F.3d 376 (5th Cir. 2008) ... 72

*Hough v. March*,
557 F. Supp. 74 (D. Mass. 1982) ... 52

*Huss v. Gayden*,
571 F.3d 442 (5th Cir. 2009) ... 48

*Jones v. Nat'l Marine Fisheries Serv.*,
741 F.3d 989 (9th Cir. 2013) ... 35, 43

*Karst Env't Educ. & Prot., Inc. v. Fed. Highway Admin.*,
559 F. App'x 421 (6th Cir. 2014) ... 11, 12, 14, 17

*Kentuckians for the Commonwealth v. U.S. Army Corps of Eng'rs*,
746 F.3d 698 (6th Cir. 2014) ... 22, 25

*La. Env't Action Network v. EPA*,
382 F.3d 575 (5th Cir. 2004) ... 10

*La. Wildlife Fed'n, Inc. v. York*,
761 F.2d 1044 (5th Cir. 1985) (per curiam) ... 68, 69, 71

*Little Traverse Lake Prop. Owners Ass'n v. Nat'l Park Serv.*,
883 F.3d 644 (6th Cir. 2018) ... 11, 15

*Lockhart v. Kenops*,
927 F.2d 1028 (8th Cir. 1991) ... 28

**Cases—Continued:** **Page(s)**

*Maiden Creek Assocs., L.P. v. U.S. Dep't of Transp.*,
823 F.3d 184 (3d Cir. 2016)........................................................................................ 57

*Medina Cnty. Env't Action Ass'n v. Surface Transp. Bd.*,
602 F.3d 687 (5th Cir. 2010) ........................................................................................ 7

*Mickelsen Farms, LLC v. Animal & Plant Health Inspection Servs.*,
No. 115-CV-00143-EJL-CWD, 2018 WL 1413183 (D. Idaho Mar. 20, 2018) ....................... 67

*Mississippi v. EPA*,
744 F.3d 1334 (D.C. Cir. 2013)................................................................................... 47

*Moore v. Ashland Chem., Inc.*,
151 F.3d 269 (5th Cir. 1998) ...................................................................................... 48

*Morris v. Myers*,
845 F. Supp. 750 (D. Or. 1993) ................................................................................... 15

*Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*,
463 U.S. 29 (1983)................................................................................................ 3, 52

*N. Coast Rivers All. v. U.S. Dep't of the Interior*,
No. 16-cv-00307, 2020 WL 9171177 (E.D. Cal. Mar. 30, 2020)........................................... 67

*N. Plains Res. Council, Inc. v. Surface Transp. Bd.*,
668 F.3d 1067 (9th Cir. 2011) ............................................................................... 42, 43

*Nat. Res. Def. Council, Inc. v. U.S. Army Corps of Eng'rs*,
No. 1:09-cv-588, 2010 WL 1416681 (N.D. Ohio Mar. 31, 2010)........................................... 20

*Nat'l Parks Conservation Ass'n v. Babbitt*,
241 F.3d 722 (9th Cir. 2001) ............................................................................... 42, 43

*Nat'l Audubon Soc'y v. Dep't of Navy*,
422 F.3d 174 (4th Cir. 2005) ...................................................................................... 50

*Neighbors of Cuddy Mountain v. U.S. Forest Serv.*,
137 F.3d 1372 (9th Cir. 1998) ..................................................................................... 61

*Neto v. Thompson*,
506 F. Supp. 3d 239 (D.N.J. 2020) ................................................................................ 7

*New York v. Nuclear Reg. Comm'n*,
681 F.3d 471 (D.C. Cir. 2012)...................................................................................... 37

*Ocean Advocates v. U.S. Army Corps of Eng'rs*,
361 F.3d 1108 (9th Cir. 2004) ..................................................................................... 26

*Ocean Advocates v. U.S. Army Corps of Eng'rs*,
402 F.3d 846 (9th Cir. 2004) ............................................................................... 25, 26

*Ohio Valley Env't Coal. v. Aracoma Coal Co.*,
556 F.3d 177 (4th Cir. 2009) ............................................................................... *passim*

**Cases—Continued:** **Page(s)**

*Or. Env't Council v. Kunzman*,
636 F. Supp. 632 (D. Or. 1986) ..... 13

*Orleans Audubon Soc'y v. Lee*,
742 F.2d 901 (5th Cir. 1984) ..... 6

*Pres. Soc'y of Charleston v. U.S. Army Corps of Eng'rs*,
No. 2:12-cv-2942, 2013 WL 6488282 (D.S.C. Sept. 18, 2013) ..... 19

*Protect Our Communities Found. v. Jewell*,
825 F.3d 571 (9th Cir. 2016) ..... 44

*Protect Our Parks, Inc. v. Buttigieg*,
--- F.4th ---, No. 21-2449, 2022 WL 2376716 (7th Cir. July 1, 2022) ..... 64

*Provident Life & Accident Ins. Co. v. Goel*,
274 F.3d 984 (5th Cir. 2001) ..... 20

*Public Citizen. Sierra Club v. U.S. Army Corps of Eng'rs*,
997 F.3d 395 (1st Cir. 2021) ..... 23

*Residents for Sane Trash Sols., Inc. v. U.S. Army Corps of Eng'rs*,
31 F. Supp. 3d 571 (S.D.N.Y. 2014) ..... 24

*Road Sprinkler Fitters Local Union No. 669 v. Indep. Sprinkler Corp.*,
10 F.3d 1563 (11th Cir. 1994) ..... 67

*Robertson v. Methow Valley Citizens Council*,
490 U.S. 332 (1989) ..... 4, 14, 30, 37

*Sabine River Auth. v. U.S. Dep't of Interior*,
951 F.2d 669 (5th Cir. 1992) ..... 5, 46, 60

*Save Our Wetlands, Inc. v. Sands*,
711 F.2d 634 (5th Cir. 1983) ..... 51

*Selkirk Conservation All. v. Forsgren*,
336 F.3d 944 (9th Cir. 2003) ..... 62

*Sierra Club v. Energy Future Holdings Corp.*,
No. W-12-CV-108, 2014 WL 2153913 (W.D. Tex. Mar. 28, 2014) ..... 5

*Sierra Club v. Fed. Highway Admin.*,
435 F. App'x 368 (5th Cir. 2011) ..... 59, 70

*Sierra Club v. Fed. Highway Admin.*,
715 F. Supp. 2d 721 (S.D. Tex. 2010) ..... 59

*Sierra Club v. FERC*,
827 F.3d 36 (D.C. Cir. 2016) ..... 56

*Sierra Club v. FERC*,
867 F.3d 1357 (D.C. Cir. 2017) ..... 57

**Cases—Continued:** **Page(s)**

*Sierra Club v. Glickman*,
67 F.3d 90 (5th Cir. 1995) ........ 3

*Sierra Club v. Marsh*,
769 F.2d 868 (1st Cir. 1985) ........ 5

*Sierra Club v. Sigler*,
695 F.2d 957 (5th Cir. 1983) ........ 30, 50

*Sierra Club v. U.S. Army Corps of Eng'rs*,
295 F.3d 1209 (11th Cir. 2002) ........ 37

*Sierra Club v. U.S. Army Corps of Eng'rs*,
803 F.3d 31 (D.C. Cir. 2015) ........ 37

*Simmons v. U.S. Army Corps of Eng'rs*,
120 F.3d 664 (7th Cir. 1997) ........ 70

*Sovereign Iñupiat for a Living Arctic v. U.S. Bureau of Land Mgmt.*,
555 F. Supp. 3d 739 (D. Alaska 2021) ........ 55

*Spiller v. White*,
352 F.3d 235 (5th Cir. 2003) ........ 4, 62, 63

*Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*,
985 F.3d 1032 (D.C. Cir. 2021) ........ 64

*Statoil USA E&P, Inc. v. U.S. Dep't of Interior*,
352 F. Supp. 3d 748 (S.D. Tex. 2018) ........ 6

*Stop The Pipeline v. White*,
233 F. Supp. 2d 957 (S.D. Ohio 2002) ........ 68

*Surfrider Found. v. Dalton*,
989 F. Supp. 1309 (S.D. Cal. 1998) ........ 65

*Sw. Elec. Power Co. v. EPA*,
920 F.3d 999 (5th Cir. 2019) ........ 12

*Sylvester v. U.S. Army Corps of Eng'rs*,
882 F.2d 407 (9th Cir. 1989) ........ 69

*Tex. Ass'n of Mfrs. v. U.S. Consumer Prod. Safety Comm'n*,
989 F.3d 368 (5th Cir. 2021) ........ 72

*Tex. Oil & Gas Ass'n v. EPA*,
161 F.3d 923 (5th Cir. 1998) ........ 10

*Texas Comm. on Nat. Res. v. Van Winkle*,
197 F. Supp. 2d 586 (N.D. Tex. 2002) ........ 61

*Texas v. EPA*,
389 F. Supp. 3d 497 (S.D. Tex. 2019) ........ 6, 72

**Cases—Continued:** **Page(s)**

*Texas v. United States*,
555 F. Supp. 3d 351 (S.D. Tex. 2021) ........ 3

*Theodore Roosevelt Conservation P'ship v. Salazar*,
616 F.3d 497 (D.C. Cir. 2010) ........ 61

*TOMAC v. Norton*,
240 F. Supp. 2d 45 (D.D.C. 2003) ........ 42

*Town of Norfolk v. U.S. Army Corps of Eng'rs*,
968 F.2d 1438 (1st Cir. 1992) ........ 6

*Tri-Valley CAREs v. U.S. Dep't of Energy*,
671 F.3d 1113 (9th Cir. 2012) ........ 42

*United Gas Pipe Line Co. v. Whitman*,
595 F.2d 323 (5th Cir. 1979) ........ 25

*United States v. Bowen*,
818 F.3d 1798 (5th Cir. 2016) ........ 67

*United States v. L.A. Tucker Truck Lines, Inc.*,
344 U.S. 33 (1952) ........ 11

*United States v. Lopez-Velasquez*,
526 F.3d 804 (5th Cir. 2008) ........ 18

*Upper Green River All. v. U.S. Bureau of Land Mgmt.*,
No. 2:19-CV-146-SWS, 2022 WL 1493053 (D. Wyo. Apr. 5, 2022) ........ 28

*Utah Physicians for a Healthy Env't v. U.S. Bureau of Land Mgmt.*,
528 F. Supp. 3d 1222 (D. Utah 2021) ........ 55

*Van Abbema v. Fornell*,
807 F.2d 633 (7th Cir. 1986) ........ 50

*Vecinos para el Bienestar de la Comunidad Costera v. FERC*, 6
F.4th 1321 (D.C. Cir. 2021) ........ 59

*Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*,
435 U.S. 519 (1978) ........ *passim*

*W. Tex. Transmission, L.P. v. Enron Corp.*,
907 F.2d 1554 (5th Cir. 1990) ........ 10

*W. Watersheds Project v. U.S. Bureau of Land Mgmt.*,
721 F.3d 1264 (10th Cir. 2013) ........ 28

*Washington Env't Council v. Bellon*,
732 F.3d 1131 (9th Cir. 2013) ........ 58

*Water Works & Sewer Bd. of the City of Birmingham v. U.S. Army Corps of Eng'rs*,
983 F. Supp. 1052 (N.D. Ala. 1997) ........ 18

**Cases—Continued:** **Page(s)**

*West Virginia v. EPA*,
142 S. Ct. 2587 (2022) .......... 54

*Winter v. Nat. Res. Def. Council, Inc.*,
555 U.S. 7 (2008) .......... 4, 63

**Statutes:**

5 U.S.C. § 702 .......... 6

5 U.S.C. § 704 .......... 6

5 U.S.C. § 706(2)(A) .......... 3

33 U.S.C. § 403 .......... 6

33 U.S.C. § 1311(a) .......... 5

33 U.S.C. § 1341(a)(1) .......... 5

33 U.S.C. § 1344 .......... 2

33 U.S.C. § 1344(a) .......... 5

42 U.S.C. § 4332(2)(C) .......... 4

**Regulations:**

30 T.A.C. § 279.11 .......... 5

30 T.A.C. § 279.11(b) .......... 5

30 T.A.C. § 279.11(c)(2) .......... 6

33 C.F.R. § 320 .......... 6

33 C.F.R. § 320.4 .......... 6, 53

33 C.F.R. § 320.4(a) .......... 6, 38

33 C.F.R. § 320.4(a)(1) .......... 18

33 C.F.R. § 320.4(b)(4) .......... 51

33 C.F.R. § 320.4(g)(1) .......... 53

33 C.F.R. § 320.4(g)(4) .......... 53

33 C.F.R. § 320.4(q) .......... 52

33 C.F.R. § 325.2(a)(3) .......... 17

33 C.F.R. pt. 325, App. B § 7(b)(1) .......... 18, 21

33 C.F.R. pt. 325, App. B § 7(b)(2) .......... 19

33 C.F.R. pt. 325, App. B § 7(b)(2)(i) .......... 21

33 C.F.R. pt. 325, App. B § 7(b)(2)(iii) .......... 21

33 C.F.R. pt. 325, App. B § 7(b)(2)(iv)(A) .......... 21

**Regulations—Continued:** **Page(s)**

33 C.F.R. pt. 325, App. B § 7(b)(3) .......... 21
33 C.F.R. pt. 325, App. B § 9.b(4) .......... 18
33 C.F.R. pt. 325, App. B § 9.b(5) .......... 18
33 C.F.R. pt. 325, App. B § 9.b(5)(d) .......... 50
40 C.F.R. § 121.3 .......... 5
40 C.F.R. § 230.1(c) .......... 62
40 C.F.R. § 230.10(a) .......... 69
40 C.F.R. § 230.10(a)(2) .......... 71
40 C.F.R. § 1500.2(b) .......... 27
40 C.F.R. § 1502.1 .......... 69
40 C.F.R. § 1502.22 .......... 50
40 C.F.R. § 1502.23 .......... 50
40 C.F.R. § 1506.5 .......... 42
40 C.F.R. § 1506.5(a) .......... 68
40 C.F.R. § 1506.5(b)(3) .......... 40
40 C.F.R. § 1508.27 .......... 63
40 C.F.R. § 1508.27(b) .......... 63
40 C.F.R. § 1508.27(b)(2) .......... 66
40 C.F.R. § 1508.27(b)(3) .......... 65
40 C.F.R. § 1508.27(b)(5) .......... 65
40 C.F.R. § 1508.27(b)(7) .......... 66
40 C.F.R. § 1508.7 .......... 59
40 C.F.R. § 1508.8(b) .......... 54
40 C.F.R. § 1508.9(a) .......... 5, 27
40 C.F.R. § 1508.9(a)(1) .......... 63
40 C.F.R. § 1508.9(b) .......... 67

**Administrative Materials:**

*Environmental Quality; Procedures for Implementing the National Environmental Policy Act (NEPA)*, Final Rule, 53 Fed. Reg. 3120 (Feb. 3, 1988) .......... 18, 19, 20, 22

*National Environmental Policy Act Regulations; Incomplete or Unavailable Information*, 51 Fed. Reg. 15,618 (Apr. 25, 1986) .......... 30

**Administrative Materials—Continued:** **Page(s)**

*PennEast Pipeline Co., LLC*,
162 FERC ¶ 61,053 (2018) .......... 57

**Other Authorities:**

Adelman, David E. & Robert L. Glicksman, *Presidential and Judicial Politics in Environmental Litigation*, 50 Ariz. St. L.J. 3 (2018) .......... 26

Coggins, George Cameron & Robert L. Glicksman,
3 Pub. Nat. Res. L. § 27:2 (2nd ed. Westlaw June 2022) .......... 12

Fuhr, Cecily, *et al.*,
80 C.J.S. *Shipping* § 17 (Westlaw July 2022) .......... 21

James, Norman D., *Section 7 Consultation and* Public Citizen, *Applying the Correct Scope of Analysis*, SM013 ALI-ABA 111 (2006) .......... 23

Wright & Miller,
33 Fed. Prac. & Proc. § 8403 (2d ed. Westlaw Apr. 2022) .......... 7

## INTRODUCTION

Plaintiffs challenge a U.S. Army Corps of Engineers ("Corps") permit amendment that will facilitate incremental but important infrastructure improvements to a longstanding commercial marine terminal on the Corpus Christi Ship Channel. At a time when energy infrastructure and safe transportation of energy resources have taken on outsized importance to U.S. domestic and national security, as well as foreign affairs, the terminal improvements at issue promise important efficiency and safety benefits. In opposing those improvements, Plaintiffs primarily allege procedural violations of the National Environmental Policy Act ("NEPA"), as well as some limited claims under the Clean Water Act. Their summary judgment motion relies heavily on an expert declaration that long postdates the agency proceedings under review and other issues not raised to the Corps during the public comment period. The motion reflects a fundamental misunderstanding of the Court's role in Administrative Procedure Act cases (which is to review agency action, not to make judicial findings of fact), the governing statutory standard of review, and black-letter principles limiting judicial review to the administrative record before the agency at the time of the challenged action. To the limited extent that Plaintiffs' claims are properly before the Court, they ignore significant portions of the rationale provided by the Corps in its decision document, and they disregard substantial supporting record evidence. Plaintiffs have not met their heavy burden of demonstrating that the Corps' action was arbitrary or capricious. The Court should grant Enbridge's cross motion for summary judgment on all counts and deny Plaintiffs' motion for summary judgment.

## BACKGROUND

Enbridge Ingleside Oil Terminal, LLC (f/k/a Moda Ingleside Oil Terminal LLC and hereinafter "Enbridge") is an infrastructure company that stores and handles liquid products

essential to the economy at a commercial marine terminal on the north side of the Corpus Christi Ship Channel in Ingleside, San Patricio County, Texas. This facility has been in service for decades. The facility first received U.S. Army Corps of Engineers permit SWG-1995-02221 (the "Permit"), which authorized dredging under Section 404 of the Clean Water Act, 33 U.S.C. § 1344, when the facility was operated by the United States Navy. The Permit has been amended several times, including changes to the permit holder.

In this case, Plaintiffs challenge the most recent permit amendment, issued by the Corps effective May 5, 2021 (the "Amendment"), which authorizes Enbridge to construct new barge and vessel docks at the terminal and to add a turning basin at the West Basin entrance to the Corpus Christi Ship Channel (the "Project").

The Corps issued a Public Notice of Enbridge's application for the Amendment on February 6, 2020, inviting public comments by March 9, 2020. AR760. The Environmental Protection Agency ("EPA"), the U.S. Fish and Wildlife Service ("FWS"), the Texas Commission on Environmental Quality ("TCEQ"), the Texas Parks and Wildlife Department ("TPWD"), the Ingleside on the Bay Coastal Watch Association (one of the Plaintiffs), a member of the Indigenous People of the Coastal Bend (another Plaintiff), two state legislators, and members of the general public submitted comments during the comment period. *See* AR107, 1518. Enbridge provided information in response to those comments and to a second round of follow-up comments. AR113-25. During its analysis of the Project, the Corps considered both the comments submitted and Enbridge's responses to those comments. *See* AR125.

On April 13, 2021, the Corps issued its Memorandum for Record, which included an Environmental Assessment ("EA") and Finding of No Significant Impact ("FONSI"). AR101-54. The EA analyzed the Project's environmental impacts and described actions required to mitigate

such impacts. Having concluded that the Project would not have significant environmental impacts, the Corps did not prepare an environmental impact statement ("EIS").

The Plaintiffs brought this suit under the Administrative Procedure Act ("APA") (Dkt. No. 1, "Complaint"), alleging the Corps' issuance of the Amendment violated the Clean Water Act and NEPA. Plaintiffs filed a motion asking the Court to permit extra-record evidence and take judicial notice of various materials, Dkt. No. 45; the federal defendants and Enbridge opposed that motion, Dkt. Nos. 44, 45. Plaintiffs have now moved for summary judgment (Dkt. No. 52, "Plaintiffs' Motion").

## STANDARD OF REVIEW

Under the APA, a reviewing court may "hold unlawful and set aside agency action" that is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "The scope of review under the 'arbitrary and capricious' standard is narrow," and an agency action may be set aside only if the agency has "offered an explanation for its decision that runs counter to the evidence before [it], or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Env't Integrity Project v. EPA*, 969 F.3d 529, 539 (5th Cir. 2020) (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983)). "Under this standard, administrative action is upheld if the agency has considered the relevant factors and articulated a rational connection between the facts found and the choice made." *Sierra Club v. Glickman*, 67 F.3d 90, 97 (5th Cir. 1995).

Courts must remain "mindful that the arbitrary and capricious standard is "highly deferential," that agency decisions must be accorded "a presumption of regularity," and that the reviewing court is "prohibited from substituting [its] judgment for that of the agency." *Texas v. United States*, 555 F. Supp. 3d 351, 417 (S.D. Tex. 2021) (Tipton, J.) (internal quotation marks

omitted). An APA challenge fails if the agency's "path could reasonably be discerned," even when "the Corps' discussion might have been improved with the addition of certain details." *Atchafalaya Basinkeeper v. U.S. Army Corps of Eng'rs*, 894 F.3d 692, 699 (5th Cir. 2018) (internal quotation marks omitted)).

## LEGAL BACKGROUND

### I. The National Environmental Policy Act

NEPA requires federal agencies to consider the potential environmental impacts of their proposed actions, while at the same time providing for public input. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). NEPA does not mandate particular results or "require agencies to elevate environmental concerns over other appropriate considerations." *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983). Instead, NEPA merely "requires federal agencies to take a 'hard look' at the consequences of their actions." *Fath v. Tex. Dep't of Transp.*, 924 F.3d 132, 136 (5th Cir. 2018). "If the adverse environmental effects of the proposed action are adequately identified and evaluated" as part of that hard look, "the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs." *Robertson*, 490 U.S. at 350.

NEPA requires an EIS for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). But "[a]n agency is not required to prepare a full EIS if it determines—based on a shorter environmental assessment—that the proposed action will not have a significant impact on the environment." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 16 (2008). "The EA is a 'concise' document that 'briefly' discusses the relevant issues and either reaches a conclusion that preparation of an EIS is necessary or concludes with a "Finding of No Significant Impact" or "FONSI." *Spiller v. White*, 352 F.3d 235, 237 (5th Cir. 2003) (quoting

*Sierra Club v. Marsh*, 769 F.2d 868, 870 (1st Cir. 1985); citing 40 C.F.R. § 1508.9(a)). Under the "arbitrary and capricious standard," the reviewing agency "must be given" "great deference [for its] decision not to prepare an EIS." *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 202 F. Supp. 2d 594, 647 (W.D. Tex. 2002); *see id.* (discussing *Sabine River Auth. v. U.S. Dep't of Interior*, 951 F.2d 669 (5th Cir. 1992)).

## II. The Clean Water Act and the Rivers and Harbors Act

Section 301(a) of the Clean Water Act ("CWA") generally prohibits the discharge of pollutants, including dredged or fill materials into the navigable waters of the United States. 33 U.S.C. § 1311(a). But Section 404 of the CWA authorizes the Corps to "issue permits . . . for the discharge of dredged or fill material into the navigable waters." 33 U.S.C. § 1344(a). Before issuing a Section 404 permit, the Corps must ensure any such discharge complies with the Section 404(b)(1) Guidelines, codified at 40 C.F.R. Part 230 (the "404(b)(1) Guidelines").

Section 401 of the Clean Water Act separately requires an applicant for a federal permit to conduct any activity that may result in a discharge into navigable waters to obtain a water quality certification from the state, unless the state waives certification. 33 U.S.C. 1341(a)(1). EPA's regulations provide the scope of certification is to assure "that a discharge from a Federally licensed or permitted activity will comply with water quality requirements." 40 C.F.R. § 121.3. In Texas, TCEQ has been delegated Clean Water Act permitting authority, and that agency issues water quality certification for the Corps' issuance of a Section 404 permit. Certification regarding Section 404 permits is specifically addressed in TCEQ's regulations. *See* 30 T.A.C. § 279.11; *see also Sierra Club v. Energy Future Holdings Corp.*, No. W-12-CV-108, 2014 WL 2153913, at *12 (W.D. Tex. Mar. 28, 2014) (TCEQ determinations entitled to deference). TCEQ's certification is to ensure that "discharges into aquatic ecosystems shall avoid unacceptable adverse impacts, including cumulative and secondary impacts." 30 T.A.C. § 279.11(b). Certification requires that

"appropriate and practical steps have been taken that will minimize potential adverse impacts of the discharge on the aquatic ecosystem." *Id.* § 279.11(c)(2).

Under Section 10 of the Rivers and Harbors Act ("RHA"), Corps authorization is required for construction work in or affecting the navigable waters of the United States. 33 U.S.C. § 403. The Corps has "developed regulations which specify the circumstances under which it will authorize activities which obstruct navigable waters." *Orleans Audubon Soc'y v. Lee*, 742 F.2d 901, 906 (5th Cir. 1984); *see* 33 C.F.R. §§ 320, 320.4.

Before issuing a permit pursuant to Section 404 of the CWA or Section 10 of the RHA, the Corps will undertake a "public interest" review. *See* 33 C.F.R. § 320.4 (listing the Corps' "general policies" applicable "to the review of all applications for . . . permits"); *see also id.* § 320.4(a) (listing factors). The Corps' application of its regulations to requests for permits is entitled to deference. *See City of Shoreacres v. Waterworth*, 420 F.3d 440, 445 (5th Cir. 2005); *see also Town of Norfolk v. U.S. Army Corps of Eng'rs*, 968 F.2d 1438, 1454 (1st Cir. 1992) ("Under the 'public interest' review, the Corps conducts a general balancing of a number of economic and environmental factors and its ultimate determinations are entitled to substantial deference.").

## III. Extra-Record Evidence

In an APA case, claims are typically resolved on summary judgment motions based on the agency's administrative record. *See Texas v. EPA*, 389 F. Supp. 3d 497, 503 (S.D. Tex. 2019); 5 U.S.C. §§ 702, 704. In this circumstance, a district court acts essentially as an appellate tribunal rather than as a fact finder. *See Statoil USA E&P, Inc. v. U.S. Dep't of Interior*, 352 F. Supp. 3d 748, 757 (S.D. Tex. 2018), *aff'd*, 801 F. App'x 232 (5th Cir. 2020). As such, "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743 (1985) (quoting *Camp v. Pitts*, 411 U.S. 138, 142 (1973)); *see* Dkt. No. 45 at 11. A court's task when

reviewing cross-motions for summary judgment in an APA record-review case is to determine whether the facts found by the agency are supported by the record, and not—as Plaintiffs erroneously suggest throughout their Motion—to supplant the agency in resolving disputes of fact, or for the court to make any factual findings of its own. *See* Wright & Miller, 33 Fed. Prac. & Proc. § 8403 (2d ed. Westlaw Apr. 2022); *see also Neto v. Thompson*, 506 F. Supp. 3d 239, 244 (D.N.J. 2020) (in APA case, "the district court does not need to determine whether there are disputed facts to resolve at trial" because "the administrative agency is the finder of fact" (citations omitted)). Because the administrative agency acts as the fact finder, "[j]udicial review has the function of determining whether the administrative action is consistent with the law—that and no more." *Girling Health Care, Inc. v. Shalala*, 85 F.3d 211, 214-15 (5th Cir. 1996) (citation omitted).

Plaintiffs previously filed a motion asking this Court to consider or take judicial notice of certain materials outside of the administrative record. Dkt. No. 43. Enbridge affirms and incorporates the arguments in its previously filed opposition, Dkt. No. 45, and supplements them below to the extent that particular arguments in Plaintiffs' Motion continue to rely on extra-record evidence. Nothing in Plaintiffs' Motion provides any additional basis for this Court to consider extra-record evidence, and this Court should adhere to the black-letter rule that "[judicial] review is limited to the record compiled by the agency." *Medina Cnty. Env't Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 706 (5th Cir. 2010) (citing *Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.C. Cir. 2008)).

## SUMMARY OF THE ARGUMENT

The Corps issued the Amendment after an extensive review and in accordance with NEPA and the Clean Water Act. The Corps began by determining the appropriate scope of review for the activities within the Corps' jurisdiction. In setting that scope, the Corps complied with its

regulations and caselaw to ensure that its analysis addressed reasonably foreseeable environmental effects that have a reasonably close causal relationship with the Corps' action in authorizing dredge-and-fill activities. The Corps then considered the comments received and Enbridge's responses to those comments. Indeed, the Corps provided a second opportunity for interested parties to respond to information Enbridge provided after the initial comment period. This process not only refined the Corps' understanding of impacts, but also led Enbridge to adopt additional efforts to further minimize and mitigate potential impacts.

The Corps' EA described the Project, evaluated potential alternatives, assessed potential impacts to a wide variety of environmental resources, and identified measures to minimize and mitigate those impacts. The EA amply supports the Corps' Finding of No Significant Impact, and it demonstrates the Corps' compliance with the 404(b)(1) Guidelines and the Corps' public interest requirements. These determinations are entitled to judicial deference. Because the Corps' action does not result in any significant impact, no EIS was required.

Although Plaintiffs and others submitted comments in opposition to the Project, they failed to alert the Corps to several of the issues that now feature prominently in Plaintiffs' Motion. Plaintiffs criticize as overly terse the Corps' discussion of oil spill risks and claim that the Corps ignored impacts from increased vessel traffic, but Plaintiffs forfeited those issues by not presenting them to the Corps during the comment period. If the Court reaches the merits, it should uphold the adequacy of the Corps' review. The Corps' action is not the cause of many of the impacts now raised by Plaintiffs, as the Corps does not authorize vessel traffic or the throughput of commodities at the terminal; rather, the Coast Guard regulates vessel traffic and navigation, and TCEQ sets maximum throughput volumes. Moreover, the Corps analyzed oil spill risk, air pollution, and light and noise impacts within the appropriate scope of its analysis.

Plaintiffs also miss the mark in criticizing the Corps' discussion of impacts to seagrass. The Corps acknowledged and disclosed impacts to seagrass within the proper scope of the Corps' review, and it required extensive seagrass mitigation to ensure no net loss of seagrass would occur. And Plaintiffs' claim that the Corps ignored potential impacts to adjacent seagrasses, even for issues outside the scope, is rebutted by the extensive back-and-forth among the Corps, Enbridge, and several state and federal agencies to understand potential impacts; this process ultimately resulted in additional measures to reduce impacts.

Plaintiffs' various other critiques about the Corps' weighing of the benefits and costs of the Project, the adequacy of the analysis on climate impacts, and the cumulative impacts analysis, are similarly without merit. The Corps' analysis satisfies NEPA's "rule of reason" and provides discussion commensurate with the anticipated level of impacts, none of which are significant.

Plaintiffs' Motion also fails to address claims included in their Complaint, such as the Corps' review of the statement of purpose and need for the Project, and the Corps' analysis of a reasonable range of alternatives. The Corps reviewed the Project purpose and evaluated eight different alternatives in compliance with NEPA and the Clean Water Act. This Court should deny Plaintiff's Motion and grant summary judgment to Defendants.

## ARGUMENT

### I. The Corps met its obligations in addressing issues related to allegedly increased vessel traffic, including oil spill risks and air, light, and noise impacts.

The Corps' discussion of potential risks from oil spills and potential impacts on air, light, and noise satisfied both NEPA and the Clean Water Act. Plaintiffs concede that the Corps addressed these issues but complain that the Corps' conclusions were not supported by enough explanation or adequate data on expected future vessel traffic, projected volumes of oil for export,

and the like. *See* Dkt. No. 52 at 20-21. Plaintiffs have not met their heavy burden to demonstrate that the Corps' discussion was arbitrary and capricious.

**A. Plaintiffs failed to adequately raise concerns regarding oil spill risk and environmental effects associated with increased vessel traffic during the public comment period.**

Plaintiffs' arguments that the Corps violated NEPA by failing to analyze potential risks from oil spills and increased vessel traffic, Dkt. No. 52 at 20-21, 33-34, were not adequately raised during the Corps' Public Notice comment period and are therefore forfeited.

*1. In APA cases, including those raising NEPA claims, parties may not seek judicial review of issues that were not timely raised in comments with sufficient clarity to apprise the agency of the concern.*

Before a party may seek judicial review of agency action, it must raise its concerns to the agency in timely comments that are clear enough to apprise the agency of the commenter's concerns. When a stakeholder "fail[s] to raise [its] objections during the notice and comment period," those objections are "waived" and need "not be considered" on judicial review. *Tex. Oil & Gas Ass'n v. EPA*, 161 F.3d 923, 933 n.7 (5th Cir. 1998); *see La. Env't Action Network v. EPA*, 382 F.3d 575, 584 (5th Cir. 2004) (finding waiver where petitioner "failed to raise the challenge before the [agency] during the comment period on the final rule"); *BCCA Appeal Grp. v. EPA*, 355 F.3d 817, 828 (5th Cir. 2003) (as amended) ("[C]hallenges to [agency] action are waived by the failure to raise the objections during the notice and comment period." (internal quotation marks omitted)); *W. Tex. Transmission, L.P. v. Enron Corp.*, 907 F.2d 1554, 1560 (5th Cir. 1990) (arguments deemed "waived" because litigant "failed to present its objections in a timely fashion to the [agency]").

This rule—which the Supreme Court has long described as a matter of "[s]imple fairness"—is premised on the commonsense notion that "courts should not topple over administrative decisions unless the [agency] not only has erred but has erred against objection

made at the time appropriate under its practice." *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952); *see BCCA*, 355 F.3d at 829 ("For the federal courts to review a petitioner's claims in the first instance would usurp the agency's function and deprive the [agency] of an opportunity to consider the matter, make its ruling, and state the reasons for its action." (internal quotation marks omitted)).

This principle applies with particular force in the context of alleged deficiencies in an agency's NEPA analysis. The Supreme Court has explained that stakeholders challenging an agency's compliance with NEPA, including the adequacy of an EA, must "structure their participation so that it . . . alerts the agency to the [parties'] position and contentions," so as to give the agency a fair opportunity to give the issue meaningful consideration. *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 764 (2004) (quoting *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 553 (1978)); *accord Karst Env't Educ. & Prot., Inc. v. Fed. Highway Admin.*, 559 F. App'x 421, 425 (6th Cir. 2014). If a party fails to raise its NEPA concerns during a public comment period, then the party forfeits those challenges for future judicial review. *See Public Citizen*, 541 U.S. at 764 (where party "did not raise the[ir] particular objections" in their comments on an EA, that party "forfeited any objection to the EA" on that ground); *Little Traverse Lake Prop. Owners Ass'n v. Nat'l Park Serv.* 883 F.3d 644, 655 (6th Cir. 2018). This rule follows from the principle that a party's objections to an agency action must be raised "at a time when the [agency] could have taken any necessary corrective action without undue delay" and not after the fact, when it is too late to include the issue in the NEPA document or the permit has already been issued. *Commonwealth of Ky. ex rel. Beshear v. Alexander*, 655 F.2d 714, 718 (6th Cir. 1981); *Glass Packaging Inst. v. Regan*, 737 F.2d 1083, 1093 (D.C. Cir. 1984) (holding that the court could

not overturn an agency's decision due to failure to analyze an issue when the issue was raised eight months after the comment period closed and less than two weeks before the EA was to be released).

Furthermore, challenges must be raised with sufficient clarity and in sufficient detail to allow the agency a fair opportunity to address the relevant concern. *See Public Citizen*, 541 U.S. at 764-65; *accord Karst*, 559 F. App'x at 425. "Administrative proceedings should not be a game or a forum to engage in unjustified obstructionism by making cryptic and obscure references to matters that 'ought to be' considered and then, after failing to do more to bring the matter to the agency's attention, seeking to have that agency determination vacated on the ground that the agency failed to consider matters 'forcefully presented.'" *Vermont Yankee*, 435 U.S. at 553-54.[1]

The Corps has historically "receive[d] about 80,000 dredge and fill permit applications each year." George Cameron Coggins & Robert L. Glicksman, 3 Pub. Nat. Res. L. § 27:2 (2nd ed. Westlaw June 2022). It is not feasible for a resource-constrained federal agency to anticipate and respond at length to every conceivable objection to every single one of its permitting or regulatory decisions, regardless of whether any interested party has actually brought that objection to the agency's attention. Requiring the agency to prepare a document of this type would contravene the purpose of NEPA by transforming each environmental analysis into a freewheeling and unfocused treatise of unwieldy length, rather than the type of easily "readable and understandable" document

[1] In some limited contexts, the Fifth Circuit has declined to require a party to raise an issue in comments to an agency before pressing that issue on judicial review. Those cases, however, are readily distinguishable, as they involved different statutory provisions authorizing review, different kinds of claims (e.g., that an agency's action exceeded its statutory authority), arose from notice-and-comment rulemaking, and did not implicate NEPA or the Supreme Court cases discussed above. *E.g.*, *Am. Forest & Paper Ass'n v. EPA*, 137 F.3d 291, 295-96 (5th Cir. 1998) (case brought under provision of Clean Water Act, inapplicable here, authorizing any "interested person" to bring suit, and comments submitted by other parties had given agency "opportunity to consider the issue"); *Sw. Elec. Power Co. v. EPA*, 920 F.3d 999, 1012 (5th Cir. 2019) (similar; following *American Forest & Paper*).

that Congress envisioned in NEPA. *Or. Env't Council v. Kunzman*, 636 F. Supp. 632, 640 (D. Or. 1986), *aff'd*, 817 F.2d 484 (9th Cir. 1987).

2. *Plaintiffs did not preserve their current claims of oil spill risks.*

Plaintiffs do not identify any language in any of the dozens of submissions to the Corps during the public comment period that clearly raised a concern regarding a potential link between allegedly increased vessel traffic on the one hand and the risk of oil spills on the other. Plaintiffs claim only that the "Corps was specifically requested to include catastrophic pollution planning for the [Enbridge] expansion," and then cite to two comments submitted by Patrick Nye on behalf of Ingleside on the Bay Coastal Watch Association. Dkt. No. 52 at 20. The first comment merely asked, without detail or elaboration, whether there was "a catastrophic pollution control plan." AR644. The second comment complains that Enbridge did not answer the commenter's "questions regarding whether there is a catastrophic pollution control plan." AR342. Critically, *neither comment mentions oil spills* (much less the potential relationship between oil spills and increased vessel traffic). Nor did the commenter explain what he meant by the phrase "catastrophic pollution control plan." That term is not used in the applicable provisions of the Coast Guard's 33 C.F.R. pt. 154, subpart F regulations, and the adequacy of the terminal's response plans are not at issue in this case.

Moreover, the comments cited in Plaintiffs' Motion identify the kinds of "pollution" with which the commenter was concerned—i.e., (1) releases of "sulfur oxide ($SO_x$) and particulate matter discharges ($PM_x$) from ship[] smokestacks," (2) releases of material from areas where dredged material would be placed during construction, and (3) water-quality impacts from releasing ballast water. AR644. Given that the commenter made no mention of oil spills but did mention *other* forms of pollution, the comment did not fairly advise the Corps of a concern about oil spills or that the commenter intended its reference to a "catastrophic pollution control plan" to

address oil spills rather than the other specific pollution risks he explicitly mentioned in his comments. *See Karst*, 559 F. App'x at 425, 427 (comments did not clearly raise issue on which litigant later challenged agency decision because the comments were "vague" and "focuse[d]" on different complaints than those later presented in litigation).

NEPA regulations once required analysis of a "worst case scenario"—a term that might be understood to require consideration of some catastrophic pollution event. But that provision was long ago removed from the regulations, and the Supreme Court held in *Robertson* that NEPA does *not* require a "worst case" analysis. *See* 490 U.S. at 354-56. Thus, Plaintiff's suggestion that the Corps erred by failing to "analyze [a] worst-case scenario of oil tanker spill," made with citation to a pre-*Robertson* case, is plainly incorrect. Dkt. No. 52 at 21.

Though not cited in Plaintiffs' Motion, one comment did ask the Corps to require Enbridge to construct a breakwater between the terminal and the nearby Ingleside on the Bay community to "help mitigate against possible increased storm surge, and to limit harm from potential oil spills." AR335. The Corps explicitly responded to this comment, explaining that a breakwater would have adverse environmental effects due to "increased impacts to existing seagrass beds" and that in any event a breakwater would "not contain an oil spill" or "provide significant risk reduction from storm surges." AR124. That discussion directly and adequately responded to the commenter's expressed concern, and Plaintiffs do not argue otherwise. In any event, the commenter's recommendations about how to potentially "limit harm from potential oil spills" is distinct from the separate question of how, if at all, increased vessel traffic might increase the risk of spills in the first place. Plaintiffs do not cite, and Enbridge is not aware of, any timely comment that presented concerns remotely resembling the one now featured in Plaintiffs' Motion—i.e., that increased vessel traffic might increase the risk of oil spills. Vague and cursory references to

recommendations for a breakwater with a possible oil spill containment function did not require the Corps to undertake a lengthy and broad-reaching analysis of oil spill risks generally.

The record also contains an untimely comment (again not cited in Plaintiffs' Motion) that identified oil spill risk as a concern. AR205. That comment was submitted to the Corps on March 23, 2021, over a year after the close of the public comment period and just ten days before the Corps signed and finalized its EA. *See* AR154, 764. Agencies are not required to consider untimely comments. *See Morris v. Myers*, 845 F. Supp. 750, 755 (D. Or. 1993) (issues "not *timely* presented" during agency proceedings are waived (emphasis added); *Roosevelt Campobello*, 684 F.2d at 1047 (arguments "not suggest[ed] . . . during the comment period" were "too late"). The *Glass Packaging* case is instructive. There, the complaining party had waited until "eight months after the written comment period had expired, and less than two weeks before the [EA] was to be released," to make its objections known to the agency. 737 F.2d at 1093. The D.C. Circuit held that "the untimely manner in which plaintiffs raised the issue . . . precludes us from overturning the [agency's] decision." *Id.* The untimely comment here is even more untimely than in *Glass Packaging*.

NEPA does not permit parties to refrain from raising issues in the agency's environmental review process and then later press them in court. *See Vermont Yankee*, 435 U.S. at 554-55. Having failed to mention oil spill risks in the extensive comments they submitted during the comment period, Plaintiffs should not now be permitted to shift gears and offer it as their lead argument in litigation. This Court should instead find that Plaintiffs' late-arriving oil spill arguments have been forfeited, as have many other courts confronted with closely analogous facts. *See Little Traverse Lake*, 883 F.3d at 655; *Beshear*, 655 F.2d at 718.

3. *Plaintiffs did not preserve their claims relating to the relationship between increased vessel traffic and air, light, and noise pollution.*

A recurring theme in Plaintiffs' Motion is the suggestion that the Corps overlooked air, light, and noise impacts from potential future increases in vessel traffic.[2] *See infra* Section I.B (collecting references to "increased vessel traffic"). But, as with the oil spill arguments discussed above, the Corps did not directly receive any timely comments raising those specific issues. The noise, light, and air pollution concerns that commenters did timely raise directly to the Corps all focused exclusively on *existing* vessels and how the Project would bring these vessels closer to the nearby community. *See, e.g.*, AR341, 628, 644, 1482-83, 1463-65, 1491, 1532, 1533, 1559-60. The Corps' Public Notice identified and invited comment on the expected impacts of the Project, highlighting the Corps' expectation that those impacts would be "temporary impacts to benthic populations and temporary turbidity associated with the proposed dredging operations." AR762. If Plaintiffs felt there were impacts unrelated to the ones mentioned in the Public Notice, or impacts from a potential future increase in vessel traffic rather than impacts from existing vessel traffic, then they should have raised made those concerns during the comment period. *See Public Citizen*, 541 U.S. at 764. Having failed to do so, Plaintiffs cannot now debut those arguments in litigation.

The record does include four comments that discussed increased vessel traffic in general terms, but the Corps was not required to consider those submissions. The first comment (AR205) is the same untimely submission discussed on page 15 above. The second comment (AR1580) was also untimely, submitted two weeks after the comment period closed. *Cf.* AR760. In any event, that comment focused on the potential relationship between increased vessel traffic and "*[w]ater*

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[2] Plaintiffs also suggest the Corps' review was deficient because the Corps said the Project was to allow for liquefied natural gas tankers. Dkt. No. 52 at 1, 4. The record clearly shows that Plaintiffs' cited reference in the EA (at AR106) was an apparent typographical error, as the rest of the EA, the Public Notice, and indeed the entire administrative record refer to crude oil tankers. *See, e.g.*, AR129, 430, 589.

quality," and not *air, light, or noise* pollution. A comment focusing on water impacts does not raise the separate issues of air, light, or noise pollution with the required clarity, especially given that TCEQ (not the Corps) has primary jurisdiction over a project's water-quality implications. *See Karst*, 559 F. App'x at 425. The final two comments (AR1544-45, 1571) were not even submitted directly to the Corps; instead, they were submitted to TCEQ as part of the 401 certification process, and then forwarded by TCEQ to the Corps. *See* AR1556. The Corps' regulations state that the obligation of the district engineer when processing permit applications is to "consider all comments *received in response to the public notice*." 33 C.F.R. § 325.2(a)(3) (emphasis added). Comments submitted to TCEQ are *not* comments that the Corps itself "received in response to the public notice," and the Corps was not required to consider them. *Cf. Vermont Yankee*, 435 U.S. at 524 (courts "not free to impose" new "procedural requirements" when agency "ha[s] not chosen to grant them").

### B. Given the scope of its review of the Project under Appendix B and *Public Citizen*, the Corps adequately discussed oil spill, air, light, and noise impacts.

Plaintiffs assert that the Corps failed to assess the possibility of oil spills or the potential "impacts" of noise, light, and air pollution. Notably, Plaintiffs do not attribute these potential "risks" or "impacts" to the actual activities the Corps authorized in the Amendment, which were marine structural improvements and related dredge-and-fill activities. *See* AR101-02, 105.

Instead, each of these "risks" or "impacts" allegedly derives from Plaintiffs' expectation of "increased vessel traffic." Dkt. No. 52 at 34 (capitalization altered); *see id.* at 21 (alleging increased "risk of oil spills" caused by an expectation of a larger "number of tankers" and an "expanded" "volume of oil being moved"); *id.* at 33 (faulting the Corps for not analyzing "noise or light levels" from "additional tankers and barges"); *id.* at 34-35 (discussing "the air pollution impacts of increased vessel traffic" (capitalization altered)). Even if those claims had been

preserved for judicial review, the Corps correctly determined that these "impacts," if any, were outside the proper scope of its analysis.

For more than 30 years, the Corps has determined the "scope" of its NEPA analyses (and the scope of its "public interest" reviews under the Clean Water Act[3]) by applying the regulations codified in Appendix B of 33 C.F.R. Part 325 ("Appendix B"). *See Environmental Quality; Procedures for Implementing the National Environmental Policy Act (NEPA)*, Final Rule, 53 Fed. Reg. 3120, 3134-37 (Feb. 3, 1988) (promulgating Appendix B). Appendix B provides that the "scope of the NEPA document" should include only "the impacts of the specific activity requiring a . . . permit and those portions of the entire project over which the district engineer has sufficient control and responsibility to warrant Federal review." 33 C.F.R. pt. 325, App. B § 7(b)(1). The district engineer is "considered to have control and responsibility for portions of the project beyond the limits of Corps jurisdiction" only in cases "where the Federal involvement is sufficient to turn

[3] Although Appendix B is appended to the Corps' NEPA implementing regulations, it informs the scope of the Corps' public interest review under 33 C.F.R. § 320.4(a)(1). That regulation provides that the public interest review must be "based on an evaluation of probable impacts" and "reasonably foreseeable detriments" from the "proposed activity," *id.* § 320.4(a)(1), which the Corps determines by reference to Appendix B; indeed, Appendix B itself contains cross-references to the "public interest" standard, and explains that the alternatives analysis in a NEPA document should be suitable for use in the "public interest" analysis. 33 C.F.R. pt. 325, App. B § 9.b.(4)-(5). Thus, "the scope of analysis considered in 33 C.F.R. Pt. 325 App. B. § 7 is the same as the activity to be considered under 33 C.F.R. § 320.4(a)(1)." *Water Works & Sewer Bd. of the City of Birmingham v. U.S. Army Corps of Eng'rs*, 983 F. Supp. 1052, 1068 (N.D. Ala. 1997), *aff'd*, 162 F.3d 98 (11th Cir. 1998).

In any event, this Court need not address the question whether the Corps' analysis of the alleged impacts from "increased vessel traffic" violates the Corps' "public interest" regulations. Apart from simply mentioning "the Clean Water Act" in passing, Plaintiffs have not developed any argument that the Corps' public interest analysis was deficient for failure to consider the risk of oil spills. *Cf.* Dkt. No. 52 at 18-19, 22; *see United States v. Lopez-Velasquez*, 526 F.3d 804, 808 n.2 (5th Cir. 2008) (arguments "waived" when litigant "fails completely to develop [them] in the body of his brief"). Similarly, Plaintiffs' complaints about impacts allegedly attributable to "increased vessel traffic" are all styled as purported NEPA violations, not as Clean Water Act violations. *See* Dkt. No. 52 at 32, 34.

an essentially private action into a Federal action." *Id.* App. B § 7(b)(2). Once determined by reference to Appendix B, the "scope" of the analysis becomes "the geographic area within which the Corps is responsible for evaluating effects of activities." AR104. Activities that occur beyond that geographic area are outside the scope of the agency's analysis; any contrary rule would contravene "judicial rulings clarifying the limits of Federal action for NEPA purposes" and would lead to an "unwarranted situation where 'the Federal tail wags the non-Federal dog.'" 53 Fed. Reg. at 3211-22.

Appendix B "entrust[s]" scope-related decisions "to the district commander" so that he or she can act with appropriate "flexibility and discretion." 53 Fed. Reg. at 3122. Plaintiffs' Motion fails entirely to grapple with the fact that "Corps' determination of the proper 'scope of analysis' is entitled to deference." *Pres. Soc'y of Charleston v. U.S. Army Corps of Eng'rs*, No. 2:12-cv-2942, 2013 WL 6488282, at *4 (D.S.C. Sept. 18, 2013).

Here, the Corps' Public Notice described the Project site at length and articulated the relevant scope, which included the effects of specific dredging activity and of certain improvements to the East and West Basins fronting the existing terminal. AR760-61. The Corps' final Memorandum for Record included a similar scope analysis, explaining that the "Corps' scope of analysis include[d] . . . structural improvements to the East Basin" and to certain components of the West Basin, the "bulkhead extension area along the shoreline," and certain mitigation areas. AR105. The scope did *not* include "the shoreward portion of the project" or the effects of vessel traffic in geographic areas other than the "specific activity" areas mentioned above. *Cf.* AR104-05. The Public Notice further explained that expected impacts for the in-scope area would be "temporary impacts to benthic populations and temporary turbidity associated with the proposed dredging operations." AR762.

Neither Plaintiffs nor any other party raised concerns about the Corps' scoping analysis during the comment period. Nor did Plaintiffs challenge the Corps' scoping analysis in their Complaint or Motion. Plaintiffs have forfeited that issue. *See supra* Section I.B; *Provident Life & Accident Ins. Co. v. Goel*, 274 F.3d 984, 990 n.11 (5th Cir. 2001).

Even if the issue were preserved, any argument that the impacts of "vessel traffic" should have been included within the scope of the Corps' analysis would be meritless. As the Corps made clear when promulgating Appendix B, the proper "subject of the NEPA document" is the actual "activity which would be authorized by the permit," to the exclusion of "State or private actions" that are not authorized in that permit. 53 Fed. Reg. at 3121. In short, the scope of analysis is "confined to the environmental effects of *only the activity requiring a Corps permit*." *Id.* at 3122 (emphasis added); *see Ctr. for Biological Diversity v. U.S. Army Corps of Eng'rs*, 941 F.3d 1288, 1301 (11th Cir. 2019) ("The Corps authorizes the discharge of dredged or fill material in 404 permits. Therefore, the activity the Corps studies in its NEPA document is the discharge of dredged or fill material.") (quoting 53 Fed. Reg. at 3121)); *Ohio Valley Env't Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 194 (4th Cir. 2009) ("The specific activity that the Corps is permitting when it issues a § 404 permit is nothing more than the filling of jurisdictional waters."); *Nat. Res. Def. Council, Inc. v. U.S. Army Corps of Eng'rs*, No. 1:09-cv-588, 2010 WL 1416681, at *5 (N.D. Ohio Mar. 31, 2010) ("Because the Corps legitimately concluded that [its] scope was limited to the specific activity of filling the U.S. waters . . . , it was not required to prepare an[] EIS to assess the potential impacts of the Applicant's [coal-to-liquid energy] facility relative to global warming, or any of the other issues arising solely from the eventual operation of the facility.").

Vessel traffic is not an "activity requiring a Corps permit." *Cf.* 53 Fed. Reg. at 3122. The Corps' statutory authority relates solely to its power to authorize discharges of dredged or fill

material into the waters of the United States (under Section 404 of the Clean Water Act) and to authorize construction of structures in or affecting those waters (under Section 10 of the Rivers and Harbors Act). *See* AR104. It is the Coast Guard, and not the Corps, that regulates vessel traffic and navigation, *see* 33 C.F.R. pts. 160-165; Cecily Fuhr *et al.*, 80 C.J.S. *Shipping* § 17 (Westlaw July 2022), and the Corps' action in issuing the Amendment does not require any action on the part of the Coast Guard relating to vessel traffic.

Moreover, "vessel traffic" is not an issue "over which the district engineer has sufficient control and responsibility to warrant Federal review," such that it would be within the scope of the Corps' analysis. 33 C.F.R. pt. 325, App. B § 7(b)(1). When the regulated activity "comprises 'merely a link' in a corridor type project," the Corps will not be considered to have "sufficient 'control and responsibility.'" *Id.* App. B § 7(b)(2)(i). That description applies aptly here, given that Enbridge's facility is merely a link in a pipeline-to-ship conduit that begins at various upstream supply basins and extends, via oceangoing cargo ships, to other distant locations.

Nor does this facility modification bear any of the other indicia that Appendix B regards as sufficient to expand the scope of the Corps' analysis. For example, this Project is not driven by "Federal financing" or "assistance." 33 C.F.R. pt. 325, App. B § 7(b)(2)(iv)(A). Nor is this a case where "the entire project will be within Corps jurisdiction." *Id.* App. B § 7(b)(2)(iii); *see id.* App. B § 7(b)(3) (when refinery is built on uplands and the permitted activity concerns a connecting "loading terminal," then the scope of the NEPA document should not include "upland portions of the facility"); *Aracoma Coal*, 556 F.3d at 195 ("[T]he fact that the Corps' § 404 permit is central to the success of the valley-filling process does not itself give the Corps 'control and responsibility' over the entire fill.").[4]

[4] To the extent that Plaintiffs seek to extend the scope of the Corps' NEPA analysis not just to the area of the "permitted fill" or even to the waters of the United States, but rather to speculative, far-

Many of Plaintiffs' claims are based on speculation that the so-called "throughput" of crude oil on vessels making use of the terminal may be larger after the Project is completed. *See* Dkt. No. 52 at 10; *see also id.* at 11 (complaining about "the volume of oil expected to be loaded"). "Throughput" is dictated by the volumes and rate set forth in the terminal's TCEQ-issued air permit, not by the Corps' action in authorizing the Amendment. *See Kentuckians for the Commonwealth v. U.S. Army Corps of Eng'rs*, 746 F.3d 698, 707 (6th Cir. 2014) (Appendix B did not require Corps to consider general health effects from mining project because the "specific activity that is the subject of the permit is only the dredging and filling of jurisdictional waters"); *see id.* at 708-09 (inappropriate to expand Appendix B analysis when the Corps' "permitting scheme . . . affect[s] only a small albeit necessary part of the particular" project and a state agency has "primary regulatory power" over the activities about which the plaintiff complains); *Aracoma Coal*, 556 F.3d at 195-96 (similar; "NEPA plainly is not intended to require duplication of work by state and federal agencies"); *see also infra* at 24-25 (collecting cases). Other issues relevant to "vessel traffic" may be subject to regulation by other authorities (e.g., a port authority or other state agencies) and would of course be subject to commercial decisions made by private parties. These are precisely the types of "State or private actions" that the regulations instruct the Corps to *exclude* from the scope of its analysis. 53 Fed. Reg. at 3121.

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off locations well beyond what is reasonably foreseeable, such a claim would only highlight the degree of overreach. *See* Dkt. No. 52 at 20 (suggesting Corps' NEPA analysis was required to include an assessment of all "tankers and barges that are or will be using the facility" without any temporal limitation, including "their route" without any apparent geographic limitation). *Cf. Ctr. for Biological Diversity*, 941 F.3d at 1301 (Appendix B did not require the Corps to consider impact that would occur "many miles away from where [the permittee] would discharge into U.S. waters"); *Kentuckians for the Commonwealth v. U.S. Army Corps of Eng'rs*, 746 F.3d 698, 707 (6th Cir. 2014) (under Appendix B, "NEPA analysis should be limited to the local, proximate effects of the *dredging and filling activities*" (emphasis added)).

The fact that the Corps was not required, under either NEPA or the Clean Water Act, to consider pollution and oil spill risks related to "vessel traffic" is further confirmed by *Department of Transportation v. Public Citizen*, in which the Supreme Court held that "a 'but for' causal relationship is insufficient to make an agency responsible for a particular effect under NEPA." 541 U.S. at 767. Instead, "NEPA requires 'a reasonably close causal relationship' between the environmental effect and the alleged cause," akin to the "familiar doctrine of proximate cause from tort law." *See id.* (internal quotation marks omitted). Courts considering challenges to the Corps' NEPA scoping analysis have often looked to *Public Citizen* for guidance, in large part because the Corps' regulations in Appendix B presciently "reject[ed] . . . but-for causation" for exactly the same reasons articulated by the Supreme Court years later in *Public Citizen*. *Sierra Club v. U.S. Army Corps of Eng'rs*, 997 F.3d 395, 405 n.10 (1st Cir. 2021); *see* Norman D. James, *Section 7 Consultation and* Public Citizen, *Applying the Correct Scope of Analysis*, SM013 ALI-ABA 111, 131 (2006) "the *Public Citizen* standard should operate much like the 'control and responsibility' test adopted by the Corps" in Appendix B).

As relevant here, the teaching of *Public Citizen* is that an agency need not account for environmental effects—be they characterized as "direct" or "indirect"—unless the agency's action is the legally relevant cause of those effects. Applying that rule, the Supreme Court held in *Public Citizen* that a Federal Motor Carrier Safety Administration rulemaking regarding foreign motor carrier registration was not required to consider the emissions from Mexican trucks entering the United States because that agency did not regulate or control vehicle exhaust. 541 U.S. at 773. And as applied here, *Public Citizen* means that the Corps was not required to consider the speculative effects of "increased vessel traffic" because it has no regulatory control over that issue, which instead falls within the domain of the Coast Guard. *See supra* at 21. Phrased simply, the

Corps action is not itself the legally relevant cause of any new oil spill or pollution risks on which Plaintiffs focus; instead, the "causes" of those risks, if any, are separate permitting, regulatory, and commercial decisions made by other regulators and private parties. *See supra* at 22-23.

Courts confronting challenges to the Corps' scoping analysis under Appendix B have often applied *Public Citizen* in rejecting arguments that closely mirror the Plaintiffs' contentions here. In *Center for Biological Diversity*, for example, the Eleventh Circuit extensively discussed *Public Citizen* before concluding that Appendix B did not require the Corps to consider impacts from downstream fertilizer production in its NEPA analysis of a proposed mining operation because "two other regulators—one state, one federal—have express control and responsibility over fertilizer production." 941 F.3d at 1301. The key proposition motivating that holding—i.e., that the Corps "has no statutory authority" to "prevent" the effects Plaintiffs feared and that those effects were "primarily regulated by other agencies," *id.* at 1296, 1299-300—equally applies here, where the Corps has no statutory authority over vessel transit. *See also Residents for Sane Trash Sols., Inc. v. U.S. Army Corps of Eng'rs*, 31 F. Supp. 3d 571, 588 (S.D.N.Y. 2014) (Appendix B did not require Corps to consider future operations of enlarged trash facility enabled by dredge activities authorized by the Corps because "these operations will be carefully monitored and controlled by the [New York Department of Environmental Conservation]").

Similarly, the Fourth Circuit's *Aracoma Coal* decision cited *Public Citizen* when rejecting the contention that the Corps had purportedly erred by "limiting the scope of its NEPA analysis to the impact of the filling of jurisdictional waters and by not looking at the larger environmental impacts of the valley fill as a whole." 556 F.3d at 193; *see id.* at 196. The Fourth Circuit explained that, although the Corps' permit was the "but-for" cause of the valley fill, it was the West Virginia Department of the Environment ("WVDEP"), and not the Corps, that had jurisdiction over the

aspects of the project "beyond the filling of jurisdictional waters." *Id.* at 197; *accord Kentuckians*, 746 F.3d at 710 (similar; citing *Public Citizen* and rejecting plaintiffs' Appendix B arguments because "agencies may reasonably limit their NEPA review to only those effects proximately caused by the actions over which they have regulatory responsibility"). As *Aracoma Coal* explained, requiring the Corps to dramatically expand its NEPA analysis to cover speculative effects regulated by a State agency would also present significant federalism concerns by "encroach[ing] on the regulatory authority of" the relevant state agency with primary jurisdiction. 556 F.3d at 197. In *Aracoma Coal*, that agency was WVDEP; here, it is TCEQ.

Plaintiffs' "vessel traffic" arguments ignore this case law entirely, and instead rely heavily on an out-of-circuit decision in *Ocean Advocates v. United States Army Corps of Engineers*, 402 F.3d 846 (9th Cir. 2004) (as amended). *See* Dkt. No. 52 at 21-22. In *Ocean Advocates*, the Ninth Circuit held that, "[b]ecause a reasonably close causal relationship exists between the Corps' issuance of the permit [for a dock-expansion project], the environmental effect of increased vessel traffic, and the attendant increased risk of oil spills, the Corps had a duty to explore this relationship further in an EIS." 402 F.3d at 868. *Ocean Advocates* differs sharply from this case because, in *Ocean Advocates*, the administrative record was flush with comments that specifically raised the issue of oil spills, *see id.* at 865, whereas here the Plaintiffs' oil spill claims were forfeited. Moreover, neither the parties' briefs in *Ocean Advocates* nor the Court's decision in that case ever discussed Appendix B or the extent to which the roles of other regulatory agencies would "break" the causal chain between the Corps permit and increased vessel traffic. Here, by contrast, Defendants have squarely raised that issue. *See United Gas Pipe Line Co. v. Whitman*, 595 F.2d 323, 328 (5th Cir. 1979) (noting that a prior decision that "did not discuss" a critical issue had limited "precedential effect" and need not be followed when it conflicted with "thoroughly

reasoned" arguments that the first-in-time court did not have occasion to consider). To the extent that *Ocean Advocates* can be read to suggest that there *always* exists a "reasonably close causal relationship" between a Corps permit of the type at issue here and the potential risks of increased vessel traffic—regardless of the roles of other regulators—it is plainly inconsistent with *Public Citizen*.[5]

In any event, the facts in *Ocean Advocates* were materially different than those here. *Ocean Advocates* itself recognized that the result there would have been different if the record showed that one of the "central purpose[s]" of the project was "to increase . . . efficiency." 402 F.3d at 854. Here, Enbridge has "*not* propos[ed] to construct any . . . new throughput or storage infrastructure," but rather has proposed improvements to "*increase[] efficiency* in handling vessels." AR283 (emphasis added). The Corps echoed that important point in its EA, noting that the "applicant is not proposing to construct any additional tanks or infrastructure for this project." AR119; *see* AR138 (project will "*not change the current baseline* in such a way that the public interests in this area will change" (emphasis added)).

**C. Plaintiffs' concerns about the impacts of increased vessel traffic were adequately addressed by the Corps.**

Even if the Plaintiffs' "increased vessel traffic" arguments were preserved (*but see* Section I.A), and fell within the proper scope of the Corps' analysis (*but see* Section I.B), their contentions

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[5] *Ocean Advocates* is emblematic of a pattern of some out-of-circuit decisions that, as recognized by some courts and commentators, have strayed from the text of NEPA itself. *Cf.* David E. Adelman & Robert L. Glicksman, *Presidential and Judicial Politics in Environmental Litigation*, 50 Ariz. St. L.J. 3, 3 (2018). The original March 2004 opinion in *Ocean Advocates* rested on the clearly erroneous view that NEPA requires only "but for" causation—a theory that was unanimously and emphatically rejected by the Supreme Court in *Public Citizen*. 361 F.3d 1108, 1127 (2004). After the government sought rehearing en banc, the *Ocean Advocates* panel amended its decision. The amended opinion attempted to avoid a facial conflict with *Public Citizen* by simply removing the reference to "but for" causation, while leaving its analysis otherwise unchanged. *See* 402 F.3d at 853-54 (detailing changes in amended opinion).

would be meritless. Plaintiffs' contrary arguments evince two fundamental misunderstandings about NEPA and its application to this project.

First, each of Plaintiffs' arguments is premised on the notion that the challenged agency action will lead to increased vessel traffic, thus—in their lay estimation—increasing the risks of oil spills and pollution associated with the additional traffic. *See supra* at 17-18. But Enbridge explained that it has "*not* propos[ed] to construct any . . . new throughput or storage infrastructure," but rather has merely proposed improvements designed to "increase[] efficiency in handling vessels expected at the site" and to enable the "load[ing of] ships at rates 30% faster than other terminals." AR283 (emphasis added). Indeed, the Project may ultimately result in a *decrease* in the presence of vessels, as the improvements will reduce the time vessels are nearshore, reduce traffic between the terminal and the Corpus Christi Ship Channel Inner Harbor, and ultimately allow a given amount of product to be transported on fewer, larger ships. AR119, 283.

Second, Plaintiffs repeatedly insist that an agency must provide "detailed information" in order "to satisfy NEPA" and that terse treatment of an issue necessarily violates NEPA. Dkt. No. 52 at 13, 21, 43-44. That is not the law. NEPA does not require an agency to write a novella analyzing, in painstaking detail, every potential risk presented by a project; requiring otherwise would flout the requirement that NEPA documents be "concise," 40 C.F.R. §§ 1500.2(b), 1508.9(a), and would divert scarce agency resources and frustrate the statute's goal of creating digestible, public-facing documents that apprise stakeholders of the relevant considerations. *See supra* at 11-13. An agency's discussion of a particular issue in a NEPA document is governed by a "rule of reason" and is not subject to artificial or absolute minimum length requirements; on the contrary, courts have often upheld NEPA analyses that, though terse, were sufficient to indicate that the agency had considered the issue. *See, e.g.*, *Druid Hills Civic Ass'n, Inc. v. Fed. Highway*

*Admin.*, 772 F.2d 700, 713 (11th Cir. 1985) (upholding NEPA analysis that addressed relevant issue in just "two sentences" because, while the analysis could have been more "detailed and careful," it was not arbitrary); *accord Upper Green River All. v. U.S. Bureau of Land Mgmt.*, No. 2:19-CV-146-SWS, 2022 WL 1493053, at *12, *14 (D. Wyo. Apr. 5, 2022) (upholding discussion of pronghorn migration that was only "three sentences" long, and noting that NEPA does not require all impacts to be discussed "at length or in specific detail"), *appeal filed* (10th Cir. No. 22-8022); *All. for the Wild Rockies v. Brazell*, No. 3:12-CV-00466-MHW, 2013 WL 6200199, at *8 (D. Idaho Nov. 27, 2013) (similar; one-sentence discussion of Canada lynx ), *aff'd*, 595 F. App'x 700 (9th Cir. 2015); *see also W. Watersheds Project v. U.S. Bureau of Land Mgmt.*, 721 F.3d 1264, 1275 (10th Cir. 2013) ("Under our highly deferential review, we cannot set aside the agency's decision merely because the EA could have been more thorough than it was.").

It is especially unreasonable to fault the agency for failing to discuss an issue in sufficient depth when, as here, the comments submitted to the agency on that issue were themselves incredibly terse. In this case, the Corps endeavored to address several issues (including oil spills) despite the fact that those issues were not raised with clarity in timely comments. Were this Court to set aside the Corps' decision based on the allegedly "cursory" nature of the Corps' discussion, it would improperly discourage agencies from even attempting to inform the public by addressing proactively issues that were not fully ventilated in comments.

When read with these two background principles in mind, the Corps' analysis of the relationship between increased vessel traffic and pollution risks was not "so deficient as to make [the agency's] decision arbitrary and capricious." *Lockhart v. Kenops*, 927 F.2d 1028, 1033 (8th Cir. 1991).

1. *The Corps sufficiently analyzed oil spill risks.*

The Corps acknowledged and disclosed that "oil spills" were a "[p]otential detrimental effect[] due to this project" and explained that such spills had "been evaluated . . . and found to be of negligible, or less, concern." AR126. Plaintiffs' insistence that the Corps should have said more misunderstands NEPA's requirements. So too does it gloss over various other portions of the Corps' EA that address closely related issues and provide important context for the Corps' explicit discussion of oil spill risks. For example, the Corps' discussion of oil spills and other water pollution concerns cross-referenced prior portions of the EA, including portions emphasizing Coast Guard safety requirements and the use of best-management practices in connection with facility construction and operation. *See* AR119.

The Corps also noted that it had considered comments concerning water pollution risks—an umbrella term that includes the risk of oil spills—and that it had both evaluated those comments and forwarded them "to TCEQ for evaluation in that agency's water quality certification review." AR139. TCEQ's water quality certification ultimately required Enbridge to "employ measures to control spills of fuels" and "other materials" and "to prevent them from entering a watercourse." AR92. The Corps was well within its discretion to respect and give weight to the role of TCEQ on the details of water-quality related issues, such as oil spill risks. TCEQ has primary jurisdiction to administer a regulatory regime designed to protect water-quality, brings significant expertise and local perspective to the issue, and is responsible for issuing or denying a Section 401 water-quality certification (without which the Project could not move forward). The role of TCEQ provides important context for the adequacy of the Corps' discussion of water-quality issues here. *See City of Bos. Delegation v. FERC*, 897 F.3d 241, 255 (D.C. Cir. 2018).

The Corps also explained that record materials addressing public comments (AR265-85, 389-408) had, in the Corps' view, "satisfied" the commenters' "pollution concerns." AR125. In

those responses, Enbridge explained that it had "minimized impacts to the maximum extent practicable." AR280. Enbridge also specifically responded to the comment concerning the relationship between oil spills and offshore breakwaters, explaining that breakwaters would have significant adverse consequences for seagrasses and in any event would "not contain an oil spill." *Id.*; *see supra* at 14. And, after noting that the comment letters had expressed only "*general* environmental concerns" rather than "succinctly identify[ing]" *specific* concerns, Enbridge's responses also provided additional details on a variety of issues intimately related to oil spills; for example, the responses again emphasized that the Project "adheres to all safety regulations and best practices," that the applicant would "adhere to all United States Coast Guard safety requirements," and that sensitive resources would be protected via Enbridge's 12-step mitigation plan. AR407.

Plaintiffs err by invoking *Sierra Club v. Sigler*, 695 F.2d 957 (5th Cir. 1983). *See* Dkt. No. 52 at 21. The holding in that case was that the agency's analysis of oil spill risks was deficient because, while the agency did consider oil spills, it did not conduct the required "worst case" analysis. *Sigler*, 695 F.2d at 969-75. But *Sigler* is no longer good law on that point, as the "worst case" requirement was removed from the NEPA regulations and the Supreme Court has confirmed that a "worst case" analysis is *no longer* required. *See National Environmental Policy Act Regulations; Incomplete or Unavailable Information*, 51 Fed. Reg. 15,618, 15,625 (Apr. 25, 1986) (preamble to CEQ's 1986 NEPA rules revision removing prior regulation requiring "worst case analysis"); *compare Sigler*, 695 F.2d at 970 (noting that a "worst case analysis . . . is required), *with Robertson*, 490 U.S. at 359 ("NEPA . . . does not require a 'worst case analysis.'").

When read as a whole, the Corps' EA confirms that the Corps *did* consider oil spills, to the extent that issue was properly raised in comments. *Cf.* Dkt. No. 52 at 20. This is not a case where

the agency simply ignored a topic that the Plaintiffs felt should have been addressed. Instead, this is a case where the agency's oil spills discussion was "tolerably terse" rather than "intolerably mute." *City of Alexandria v. Slater*, 198 F.3d 862, 870-71 (D.C. Cir. 1999).

*2. The Corps sufficiently analyzed air pollution.*

The EA explained that the facility improvements will "actually *reduce[]* pollutants that enter the air by reducing the time [vessels] spen[d] nearshore" and by "eliminat[ing] the longer voyage into the Inner Harbor of the [Corpus Christi Ship Channel]." AR119 (emphasis added); *see* AR283 (explaining that the "new docks reduce pollutants that enter the air by reducing the time for ships waiting to dock" and by enabling faster docking, which in turn "reduc[es] hoteling time at the docks"); AR407 (similar). The Corps also explained that the "on-site tanks exceed TCEQ air permit requirements." AR119; *see* AR124 (noting that the "applicant has air monitoring systems in place" that meet all applicable requirements).

Moreover, Plaintiffs conspicuously make no mention of the fact that alleged air pollution from "increased vessel traffic," if any, will be mitigated by Enbridge's plan to preserve 70 acres of pothole wetland forest. That preserve will have "air quality benefits" for "the adjacent residential subdivision, as well as [for] the area as a whole," because it will ensure that a "buffer" between those neighborhoods and Channel-adjacent industrial operations will "remain[] in perpetuity." AR122, 124; *see* AR270 (explaining that the 70-acre preserve is situated on "developable land" with "substantial real estate value," and that creating a preserve that will exist in "perpetuity" eliminates the possibility that this land could ever be used for activities that have air-polluting effects). Moreover, preservation of that buffer area's pothole wetlands forest will further replace lost functions and services, including "removal of gaseous air pollutants." AR391.

Based on its analysis of the record, the Corps ultimately determined that the risks of "air" pollution were "negligible," and that in fact the Project would, on net, have a salutary effect on air quality. AR139; *see* AR119. There was nothing arbitrary or capricious about that conclusion.

*3. The Corps sufficiently analyzed light and noise pollution.*

As with the risks related to oil spills and air pollution, the Corps' discussion of light and noise pollution satisfied NEPA. The Corps explained that the bulk of the noise effects attributable to the Project would be temporary and would "return to normal levels once the project is complete." AR138; *see* AR139. And the Corps explained that any light-related effects related to this action would not be significantly additive vis-à-vis the baseline operations of an "an existing commercial marine facility." AR139. In addition, the same reductions in the time vessels are nearshore that decrease air pollution (*see supra* Section I.C.2) will also decrease light and noise associated with vessel activities at the terminal. AR119, 283, 407. Those facts—in combination with Enbridge's use of "all best management practices to reduce light and sound" during Project construction and operation (AR278)—informed the Corps' reasonable conclusion that any "pollution concerns" related to "light" and "noise" were "negligible." AR139.

Plaintiffs again ignore the EA's discussion of how the preservation area would reduce noise and light impacts. As Enbridge explained, its mitigation plan concerning the 70-acre pothole wetland forest preserve will "not just benefit the watershed, but will also provide . . . noise reduction functions, and reduced light impacts to the adjacent residential subdivision, as well as the area as a whole." AR122; AR269 (noting that the forest buffer "reduces the noise and light levels reaching the subdivision" and that studies have shown that "noise is reduced by five to eight decibels" for "every 100 feet of buffer area").

## II. The Corps adequately considered impacts to seagrasses.

Plaintiffs' next complaint—that the Corps purportedly failed to "assess" the Project's impacts on seagrass—is also meritless. *Cf.* Dkt. No. 52 at 22-32. The Corps took the required "hard look" at the Project's effects on seagrass. *See infra* Section II.A. Plaintiffs' contrary arguments misrepresent the record and misunderstand NEPA. *See infra* Section II.B. Finally, this Court should disregard the declaration of Dr. Cammarata because it is not part of the administrative record and sheds no light on legally relevant questions. *See infra* Section II.C.

### A. The Corps took a hard look at seagrass issues.

Plaintiffs' claim that the Corps "fail[ed] to assess and consider the impacts of the [Project] to seagrasses" (Dkt. No. 52 at 28) is puzzling, because in fact the Corps *did* take a hard look at seagrass-related issues. In addition to direct effects on seagrass from dredging, the Corps acknowledged and considered comments suggesting that dredging and other Project-related work can result in sedimentation, which in turn can create turbidity, which can reduce light penetration, which can damage seagrass. *See, e.g.*, AR143, 582, 628. In order to account for these effects,[6] the Corps estimated the amount of seagrass to be lost, assessed various other potential impacts to seagrass, considered Enbridge's efforts to monitor seagrass health, evaluated Enbridge's plan to minimize and mitigate for seagrass-related effects, and then considered all of these seagrass-related issues holistically within the broader context of the Project.

Contrary to Plaintiffs' Motion, the Corps did not conclude that "there will be no environmental impacts [on seagrass] caused by the agency action." Dkt. No. 52 at 29. The Corps found that the proposed dredging and bulkhead extension would result in a permanent loss of 8.86

[6] To the extent Plaintiffs complain about seagrass impacts from so-called "increased vessel operations" (Dkt. No. 52 at 28), any such effects were beyond the scope of the Corps' analysis. *See supra* Section I.B.

acres of submerged aquatic vegetation, which would in turn be mitigated at a 2:26:1 ratio, thus ensuring no net loss of seagrass. AR103; *see* AR122. This determination was supported by documentation submitted by an experienced contractor that used "methods previously approved and accepted by" the Corps for "delineation of submerged aquatic vegetation." AR877.

The Corps' ultimate conclusion was that—in light of Enbridge's extensive efforts to minimize seagrass-related harms, monitor seagrass health, and mitigate for unavoidable impacts—seagrasses would be adequately protected. AR114. The Corps reached that conclusion after carefully considering an iterative series of submissions that included two rounds of comments from the Corps' peer agencies, two responses from Enbridge to the same, and a variety of other comments and analyses. The Corps also concluded, based on record evidence, that the "existing seagrass beds have persisted for decades adjacent to the existing site which includes regular nearby vessel traffic" (AR114), which further supported the notion that seagrass impacts were likely to be less severe than Plaintiffs fear. The Corps' analysis was neither cursory nor arbitrary.

Plaintiffs' contention that the Corps failed to take a hard look at seagrass impacts rests largely on their suggestion that, other than crediting the judgment of Enbridge's engineers, the Corps "provided no other analysis or information regarding impacts to seagrasses." Dkt. No. 52 at 27. That is not accurate. Although Plaintiffs accuse the Corps of "ignor[ing]" seagrass impacts (*id.* at 37), it is in fact *Plaintiffs* who ignore large swaths of the EA and its discussion of numerous measures Enbridge will take to minimize, monitor, and mitigate seagrass harms, including, among others:

1. ***Use of turbidity curtains.*** The Corps explained that "[t]urbidity curtains will be utilized during dredging operations to minimize any impacts to adjacent seagrasses." AR102, 390. A turbidity curtain is a sheet of vertical, flexible fabric that extends downward from a flotation device at the water surface to a ballast chain along the bottom. When wrapped around an area of active dredging, it contains suspended sediments or turbidity in the water column to allow sediments to settle.

The Corps concluded that "[a]ny turbidity that will result from the project will be localized and settle out of the water quickly." AR131.

2. ***Use of an articulated block mattress and other strategies to stabilize the dredge side slope and prevent erosion that would affect seagrasses.*** To stabilize the slope along the edge of the dredged areas, Enbridge will use an articulated block mattress. AR102; *see* AR273, 390. An articulated block mattress is a series of interlocked or connected pre-formed concrete blocks that can "articulate," or bend, to follow changes in topography while stabilizing and protecting the subsurface. Enbridge explained that the use of this block mattress "has been proven to be the most effective means for dredge slope stabilization and has been used since 1915 as the standard method for stabilizing dredge slopes" because submerged stabilization of this type "decreases the likelihood of scour or accretion." AR1442. Enbridge also explained that the "proposed deepening and widening of the basin will likely reduce the prop wash that could occur in the area" given that "prop wash is a function of the depth of water." *Id.* After receiving this information from Enbridge, TCEQ forwarded it to the Corps with a note that Enbridge's explanation "adequately addressed" both "TCEQ concerns and public concerns" regarding seagrass and other issues. AR1438.

3. ***Use of navigational aids.*** The Corps explained that "[n]avigational aids will be installed to mark the limits of the basin and prevent vessels from disturbing nearby seagrass area[s] during operational movements." AR102.

4. ***Use of Best Management Practices ("BMPs").*** The Corps noted that "[a]ll applicable [BMPs] would be implemented to avoid impacts to existing seagrass." AR114; *see* AR102, 118-19, 135, 390; *see also* AR273 (noting that Enbridge has "avoided impacts" to areas of "adjacent seagrass" to "the maximum extent practicable"), 1460 (noting that Enbridge's BMPs included use of silt curtains and turbidity monitoring).

5. ***Compliance with Section 401 water quality certification.*** The Project must comply with the Section 401 water quality certification issued by TCEQ, which requires Enbridge to "employ measures to control spills . . . to prevent them from entering [the] watercourse" (AR76) and to limit "[d]isturbance[s] to vegetation" to "only what is absolutely necessary" (AR78). *See Jones v. Nat'l Marine Fisheries Serv.*, 741 F.3d 989, 1000 (9th Cir. 2013) (noting that the Corps is "entitled to rely on mitigation measures pursuant to state permits," specifically including requirements imposed in a Section 401 water quality certification).

6. ***Seagrass monitoring and survey plans.*** The Corps noted that Enbridge has committed to three independent monitoring and survey programs. First, Enbridge "will include a five-year monitoring plan for the seagrass bed adjacent to [its] facility," plus "monitoring of a nearby reference bed for comparison." AR122. That "monitoring plan will include remedial actions to be implemented if a decline in seagrass is documented that is not consistent with natural variations observed at the

reference bed." *Id.*; *see* AR268. Second, Enbridge will conduct an initial hydrographic survey of the West Basin dredge slope and block mattresses prior to dredging, and thereafter monitor the dredge slopes and block mattress for five years with annual hydrographic surveys. AR102, 151; *see* AR390. And third, "to further protect the avoided seagrass, the applicant will . . . complete a pre- and post-construction seagrass survey. While impacts to the seagrass outside the project area are not anticipated, the pre- and post-construction surveys will provide documentation that impacts were avoided." AR390. In addition to requiring the survey, the Permit also requires Enbridge "to take necessary corrective measures" in the future, as directed by the Corps, should the post-construction surveys show "significant impacts to seagrass." AR4.

These monitoring measures were the culmination of a collaborative process among the Corps and several state and federal agencies, all of whom received and reviewed Enbridge's responses to agency comments raising seagrass issues. *See, e.g.*, AR385. Except for requesting the five-year survey discussed below, *none of those agencies disputed the engineers' conclusion that slope stabilization measures provide adequate protection to avoided seagrass*. Moreover, although some agencies suggested the possibility of additional seagrass impacts beyond the 8.86 acres that would be permanently lost, these agencies uniformly suggested that the additional monitoring that Enbridge agreed to perform (with Enbridge's commitment for required action if seagrass declines are documented) would address those potential impacts.

7. ***Compensatory mitigation.*** Enbridge will also implement a comprehensive compensatory mitigation plan to "compensate for the impacts to 8.86 acres of submerged aquatic vegetation and 0.95 acre of estuarine wetland." AR102. That mitigation plan will include (1) "plant[ing] 20 acres of seagrass" in a "vegetated bay bottom that historically supported dense seagrass beds" (AR102); (2) "preserv[ing] 70 acres of on-site forested land that includes a mosaic of pothole wetlands" (AR103); and (3) "construct[ing] approximately 2,000 feet of rock breakwater to provide protection from high wave energy," which will "create conditions conducive to seagrass development" (AR102). *See also* AR391 (lengthy description of Enbridge's mitigation plan). Seagrass restoration would be done by a highly experienced mitigation contractor—one who has "performed more seagrass mitigation and restoration than any other practitioner in the United States." AR176. The Corps concluded that this mitigation plan, "which includes a 1.58 to 2.26:1 mitigation ratio," would "more than adequately replace the lost functions and services provided by the existing seagrass at the project site." AR114; *see id.* at AR115, 122, 124. Critically, the Corps concluded that *"[t]here will [be] no net loss of aquatic resources."* AR122 (emphasis added); *see* AR133, 145, 270. Plaintiffs here do not challenge that conclusion, or otherwise contend that Enbridge's compensatory mitigation plan violates any Corps regulation or other source of law.[7]

[7] Although Plaintiffs appeared to argue in Count 5 of their Complaint that the Corps failed to adequately minimize seagrass-related harms (Dkt. No. 1 at 38-42 ¶¶ 151-62), they present no such

The Corps' review of seagrass issues easily satisfied the "hard look" standard. The Corps examined available data and then articulated a satisfactory explanation for its action, including a rational connection between the facts found and the choice made. *See Sierra Club v. U.S. Army Corps of Eng'rs*, 295 F.3d 1209, 1216 (11th Cir. 2002). That was all that was required.

In arguing otherwise, Plaintiffs' lead argument appears to be that an agency cannot approve some action if the NEPA analysis reveals that the action will have adverse environmental consequences. *Cf.* Dkt. No. 52 at 28-29 (suggesting that the Corps' EA is deficient because the record shows that there will be "adverse impacts to adjacent seagrasses"). That is not the law. Plaintiffs "misunderstand the nature of the Corps' responsibility under NEPA, which is not to produce any particular outcome but instead simply to produce informed decisionmaking with respect to the specific application before it." *Waterworth*, 420 F.3d at 454. NEPA "does not dictate particular decisional outcomes." *Sierra Club v. U.S. Army Corps of Eng'rs*, 803 F.3d 31, 37 (D.C. Cir. 2015). Instead, "NEPA is an essentially procedural statute" designed to ensure that the agency makes a "fully informed" decision, even if that decision is "not necessarily the best decision" from an environmental perspective. *New York v. Nuclear Regul. Comm'n*, 681 F.3d 471, 476 (D.C. Cir. 2012) (internal quotation marks omitted); *accord Robertson*, 490 U.S. at 351 ("NEPA merely prohibits uninformed—rather than unwise—agency action."). Plaintiffs cannot simply show that the Corps' action may result in environmental harm; instead, Plaintiffs must demonstrate that, even after according "great deference" to the Corps, the record reveals that the Corps has "ignored evidence" relating to significant environmental harms attributable to the Project. *See City of*

claim in their Motion, and ergo have now abandoned and forfeited that issue. In any event, the Corps did appropriately minimize seagrass-related harms, for all of the reasons described above. *See supra* at 34-36.

*Auburn v. U.S. Gov't*, 154 F.3d 1025, 1032 (9th Cir. 1998) (as amended). Plaintiffs have not met that standard.

Plaintiffs suggest in a fleeting, two-sentence argument that the Corps' seagrass analysis somehow violated 33 C.F.R. § 320.4(a), a Clean Water Act regulation which requires the Corps to "balance" the "benefits" from the Project "against its reasonably foreseeable detriments" and to reach a determination about whether the Project is "contrary to the public interest." Dkt. No. 52 at 32. But Plaintiffs' claim that the Project categorically violates that regulation because it will "result[] in a net loss of . . . aquatic resources" (*id.*) is wrong factually, because in fact "*[t]here will [be] no net loss of aquatic resources.*" AR122 (emphasis added). To the extent Plaintiffs argue that the Corps violated the public interest regulation by allowing harms to occur and "simply monitoring" them (Dkt. No. 52 at 32), that is wrong too: Enbridge is not "just" monitoring, but also undertaking efforts to minimize harms and mitigate harms that do occur. *See infra* Section II.B.2. And to the extent Plaintiffs suggest the Corps' public interest determination failed to weigh the appropriate considerations, the Corps *did* consider all relevant dimensions of the problem. Plaintiffs' terse argument does not identify any specific "reasonably foreseeable detriments," "secondary effects," or other effects that the Corps purportedly failed to analyze.

**B. Plaintiffs' procedural critiques of the Corps' seagrass analysis are meritless.**

Plaintiffs advance three *procedural* arguments that they believe require this Court to set aside the EA. According to Plaintiffs, the Corps erred by (1) accepting seagrass-related statements from Enbridge's engineer without sufficient justification, (2) relying on monitoring of seagrass harms rather than requiring efforts to prevent those harms, and (3) ignoring seagrass-related comments from other federal agencies and stakeholders. All of those arguments are wrong.

1. *The Corps appropriately relied on Enbridge's expert.*

As part of its seagrass analysis, the Corps credited "the applicant's engineers' professional judgement that the slope stabilization measures provide adequate protection to avoided seagrass," especially given that the "existing seagrass beds have persisted for decades adjacent to the existing site which includes regular nearby vessel traffic." AR114; *see* AR390. Plaintiffs complain that the "record contains no information of any kind about the 'applicant's engineer' or the basis of that individual's 'professional judgment'" and argues that, "rather than assess[ing] and consider[ing]" seagrass issues, the "Corps simply accepted the statement from an unidentified engineer, with unknown qualifications." Dkt. No. 52 at 25, 28. There are several problems with this argument.

First, Plaintiffs' characterization of the Corps' reliance on Enbridge's engineer is misleading. Plaintiffs claim that the Corps is now "ask[ing] the Court and the public to accept, based on no data and a conclusory statement by an unknown person, that the [Project] will have no significant adverse impacts to seagrasses." Dkt. No. 52 at 30. There are many problems with that sentence. The Corps identified some potential impacts to seagrasses and ensured that they will be appropriately avoided, minimized, and mitigated. That conclusion was not based solely on the statement from Enbridge's engineer, but rather on a holistic analysis performed by experts at the Corps, which in turn relied on a host of other submissions from Enbridge and on comments from peer agencies. Plaintiffs cannot show arbitrary agency action by simply ignoring the voluminous other comments on seagrass that the Corps delivered after consulting with the applicant and other agencies. *See supra* at 34-36.

Plaintiffs' unexplained contention that the Corps' analysis was "based on no data" is also wrong. The starting point for Enbridge's seagrass plan was a data-driven survey of current seagrass conditions. That survey, which was based on "techniques previously coordinated with and approved by the [Corps] and other agencies," involved a complex system of seagrass sampling via

hand-grabs and "core samples" at transected 30-foot intervals in the Project area; that data was then paired with analysis of aerial imagery of seagrass, with positioning confirmed by a sub-meter Trimble GEO 7X that was then "post-processed and mapped in office using ArcMaps 10.4" before the data was reported to the Corps. AR396.

Second, to the extent that Plaintiffs suggest that the Corps is not permitted to rely on the judgment of an applicant's engineer unless the Corps identifies that engineer and undertakes some sort of independent evaluation of his or her "qualifications," that is mistaken. CEQ's implementing regulations for NEPA require an agency to list "the names and qualifications of the persons *preparing environmental documents*," not the names and qualifications of the persons who prepare *submissions to the agency* that are then reviewed by agency personnel. 40 C.F.R. § 1506.5(b)(3) (emphasis added). The Corps complied with that regulation by listing its employees who were responsible for reviewing and acting upon the application. *See* AR154.

In any event, the record *does* reveal the identity of Enbridge's engineers (who were a team of professionals at Lanier & Associates ("Lanier"), *see* AR7) and the identity of Enbridge's consultants and consulting firm (who were Sara Flaherty and Charles Belaire of Belaire Environmental, Inc. ("Belaire"), *see* AR265, 389). The record also contains a visual depiction of the exact slope stabilization measures that the engineers believed would "provide adequate protection to avoided seagrass" (AR114). That visual depiction—which was included in the Public Notice at AR786—indicates that the design for the slope stabilization measures was prepared by Albert R. Favalora, a civil and structural engineer at Lanier. Plaintiffs provide no reason to doubt any of the opinions or qualifications of personnel at Belaire or Lanier.

The Corps' statement concerning the "applicant's engineers' professional judgement that the slope stabilization measures provide adequate protection to avoided seagrasses" (AR114) was

based on a document that Belaire submitted to the Corps after conferring with the Project's engineers (AR390), and the views expressed in that comment letter were in turn explained in detail in a longer-form letter that Belaire previously sent to TCEQ (AR1440-43). Belaire's letter to TCEQ explained that the "engineering plans" concerning slope stabilization involved the implementation of methods that "ha[d] been proven to be the most effective means for dredge slope stabilization" and that had been industry-standard for more than 100 years. AR1442. TCEQ received that explanation and forwarded it the Corps with a note indicating that TCEQ's "concerns . . . have been adequately addressed." AR1438. Given that TCEQ itself found that the "engineering plans" related to slope stabilization had "adequately addressed" the expert agency's concerns about seagrass and other issues, it strains credulity for Plaintiffs to contend that the Corps could not also rely, in part, on the engineers' views. Notably, Plaintiffs' Motion never actually identifies what is purportedly wrong or objectionable about the engineers' view that "slope stabilization" would protect avoided seagrass. And, as explained on page 36 above, none of the Corps' peer agencies disputed the engineers' conclusion.

Third, to the extent that Plaintiffs suggest that the Corps "rubber stamp[ed]" the engineers' views (Dkt. No. 52 at 29), that too is wrong. Relying on an engineer's judgment does not mean that the opinion was "rubber stamped." On the contrary, the Corps moderated a discussion between Enbridge and other agencies that led to the adoption of monitoring programs and protective measures *beyond* what Enbridge and its engineers had originally thought necessary. *See* AR595-610 (Corps sending Enbridge summary of comments on seagrass issues); *see also* AR366 (FWS comment requesting five years of monitoring), 1444-45 (TCEQ comment concerning monitoring). In response to these and other comments, Enbridge committed "to monitor the area for a period of five years to document the effectiveness of this articulated matting." AR621; *see* AR102, 151.

That proves that the Corps did not simply take the applicant's views and submissions at face value, but rather took the independent analysis required by 40 C.F.R. § 1506.5.

In any event, the Corps was entitled to defer to the judgments and expertise of Enbridge's engineer, even if the engineers' views differed from those of other commenters and experts. *See, e.g.*, *TOMAC v. Norton*, 240 F. Supp. 2d 45, 50 (D.D.C. 2003) (noting that courts must accord "particular deference to agencies in choosing among conflicting experts' reports on matters requiring technical expertise"), *aff'd sub nom. TOMAC, Taxpayers of Mich. Against Casinos v. Norton*, 433 F.3d 852 (D.C. Cir. 2006); *accord Tri-Valley CAREs v. U.S. Dep't of Energy*, 671 F.3d 1113, 1126 (9th Cir. 2012); *see also infra* at 46-47 (collecting cases).

*2. Plaintiffs' arguments concerning "monitoring" misread the record and misconstrue the governing law.*

Plaintiffs next contend that "studies and monitoring after project approval [cannot] substitute for gathering data and analyzing impacts before approval." Dkt. No. 52 at 31. In support of that statement, Plaintiffs marshal two cases suggesting that monitoring and mitigation measures "are not alone sufficient to meet [an agency's] NEPA obligations to determine the projected extent of the environmental harm to enumerated resources before a project is approved." *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1084 (9th Cir. 2011) (emphasis omitted); *see Nat'l Parks Conservation Ass'n v. Babbitt*, 241 F.3d 722, 733 (9th Cir. 2001) (noting that an agency cannot "increase the risk of harm to the environment and then perform its studies"). But the factual predicate of Plaintiffs' argument is absent because the Corps did not do what Plaintiffs say it should not have done.

*Northern Plains* rejected the agency's contention that it was not required to study the effects of a project on plants and wildlife because "rough terrain" and potential objections from private property owners meant that the agency was allegedly "unable to conduct" surveys. 668

F.3d at 1085. Similarly, in *Babbitt*, the agency characterized the project effects as "unknown" and made no *ex ante* effort to fill the information gap, despite establishing that the missing information was "obtainable." 241 F.3d at 732-33. In both cases, the Court found that the agency could not stay silent on a critical issue, and then rely on *ex post* monitoring to discharge its obligation to consider the project's environmental effects.

This case is materially different because the Corps *has* undertaken a robust *ex ante* analysis of the likely effects of the Project on seagrass. As explained above, the Corps recognized that there would be some losses of seagrass, evaluated measures to minimize seagrass impacts, and then required additional monitoring and mitigation. The Corps—unlike the agencies reversed in *Northern Plains* and *Babbitt*—did *not* say that mitigation and monitoring were sufficient to avoid any need to identify and disclose risks before approving the Project; instead, the Corps explained that monitoring would ensure that the Corps' estimates of seagrass impacts were consistent with reality on a going-forward basis. That approach is fully consistent with relevant NEPA caselaw from other courts. *Jones v. National Marine Fisheries Service* is instructive. 741 F.3d 989 (9th Cir. 2013). There, plaintiffs cited *Northern Plains* in arguing that the Corps "cannot rely on monitoring . . . alone" in reaching its conclusions regarding the potential ability of a mining project to generate a toxic pollutant known as $Cr^{+}6$. The Court rejected that argument, explaining that the agency's monitoring was not being used "to dismiss the risk of $Cr^{+}6$ generation," but instead "merely to confirm that $Cr^{+}6$ generation is behaving as the site conditions suggest that it will." *Id.* at 999-1000. The same is true here.

Moreover, the monitoring plans included "remedial actions to be implemented if a decline in seagrass is documented that is not consistent with natural variations observed at the reference bed." AR122. These monitoring programs are emblematic of an "adaptive management" approach

that will have salutary environmental benefits by giving the Corps and other regulatory agencies built-in flexibility to respond to and address potential future changes in site conditions. Indeed, "inclusion of an adaptive-management plan, among other mitigation measures, provides flexibility in responding to environmental impacts through a regime of continued monitoring and inspection. . . . [T]he use of such a continuous monitoring system may complement other mitigation measures, and help to refine and improve the implementation of those measures as the Project progresses." *Protect Our Communities Found. v. Jewell*, 825 F.3d 571, 582 (9th Cir. 2016).

*3. The Corps appropriately considered all seagrass-related comments.*

Finally, Plaintiffs criticize the Corps' responses to other agencies' comments. *See* Dkt. No. 52 at 27. Plaintiffs block-quote FWS and EPA comments, which they characterize as "clearly document[ing]" potential "adverse impacts" to seagrasses. *Id.* at 28; *see id.* 24-26. Plaintiffs appear to suggest that the Corps erred either by (1) failing to "assess and consider" these comments (*id.* at 28), or (2) approving the permit despite the fact that some other agencies had reservations about the Project (*id.* at 30). Both theories are incorrect.

To the extent Plaintiffs argue that the Corps did not "assess and consider" other agencies' comments, that is mistaken. The EA acknowledged and discussed other agencies' comments, including the specific comments cited in Plaintiffs' Motion. *See* AR107-12. The Corps also forwarded these other agencies' comments to Enbridge and required Enbridge to "address the concerns/issues raised over the proposed project" by the other agencies within 30 days, or else withdraw its application. AR600. Enbridge responded to the other agencies' concerns, in many instances by making the changes or providing the information that the other agencies had requested. For example, Plaintiffs point to comments from FWS addressing the possibility that seagrass outside "of the proposed basin expansion area" could be affected by vessel transits. AR712. FWS's recommendation was that the Corps confront this risk by (1) implementing BMPs,

(2) engaging in slope stabilization, and (3) developing a plan to protect area seagrass beds. *Id.* In response, Enbridge explained that it would implement BMPs and undertake extensive efforts to stabilize slopes. AR390. Similarly, Plaintiffs point to comments from EPA "recommend[ing] efforts [to] incorporate monitoring of potential impacts to nearby seagrasses." AR363. Enbridge did exactly that. *See supra* at 35-36.

Plaintiffs' Motion misleadingly suggests that, after the "Corps referred the EPA's comment to [Enbridge's] consultant for a response," Enbridge "did not address impacts to adjacent seagrasses but simply stated 'comment noted.'" Dkt. No. 52 at 26 (quoting AR395). Plaintiffs fail to mention that earlier portions of Enbridge's responses to the agencies' comments did address seagrass-related issues, and that Enbridge's consultant responded here with "comment noted" merely because the issues in question had already been discussed earlier in Enbridge's response, or were discussed at length later in the same document. *See* AR390-93, 396-98, 401-02.

At bottom, it appears that Plaintiffs' complaint is not so much that Enbridge and the Corps failed to consider other agencies' comments, but rather that the Corps should not have approved the Project given that other agencies had some initial reservations about its effect on seagrasses. But this again evinces a misunderstanding of NEPA. An EA is not "arbitrary and capricious" merely because an agency's views may conflict with the views of other agencies. Indeed, as the cases cited by Plaintiffs confirm, the Corps' obligation is merely to *consider* other agencies' views; it had no obligation to *defer to* those agencies on the substantive question of whether the Amendment should issue. *See* Dkt. No. 52 at 30; *see also Bair v. Cal. Dep't of Transp.*, 982 F.3d 569, 579 (9th Cir. 2020) ("NEPA anticipates that the administrative record may contain contradictory and conflicting opinions, expert and otherwise, and does not require an agency to follow all recommendations made by commentators, other agencies, or experts."); *Fuel Safe Wash.*

*v. FERC*, 389 F.3d 1313, 1332 (10th Cir. 2004) (federal agency "was obligated to consider the views of other agencies" but "was not obligated to defer to that [other] agency's view"). By responding to and accepting the other agencies' substantive suggestions, the Corps more than satisfied its NEPA obligations here.

### C. The Cammarata declaration should be disregarded, and in any event does not demonstrate that the Corps' decision was arbitrary or capricious.

As Enbridge has explained (Dkt. No. 45), Dr. Cammarata's declaration should be disregarded because it is not part of the administrative record and falls outside the limited circumstances for supplementation of that record.

Even putting aside Plaintiffs' failure to satisfy the standards for considering extra-record evidence, the Cammarata declaration falls well short of demonstrating that the agency's action was arbitrary or capricious. As explained at length above, the Corps gave a "hard look" to seagrass-related issues before issuing the EA. It is well-established that a litigant cannot show that an agency's conclusion was arbitrary and capricious merely by presenting a contrary expert opinion (especially when, as here, that expert opinion was never contemporaneously presented to the agency). *See Sabine River Auth.*, 951 F.2d at 678 ("Where conflicting evidence is before the agency, the agency and not the reviewing court has the discretion to accept or reject from the several sources of evidence. . . . The reviewing court may be inclined to raise an eyebrow under such circumstances, but it must show the proper respect for an agency's reasoned conclusion even if the reviewing court finds the opinions of other experts equally or more persuasive."). In a "battle of the experts," it is the agency who serves as umpire, and the mere fact that some evidence supports a different view is not sufficient to establish that the agency's action ought be set aside. *See Gulf Coast Rod Reel & Gun Club, Inc. v. Patterson*, No. 3:13-CV-126, 2015 WL 10097622, at *6 (S.D. Tex. Dec. 4, 2015) ("NEPA does not give this court authority to pick a battle-of-the-

experts winner."), *aff'd sub nom. Gulf Coast Rod, Reel & Gun Club, Inc. v. U.S. Army Corps of Eng'rs*, 676 F. App'x 245 (5th Cir. 2017); *see also Harris v. United States*, 19 F.3d 1090, 1096 n.8 (5th Cir. 1994) ("As this appears to be the typical battle of the experts, we defer to the agency's interpretation."); *Mississippi v. EPA*, 744 F.3d 1334, 1348 (D.C. Cir. 2013) (per curiam) (same).

In any event, Dr. Cammarata's declaration does not help resolve any disputed issue. While the declaration concludes that the permitted operation will "significantly impair seagrass beds" (Dkt. No. 43-1 at 50 ¶ 13), it makes no attempt to define "significantly impair" and indeed does not even quantify the expected impairment. The declaration does not state if Dr. Cammarata thinks the impairment is more than, less than, or the same as the 8.86 acres estimated by the Corps as probably lost due to the Project. The declaration also lacks any generally accepted definition of when a seagrass bed becomes "significantly impaired." An unexplained, nebulous discussion of this type has no probative value. At bottom, Dr. Cammarata's declaration adds nothing beyond the Corps' existing estimate of a probable loss of 8.86 acres of seagrass (which will be mitigated) and acknowledgment of the possibility of additional impacts (for which Enbridge will monitor and, if necessary, take action to minimize and mitigate).

An unexplained and undefined conclusion is also inadmissible because it lacks any "reliable basis in the knowledge and expertise" of Dr. Cammarata's discipline. *See Allen v. Pa. Eng'g Corp.*, 102 F.3d 194, 196 (5th Cir. 1996) (internal quotation marks omitted). The declaration lacks the required explanation for the reasoning Dr. Cammarata used to conclude the non-quantified impairment would be significant. *See Boyd v. State Farm Ins. Cos.*, 158 F.3d 326, 331 (5th Cir. 1998). The lack of a sufficient basis for Dr. Cammarata's opinions reflects the absence of reliable data or studies establishing that terminal operations cause seagrass bed impairment. Indeed, the declaration contains statements such as "[d]ata is still being collected and has not been

fully processed and analyzed" (Dkt. No. 43-1 at 43 ¶ 9); "imagery . . . is strongly suggestive of significant seagrass decline" (*id.* at 44 ¶ 9); "observed gradient results are consistent with the hypothesis" (*id.* at 47 ¶ 9); and "seagrass bioindicator data is also consistent with changing seagrass" (*id.* at 48 ¶ 10). But "correlation is not causation." *Huss v. Gayden*, 571 F.3d 442, 459 (5th Cir. 2009). The data developed or reviewed by Dr. Cammarata are simply not adequate for him to make any causation conclusions to a reasonable degree of scientific certainty. The lack of "fit" between the data and his opinion renders the opinion inadmissible. *See Moore v. Ashland Chem., Inc.*, 151 F.3d 269, 276 (5th Cir. 1998).

Thus, even if the Court were to consider the declaration, it would not provide a basis to set aside the Corps' action as arbitrary or capricious.

## III. The Corps' discussion of beneficial and detrimental effects complied with NEPA and the Clean Water Act.

The Corps adequately considered the effects of its action in a manner that was sufficient to satisfy both NEPA and the Clean Water Act public interest review.

### A. Plaintiffs' summary-judgment arguments fail.

Plaintiffs claim that the Corps did not provide data on or analyze various impacts of the Project, and then failed to consider those impacts when considering Project benefits, Dkt. No. 52 at 36-37, but the record belies this. First, the EA included in-depth analysis of various impacts to water quality, seagrasses, wetlands, other aquatic resources, and extensive mitigation measures to address those impacts. *See* AR108-12, 114-25, 131-38, 140-46, 151-52. The EA also addressed water, air, light, and noise pollution issues within the appropriate scope of review. *See* AR119, 124, 139. The Corps' analysis addressed myriad other environmental effects of the Project, including impacts on cultural resources (AR125-26, 138, 148), protected species (AR109, 115,

138 146), recreation (AR118, 134, 144), aesthetics (AR118, 122, 134, 139), navigation (AR118, 138, 150), economics (AR118-19, 138-39), and safety (AR119, 124, 150-51).

Plaintiffs' claims that impacts on adjacent residences were ignored is also refuted by the EA. During the public comment period, some commenters raised concern about noise, light, and visual impacts on the Ingleside on the Bay community, property values, and the small businesses that are there. *See, e.g.*, AR1525, 1557. The Corps considered potential impacts on the nearby community, noting that the preservation in perpetuity of 70 acres of pothole wetland forest between the community and the terminal would provide a natural and aesthetic buffer, reduce noise and light impacts, and bring wildlife and avian habitat and air quality benefits. AR122, 124. The Corps similarly addressed the relatively few comments made raising commercial fishing impacts, finding that "[t]here will be some loss of shallow water habitat that will have a negligible effect on recreational and commercial fisheries by reducing aquatic habitat utilized by fish game species," and a temporary effect on fish and other aquatic organisms, as dredging activities would temporarily displace fishery species in the vicinity of the work. AR133-34, 138, 147.

As for the Corps' balancing of costs and benefits of the Project, Plaintiffs suggest that NEPA requires a "'full and fair' treatment of risks and benefits," Dkt. No. 52 at 37, and that the Corps ignored various risks and claimed various benefits without adequate basis. Plaintiffs misstate NEPA's requirements: The cited regulation states that an EIS must provide a "full and fair discussion of significant environmental impacts." 40 C.F.R. § 1502.1. Here, the Corps provided a full and fair discussion of potential environmental impacts, as discussed above, and ultimately found no significant impact. AR153. Plaintiffs' argument amounts to a request for a cost-benefit tally sheet. At bottom, they allege that the Corps ignored costs (e.g., oil spills, impacts on adjacent property owners, indirect impacts to seagrasses) while improperly claiming benefits

to Enbridge and to the public (e.g., economic benefits, energy availability). But this NEPA challenge rests on two fundamental legal errors.

First, it is black-letter law that NEPA is only a procedural statute, and does not compel any substantive outcomes; after undertaking an adequate NEPA review, an agency may select a particular course of action, even if its environmental costs outweigh benefits. *See Nat'l Audubon Soc'y v. Dep't of Navy*, 422 F.3d 174, 184 (4th Cir. 2005).

Second, Plaintiffs err in suggesting that the Corps must include a cost-benefit analysis in its EA. CEQ's cost-benefit regulation only applies "if" the agency chooses to prepare one. 40 C.F.R. § 1502.23. In fact, CEQ's NEPA regulations caution against displaying "a monetary cost-benefit analysis . . . when there are important qualitative considerations," *id.* § 1502.22, and the Corps' regulations implementing NEPA, in place since 1988, direct that the Corps "shall not prepare a cost-benefit analysis for projects requiring a Corps permit," 33 C.F.R. pt. 325, App. B(9)(b)(5)(d).

In suggesting otherwise, Plaintiffs rely on off-point authority. In *Sierra Club v. Sigler*, the court found that the cost-benefit analysis the Corps chose to include in an EIS it finalized in 1979 (under prior Corps NEPA regulations no longer in force) was skewed because the Corps used quantified data to "trumpet" certain benefits without attempting to quantify related costs. 695 F.2d at 976, 978-79. Here, the Corps did not, and was not required to, prepare a cost-benefit analysis, and the Corps did not include any quantitative data on benefits in a manner that could skew unquantified costs. Plaintiffs' reliance on *Van Abbema v. Fornell*, 807 F.2d 633 (7th Cir. 1986), is also misplaced. That case dealt with the Corps' weighing of economic factors as part of its public interest determination under the Clean Water Act, *see id.* at 640-42, an issue not raised in Plaintiffs' Motion.

Plaintiffs cite a Corps Clean Water Act regulation, requiring that the Corps determine whether "the benefits of the proposed alteration [to wetlands] outweigh the damage to the wetlands resource." 33 C.F.R. § 320.4(b)(4). The Corps specifically made this finding in its EA, AR150, and contrary to Plaintiffs' claim, it is amply supported by the agency's reasoning. First, the Corps measured damages to wetland resources to be a total of 0.95-acre of estuarine emergent wetlands, whereas the benefits of the Project include (1) a new rock breakwater that will protect more than five acres of estuarine wetland habitat along the adjacent shoreline in a location where it is well-documented that the shoreline has experienced significant historical erosion that would likely continue absent protective measures, and (2) preservation in perpetuity of 70 acres of a pothole wetland forest with significant conservation value. AR102-03, 114, 116, 141.

The Corps' regulation specifically directs the Corps to consider the public interest factors listed in 33 C.F.R. § 320.4(a) when it performs this evaluation, and those factors include economics, navigation, energy needs, and the needs and welfare of the people. The Corps determined that the damages to wetlands were offset by mitigation, AR137, 140-42, and the Corps reasonably considered other Project benefits (including improved navigation at the site, AR138), thus supporting the conclusion that these benefits outweighed those mitigated damages. Courts defer to the Corps' exercise of discretion in balancing costs and benefits, including in cases where the Corps has found that overall project benefits, including these kinds of economic benefits, outweigh insignificant wetlands losses. *See, e.g.*, *Save Our Wetlands, Inc. v. Sands*, 711 F.2d 634, 646 n.10 (5th Cir. 1983) (benefits of an entire electric transmission line project to deliver energy weighed against the lack of any significant adverse environmental effects); *Bering Strait Citizens for Responsible Res. Dev. v. U.S. Army Corps of Eng'rs*, 524 F.3d 938, 948-49 (9th Cir. 2008) (as amended) (use of numerous factors from 33 C.F.R. § 320.4(a), including economic benefits);

*Hough v. March*, 557 F. Supp. 74, 83 (D. Mass. 1982) ("expanded tax base, additional jobs and the owners' 'right to reasonable use' of their property . . . outweighed . . . insignificant loss of wetland").

### B. Defendants are entitled to summary judgment on claims pleaded in the Complaint but not briefed by Plaintiffs.

Plaintiffs have abandoned other alleged public interest review claims mentioned in their Complaint but not raised in their Motion. *See infra* Section VII. Regardless, because these lack merit, the Court should grant summary judgment against Plaintiffs for each.

In the Complaint, Plaintiffs alleged that the Corps did not adequately explain how the economic benefit to an applicant, improved navigation, or increased energy availability weigh in the public interest. But the Corps' path in finding benefits to the applicant and to the public from improved navigation and increased energy availability may reasonably be discerned. *See State Farm*, 463 U.S. at 43. The Corps' public interest regulations affirm that "economic benefits of many projects are important to the local community and contribute to needed improvements in the local economic base, affecting such factors as employment, tax revenues, community cohesion, community services, and property values," and that "[m]any projects also contribute to the National Economic Development (NED) (i.e., the increase in the net value of the national output of goods and services)." 33 C.F.R. § 320.4(q). Here, the Corps noted how the Project allows the applicant to meet the demands of its customer base, helps ensure long-term viability and long-term full-time employment for area residents, and provides temporary construction jobs. AR118-19. The Corps also weighed some detrimental effects (i.e., greenhouse gas emissions) against national goals of energy independence, national security, and economic development, AR139, and there is other record support noting the benefits of oil exports on national security, reduced trade deficit, and global competitiveness, AR613. Regarding navigation, the Corps' public interest regulations

affirm that the public has rights and interests in the navigable waters, including protections for the improvement of navigation, 33 C.F.R. § 320.4(g)(1), (4), and the Corps reasonably concluded that these improvements to navigation would accrue to the public. In sum, Plaintiffs are wrong that the only economic benefits will accrue to Enbridge to the exclusion of the public.

## IV. The Corps appropriately considered climate change.

The EA's discussion of climate change was more than sufficient to discharge the Corps' obligations under NEPA and the Clean Water Act. Although Plaintiffs contend that the Corps "fail[ed] to analyze and consider climate change and its impacts," that is not the case. Dkt. No. 52 at 38 (capitalization altered). In fact, the Corps acknowledged that the proposed activities that are within the Corps' federal control and responsibility will likely result in a "release of greenhouse gases into the atmosphere," but it then noted that these releases would be "negligible . . . when compared to global greenhouse gas emissions." AR139. The Corps also acknowledged that greenhouse gas ("GHG") emissions could "occur from the combustion of fossil fuels associated with the operation of construction equipment" or "increases in traffic," before explaining that the Corps itself "has no authority to regulate emissions that result from the combustion of fossil fuels," which are instead regulated by EPA pursuant to the Clean Air Act. AR139. The Corps' ultimate conclusion under NEPA was that the environmental impacts of the Project on climate change would be insignificant. AR153. And the Corps' conclusion under the Clean Water Act's public interest balancing, *see* 33 C.F.R. § 320.4(a), was that the Project was "not contrary to the public interest" after the minor climate-related effects of the Project were "weighed against national goals of energy independence, national security, and economic development." AR139.[8] For the

[8] Although Section XI of Plaintiffs' Motion claims that the Corps' climate-change analysis "violated NEPA and the Clean Water Act" (Dkt. No. 52 at 38 (capitalization altered)), their Motion develops no argument that is specific to the public interest balancing under the Clean Water Act

numerous reasons set forth below, the Plaintiffs have not shown the Corps' discussion of greenhouse gases and climate change was arbitrary and capricious, and the Court should grant summary judgment to Defendants on this claim.

CEQ's NEPA regulations require agencies to consider, as indirect effects, those effects "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). As discussed above, *see supra* at 23-25, NEPA does not require agencies to discuss an alleged effect where the agency has no statutory authority to "categorically . . . prevent" that same effect; rather, NEPA only requires agencies to consider effects that (1) have a "reasonably close causal relationship" with the federal action, and (2) are reasonably foreseeable. *Public Citizen*, 541 U.S. at 767-70.

Here, the Corps' decision to limit the scope of its review to only those GHG emissions occurring as a result of proposed activities within the Corps' federal control and responsibility complied with CEQ's NEPA regulations, the Corps' own longstanding NEPA implementing regulations, 33 C.F.R. pt. 325, App. B, *see also* section I.B *supra*, and with *Public Citizen*. The Corps explained that although there may be some GHG emissions associated with combustion of fossil fuels by end-users to whom product is ultimately delivered, whether inside or outside the United States, the Corps has no authority to regulate emissions that result from such combustion. AR139. Indeed, the Corps has no statutory authority to regulate the production, transportation, export, or use of fossil fuels. The Court should disregard Plaintiffs' extra-record evidence regarding the volumes of storage capacity and export at the terminal. *Compare* Dkt. No. 52 at 38, *with* Dkt. Nos. 44, 45. Nor does the Corps have authority to regulate GHGs. *See West Virginia v.*

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and instead relies exclusively on NEPA case law. Plaintiffs have therefore waived any argument that the Corps' climate-change analysis violated the Clean Water Act or 33 C.F.R. § 320.4.

*EPA*, 142 S. Ct. 2587, 2609 (2022) (finding EPA exceeded its statutory authority in promulgating regulations limiting GHG emissions where the agency lacked "clear congressional authorization").

Any "but for" causal relationship the Corps' action in permitting dredging and the construction of two docks at an existing terminal has with ultimate downstream combustion of GHGs is far too attenuated to make the Corps responsible for those GHG emissions, never mind any alleged environmental impacts (e.g., on global climate) that Plaintiffs seek to attribute to those incremental emissions. The Corps has no control or legal authority over the types and volume of fossil fuels received by the terminal, the types or flags of vessels transporting those fuels away from the terminal, the locations where any shipped commodities are delivered, or how, where, and when any shipped commodities are used. In arguing otherwise, Plaintiffs rely on cases where the federal agency in question had authority to authorize incremental fossil fuel *extraction* on federal land. Even assuming those cases were correctly decided and provided any weight of authority here, the causation analysis is plainly different. *See 350 Montana v. Haaland*, 29 F.4th 1158, 1171 (9th Cir. 2022) (coal mine expansion); *Utah Physicians for a Healthy Env't v. U.S. Bureau of Land Mgmt.*, 528 F. Supp. 3d 1222 (D. Utah 2021) (same); *Ctr. for Biological Diversity v. Bernhardt*, 982 F.3d 723, 735 (9th Cir. 2020) (offshore oil drilling); *Sovereign Iñupiat for a Living Arctic v. U.S. Bureau of Land Mgmt.,* 555 F. Supp. 3d 739, 751 (D. Alaska 2021) (onshore oil drilling). The causal relationship between climate change and construction of docks at an existing terminal intended to facilitate safe and efficient transportation of commodities is far more attenuated than permits authorizing the extraction of fossil fuels on federal lands.

Moreover, proximate causation is lacking. The overall volume of liquids transported from the terminal is governed by the terminal's TCEQ-issued air permit and the size of tanks and storage infrastructure. The transport of any volumes beyond those currently permitted for the terminal

would be the result of an "intervening action" by TCEQ, breaking any causal chain tying the environmental effects of such increases to the Corps. This case is therefore on all fours with *Sierra Club v. FERC*, 827 F.3d 36 (D.C. Cir. 2016). In that case, the petitioners challenged the sufficiency of the environmental analysis underlying a decision by the Federal Energy Regulatory Commission ("FERC") to approve a project that would redesign a liquefied natural gas ("LNG") terminal to support export operations. The Court rejected the petitioners' arguments that FERC's GHG analysis was deficient because it was the Department of Energy, not FERC, which had authority to grant an LNG export license. The Court explained that the Department of Energy's independent licensing authority—like TCEQ's permitting authority here—"br[oke] the NEPA causal chain and absolve[d FERC] of responsibility to include in its NEPA analysis considerations that it 'could not act on' and for which it cannot be 'the legally relevant cause.'" *Id.* at 48 (quoting *Public Citizen*, 541 U.S. at 769). Thus, the Corps cannot be considered the relevant cause for any such downstream combustion of product transported to third parties, in unknown locations, by the terminal's customers, using the terminals facilities.

Nor are any such downstream emissions or their environmental effects reasonably foreseeable for purposes of NEPA. Downstream GHG emissions associated with fossil fuel combustion, in the context of a project reflecting one minor link in the chain of infrastructure involved in the *transportation* of fuels, are not (contrary to Plaintiffs' suggestion) reasonably foreseeable under NEPA. Even accepting as valid out-of-circuit decisions addressing this issue in other contexts, foreseeability depends on information about the "destination and end use." *Food & Water Watch v. FERC*, 28 F.4th 277, 288 (D.C. Cir. 2022) (quoting *Birckhead v. FERC*, 925 F.3d 510, 519 (D.C. Cir. 2019)). Nothing in the record here would allow the Corps to predict where any commodities shipped by third parties using the terminal's facilities will be transported, how

they will be used, or where or how they will be refined—never mind allow the Corps to predict how the incremental improvements here might affect those dynamics. Plaintiffs allege that shipping destinations include China and Europe, but they provide no record basis for that information. *Cf.* Dkt. No. 52 at 38. Nor does the record contain any information about the extent to which hydrocarbons exported from the Project will displace or "substitute" for other higher-emitting fuels that are commonly combusted abroad, such as coal. *Cf. PennEast Pipeline Co., LLC*, 162 FERC ¶ 61,053 P 208 (2018) (noting that certification of new energy infrastructure can sometimes "result in lower total $CO_2e$ emissions" because it enables lower-emitting fuels to "displace" high-emitting fuels such as "coal," and also because the new infrastructure may alter transportation methods away from high-emitting alternatives (e.g., trucking)), *vacated on other grounds*, 177 FERC ¶ 61,197 (2021). And in any event, the type of generic predictions at which Plaintiffs gesture—i.e., that export destinations *may* "include[e] China and Europe," Dkt. No. 52 at 38—is much too generalized to be of any use in a useful environmental analysis. *See Maiden Creek Assocs., L.P. v. U.S. Dep't of Transp.*, 823 F.3d 184, 190 (3d Cir. 2016) ("[NEPA] does not . . . require an agency to assess every impact of a proposed action—only its impact or effect on the physical environment.").

Even assuming they would apply in this Circuit by their own terms, the out-of-circuit cases that Plaintiffs cite demonstrate that changes in downstream GHG emissions are not reasonably foreseeable here. *See Food & Water Watch*, 28 F.4th at 288 (downstream GHG emissions reasonably foreseeable where pipeline would deliver natural gas to existing customers in Springfield, Massachusetts for residential and commercial gas connections); *Sierra Club v. FERC*, 867 F.3d 1357, 1372 (D.C. Cir. 2017) (downstream GHG emissions reasonably foreseeable where pipeline was constructed to serve two known powerplants in Florida); *Columbia Riverkeeper v.*

*U.S. Army Corp of Eng'rs*, No. 19-6071 RJB, 2020 WL 6874871, at *4 (W.D. Wash. Nov. 23, 2020) (downstream GHG emissions reasonably foreseeable for methanol export since the agency received specific information through public comments and in prior EISs). The Court should reject Plaintiffs' reliance here on extra-record evidence regard oil exports that they failed to provide the Corps during the comment period. *See Vermont Yankee*, 435 U.S. at 554-55.

Given the impossibility of quantifying any one project's incremental effects on climate change (a phenomenon which depends on aggregate global GHG concentrations), it was neither arbitrary nor capricious for the Corps to refrain from engaging in such speculation in its climate change discussion. The Corps thus properly limited the EA's consideration of climate-related impacts to those from the "proposed activities within the [Corps'] federal control and responsibility" (e.g. construction of the docks), which the Corps reasonably determined "will result in a negligible release of greenhouse gases into the atmosphere when compared to global greenhouse gas emissions." AR139. Plaintiffs do not—and could not—argue that it was improper for the Corps to make a significance determination by considering the emissions from this Project in the broader context of global emissions. *Cf. Ctr. for Cmty. Action & Env't Justice v. Fed. Aviation Admin.*, 18 F.4th 592, 606 (9th Cir. 2021) (affirming EA that found project would have no significant impact on climate change because the project's emissions constituted less than one percent of global and American GHG emissions); *Washington Env't Council v. Bellon*, 732 F.3d 1131, 1143 (9th Cir. 2013) (noting "tenuous" causal chain in case where project's emissions represented less than 6% of state emissions and therefore had a "scientifically indiscernible" effect on "global climate change").

Plaintiffs rely entirely on distinguishable, non-binding cases in suggesting that there is "consensus in the federal courts" that an EA must contain a detailed consideration of climate

change impacts, "including the downstream greenhouse gas emissions of fossil fuel related projects." Dkt. No. 52 at 40. To the contrary, the only court in the Fifth Circuit to address this issue rejected a NEPA challenge where, as here, challengers failed to "point[] to any *law or regulation* showing that [the agency's] failure to consider greenhouse gas emissions makes the [NEPA determination] inadequate." *Sierra Club v. Fed. Highway Admin.*, 715 F. Supp. 2d 721, 741 (S.D. Tex. 2010), *aff'd*, 435 F. App'x 368 (5th Cir. 2011) (emphasis added). *Vecinos para el Bienestar de la Comunidad Costera v. FERC*, 6 F.4th 1321, 1329 (D.C. Cir. 2021), held only that the agency had not adequately responded to a comment arguing that a particular regulation required the use of social cost of carbon estimates—an issue irrelevant here as Plaintiffs did not raise social cost of carbon issues in their comments or their summary judgment briefing.

**V. The Corps adequately analyzed potential cumulative impacts.**

The Corps adequately considered the cumulative impacts of its action under both NEPA and the Clean Water Act. NEPA requires that agencies consider the cumulative impact, or "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions." 40 C.F.R. § 1508.7. However, when an agency does not expect a project to have any significant environmental impact that can "accumulate" with the impacts of other actions, NEPA does not require a full cumulative impacts analysis. *Fath*, 924 F.3d at 139; *Atchafalaya*, 894 F.3d at 703.

The Corps' cumulative impacts inquiry adheres to NEPA's "rule of reason," under which agencies need not prepare exhaustive reports that "would serve 'no purpose' in light of NEPA's regulatory scheme as a whole." *Fath*, 924 F.3d at 139 (citing *Public Citizen*, 541 U.S. at 767). The Corps' EA described the geographic scope, temporal scope, and the affected environment, and it included a discussion of numerous other actions and activities in the Corpus Christi Bay area (e.g., other dredging projects, residential and commercial development, oil and gas development, utility

lines, marinas, commercial shipping operations), as well as a brief summary of their impacts. AR143-45. The Corps noted its familiarity with similar dredging projects (including ten projects at major Texas ports since 2005) and highlighted two key issues of concern in the watershed where the Project might result in a cumulative impact: (1) impacts to water quality, and (2) the loss of special aquatic sites. AR145. The Corps addressed potential cumulative water quality impacts with a discussion of Enbridge's avoidance and minimization measures (e.g., turbidity curtains; limited dredging window) to ensure water quality effects would be temporary. AR145. The Corps then explained that mitigation for losses of waters of the United States (including restoration, establishment of twenty acres of seagrass beds, enhancement of at least five acres of existing wetlands and hard substrate, and preservation of 70 acres of a pothole wetland forest) would ensure that the Project "will not contribute to an adverse cumulative effect on aquatic functions and values of the watershed." AR141, 145.

The Corps further discussed reasonably foreseeable future actions within the watershed of concern, including "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." AR145. The Corps noted that 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." AR145. Plaintiffs claim the EA was deficient because it did not present quantified or specific information, but they ignore that the analysis required for an EA is less than the "detailed analysis" required for

an EIS. *Fritiofson v. Alexander*, 772 F.2d 1225, 1249 (5th Cir. 1985), *abrogated on other grounds by Sabine River Auth.*, 951 F.2d at 678 n.1.

Plaintiffs cite two cases involving the more extensive analysis required for an EIS, not the concise treatment acceptable in the context of an EA. *See Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1375 (9th Cir. 1998); *Texas Comm. on Nat. Res. v. Van Winkle*, 197 F. Supp. 2d 586, 592 (N.D. Tex. 2002). Although Plaintiffs note a Corpus Christi Ship Channel Improvement Project that Plaintiffs say will have its own EIS, the Corps explicitly acknowledged that project in its analysis. AR145. Plaintiffs argue that the Corps has quantifiable information about that project since, according to extra-record evidence the Court should ignore, the Corps previously issued a notice that it was intending to prepare an EIS for that project. Dkt. No. 52 at 43-44. In similar circumstances, the D.C. Circuit rejected a party's attack on a cumulative impacts analysis based on extra-record evidence of a concurrently pending proposal for many of the same reasons Enbridge set forth in its response to Plaintiffs' motion to supplement (Dkt. No. 45). That court concluded that an agency does not violate NEPA when it omits details of another project for which nothing had been completed except issuance of a notice of intent to prepare an EIS. *See Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 514 (D.C. Cir. 2010).

In sum, the Corps considered the Project's impacts in relation to impacts from past, present, and reasonably foreseeable future actions, and the Corps reasonably concluded that "the incremental contribution of the proposed activity to cumulative impacts in the area" were not significant. AR146. Without incremental effects triggering the need for additional cumulative impacts analysis, the EA's discussion of cumulative impacts satisfies the deferential standard of review. *See Fath*, 924 F.3d at 139-40; *Atchafalaya*, 894 F.3d at 704.

Plaintiffs' also allege in a single conclusory sentence that it was arbitrary for the Corps to apply a temporal scope of five years into the past and five years into the future for its cumulative impacts analysis since, they argue, "no regulation or other authority" allows the Corps to do this. Dkt. No. 52 at 44. But NEPA does not "impose a requirement that [an agency] analyze impacts for any particular length of time." *Selkirk Conservation All. v. Forsgren*, 336 F.3d 944, 962 (9th Cir. 2003) (finding that the temporal scope for an EIS at three years was not unreasonable, even if the agency had some more information from additional years beyond that three-year period). An EA is a *concise* document intended to determine "whether a full-fledged environmental impact statement . . . is necessary," *Spiller*, 352 F.3d at 237, and Plaintiffs cite no authority from any court ever finding a 10-year scope for cumulative impacts analysis to be arbitrary or capricious.

Plaintiffs' attack on the cumulative impacts analysis under the Clean Water Act's 404(b)(1) Guidelines is similarly unavailing. Plaintiffs claim that the Corps underestimated cumulative effects on seagrasses and provided no information about how past and probable future activities have impacted special aquatic sites and water quality. Dkt. No. 52 at 44. But the Corps *did* discuss the Project's potential cumulative effect on seagrasses, other special aquatic sites (like wetlands), and water quality, and the Corps explained how the Project's seagrass and wetlands mitigation measures would ensure that the Project "will not contribute to an adverse cumulative effect on aquatic functions and values of the watershed." AR145. Fundamental to the 404(b)(1) Guidelines is the precept that the Corps must ensure that any proposed dredge and fill activity "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). In conjunction with the Corps' review under the 404(b)(1) Guidelines of potential impacts on physical and chemical characteristics, biological characteristics, special aquatic sites, human use

characteristics, possible contaminants, and minimization measures, the Corps concluded that cumulative effects on the aquatic ecosystem would be negligible and the overall cumulative impacts would be insignificant. *See* AR135-36, 146. Plaintiffs' suggestions to the contrary are groundless.

## VI. The Corps reasonably determined that no EIS was necessary.

The Corps' decision not to prepare an EIS was not arbitrary and capricious.

When an agency is uncertain whether an action may result in a significant effect, it may prepare an EA to "[b]riefly provide sufficient evidence and analysis for determining whether to prepare an [EIS] or a [FONSI]." 40 C.F.R. § 1508.9(a)(1). Stated differently, an agency may prepare an EA to determine whether an EIS is necessary. *Winter*, 555 U.S. at 15-16; *City of Dallas v. Hall*, 562 F.3d 712, 717 (5th Cir. 2009). As discussed above, the Corps analyzed potential impacts on air and water quality, aquatic resources, light, and noise; cultural resources; protected species; recreation; aesthetics; navigation; economics; and safety. Additionally, the Corps prepared a cumulative impacts analysis (AR142-46), an alternatives analysis (AR126-30), and a summary of two rounds of public comments and responses to those comments (AR106-26). Based on this EA, the Corps briefly set forth its analysis and conclusions in support of its Finding of No Significant Impact, AR153, obviating the need for an EIS.

The issue of whether the Corps appropriately issued a FONSI turns on whether the project's effects are "significant." In assessing significance, an agency must consider both "context" and "intensity." 40 C.F.R. § 1508.27. CEQ's NEPA regulations provide ten factors agencies should consider when considering the intensity of an impact and whether it rises to a level of significance. 40 C.F.R. § 1508.27(b)(1)-(10). These factors are not "categorical rules" that determine whether an impact is significant; rather, an agency need only show that it considered these factors in some

way. *See Spiller*, 352 F.3d at 243. Plaintiffs raise several factors but ignore that the Corps considered each and reasonably made a finding of no significant impact.

Plaintiffs first claim that certain letters from project opponents (only a fraction of which actually requested an EIS, AR126) rendered the Project "highly controversial," necessitating an EIS. Dkt. No. 52 at 45-46. But mere public opposition does not render a project "controversial" in the sense relevant to NEPA. *Coliseum Square Ass'n, Inc. v. Jackson*, 465 F.3d 215, 234 (5th Cir. 2006). Rather, the agency must consider "whether there are substantial methodological reasons to disagree about the size, nature, or effect of a project," as NEPA does not contain a "heckler's veto." *See Protect Our Parks, Inc. v. Buttigieg*, --- F.4th ---, No. 21-2449, 2022 WL 2376716, at *6 (7th Cir. July 1, 2022); *Coliseum Square*, 465 F.3d at 234. The only substantive issue Plaintiffs identify in the opposition comments is the importance of the site to indigenous peoples and the possibility of damage to cultural sites. Dkt. No. 52 at 45. The EA addressed these issues, explaining the cultural surveys performed in the area, the lack of any work occurring in the adjacent uplands that were the subject of commenters' concerns, and concurrence from the Texas State Historic Preservation Officer that the Project would have no effect on historic properties. AR126, 138, 147-48. Neither Plaintiffs nor commenters raised any substantial methodological reasons to disagree with the Corps' analysis. The Corps' analysis and conclusion of no effect to cultural resources also rebuts Plaintiffs' claim of significant effects based on the NEPA factor of "unique characteristics of the geographic area" related to cultural resources. *See* 40 C.F.R. § 1508.27(b)(3).

Nor do critical comments from EPA and the FWS render the Project "highly controversial." Plaintiffs rely on *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 985 F.3d 1032, 1043 (D.C. Cir. 2021), to argue an EIS is warranted when an agency fails to resolve serious criticism from other agencies. But the EPA and FWS comments here dealt with allegedly

unevaluated indirect impacts to adjacent seagrasses, with the agencies recommending future monitoring of the nearby seagrasses. AR363, 366. As discussed in Section II above, as well as in the EA itself, the Corps not only acknowledged the comments, but it also noted that Enbridge committed to *implement* the agencies' recommended approach for monitoring and potential future mitigation. AR122. NEPA does not require an agency to *completely* resolve every concern, but rather that the agency makes a good faith effort. *Surfrider Found. v. Dalton*, 989 F. Supp. 1309, 1323 (S.D. Cal. 1998), *aff'd sub nom. San Diego Chapter of the Surfrider Found. v. Dalton*, 196 F.3d 1057 (9th Cir. 1999).

Here, not only did the Corps address the concerns that EPA and FWS raised, but even more, Enbridge adopted the precise measures those agencies had proposed, AR122, 125, and Plaintiffs fail to raise any unresolved serious criticism. Moreover, this monitoring, along with 20 acres of seagrass mitigation, more than 5 acres of wetlands enhancement, and preservation of 70 acres of a pothole wetland forest rebuts Plaintiffs' claim of significant effects based on the NEPA factor of "unique characteristics of the geographic area" related to special aquatic sites like seagrasses and wetlands. *See* 40 C.F.R. § 1508.27(b)(3).

Plaintiffs cite three more factors but only muster a single sentence to support each one. Dkt. No. 52 at 46. In claiming the effects that are "highly uncertain" under 40 C.F.R. § 1508.27(b)(5), Plaintiffs allege that Enbridge failed to supply any information regarding "vessel traffic." But questions about potential increase in vessel traffic were not raised to the Corps during the public comment period, and are outside the scope of the Corps' jurisdiction. Moreover, as Enbridge has not proposed "to construct any . . . new throughput or storage infrastructure," but rather has merely proposed improvements designed to "increase[] efficiency in handling vessels expected at the site" and to enable the "load[ing of] ships at rates 30% faster than other terminals."

AR119, 283. Plaintiffs fail to show how the EA's alleged lack of information about vessel traffic makes the effects of the Project "highly uncertain" under CEQ's rule.

Plaintiffs next cite 40 C.F.R. § 1508.27(b)(7), which discusses actions "related to other actions with individually insignificant but cumulatively significant impacts." Plaintiffs assert without any factual basis that the Project is related to the Corpus Christi Ship Channel Improvement Project. But this factor by its own terms only relates to other actions with individually insignificant impacts, to avoid the possibility that significant impacts be overlooked "by breaking down a related action into smaller component parts." *Id.* By Plaintiffs' own characterization, the Corpus Christi Ship Channel Improvement Project will have a significant impact on the environment and will be subject to its own EIS, undercutting any reliance on the § 1508.27(b)(7) factor here.

Finally, Plaintiffs cite "the degree to which the proposed action affects public health or safety," 40 C.F.R. § 1508.27(b)(2), given "its light and noise impacts on the neighboring community, the possibility of oil spills, and not least its clear connection to climate change." Dkt. No. 52 at 46. Plaintiffs fail to grapple with the EA's discussion of these impacts and conclusion that they are, in various areas, negligible, insignificant, or outside the appropriate scope of review. *See supra* Section I.C (discussing oil spills, light, and noise) and Section IV (discussing climate change).

In sum, the Corps reasonably made a Finding of No Significant Impact based on the analysis in the EA, and Plaintiffs have failed to meet their burden to demonstrate that the Corps' determination not to prepare an EIS was arbitrary and capricious.

## VII. Summary judgment is appropriate for Plaintiffs' unbriefed claims about the statement of purpose and need and the alternatives analysis.

Plaintiffs' Motion does not even mention two of the claims pleaded in the Complaint: Count 3 (regarding the statement of purpose and need) and Count 4 (regarding the alternatives analysis). Given Plaintiffs' failure to advance these claims in Plaintiffs' Motion, the Court should consider them abandoned. *See Road Sprinkler Fitters Local Union No. 669 v. Indep. Sprinkler Corp.*, 10 F.3d 1563, 1568 (11th Cir. 1994) ("claim alleged in the complaint but not even raised as a ground for summary judgment" deemed abandoned); *Mickelsen Farms, LLC v. Animal & Plant Health Inspection Servs.*, No. 115-CV-00143-EJL-CWD, 2018 WL 1413183 (D. Idaho Mar. 20, 2018) (because plaintiffs pursued only one of three APA claims on summary judgment, "Plaintiffs have abandoned their other claims by failing to raise them in their summary judgment motion"); *N. Coast Rivers All. v. U.S. Dep't of the Interior*, No. 16-cv-00307, 2020 WL 9171177 (E.D. Cal. Mar. 30, 2020) (similar).

In any event, Plaintiffs' Claims 3 and 4 fail on the merits for the reasons set forth below. In opposing Enbridge's motion for summary judgment, Plaintiffs may not seek judgment in their own favor, since issues not raised in an opening brief have been forfeited. *See, e.g.*, *United States v. Bowen*, 818 F.3d 179, 192 n.8 (5th Cir. 2016).

### A. The Corps appropriately evaluated the purpose of the Project.

The Corps appropriately considered the applicant's purpose in both its NEPA review and its public interest review.

Under NEPA, the agency must include a brief discussion in its EA of the need for the proposed action. 40 C.F.R. § 1508.9(b). The statement of purpose and need defines project goals in a way that allows for the review of an appropriate range of alternatives. When an applicant asks an agency to approve a specific plan, "the agency should take into account the needs and goals of

the parties involved in the application." *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 195-96 (D.C. Cir. 1991). "Indeed, it would be bizarre if the Corps were to ignore the purpose for which the applicant seeks a permit and to substitute a purpose it deems more suitable." *La. Wildlife Fed'n, Inc. v. York*, 761 F.2d 1044, 1048 (5th Cir. 1985) (per curiam). The Corps reviewed Enbridge's statement of purpose and need, AR106, but did not do so in a vacuum; rather, the record shows several statements supporting project need submitted to the Corps from third parties. *See* AR612-14. This provided a reasonable basis for the Corps' judgment that need for the Project existed. Moreover, as discussed below, the statement of purpose and need allowed the Corps to study multiple onsite and offsite alternatives and did not limit the reasonable range of alternatives. AR126-30. Agencies are entitled to considerable deference in their definition of purpose and need. *See, e.g.*, *Friends of Se.'s Future v. Morrison*, 153 F.3d 1059, 1065-67 (9th Cir. 1998). The Corps was not arbitrary and capricious in defining the purpose and need, and summary judgment is warranted on this claim.

The Complaint alleges that the Corps did not "independently evaluate" Enbridge's asserted purpose and need, citing 40 C.F.R. § 1506.5(a). Dkt. No. 1 at 34 ¶ 135, 35 ¶ 138. Courts recognize that agencies such as the Corps are "not . . . business consulting firm[s]," but rather have limited resources. *Friends of the Earth v. Hintz*, 800 F.2d 822, 834-36 (9th Cir. 1986). "Plaintiffs' position that the Corps must conduct its own independent evaluation or otherwise independently verify all data goes beyond the well-settled prohibition against an agency reflexively rubber stamping a third-party report." *Stop The Pipeline v. White*, 233 F. Supp. 2d 957, 968 (S.D. Ohio 2002). Consulting with other agencies and analyzing the supplied information are examples of how an agency can sufficiently and independently verify an applicant's supplied information. *Hintz*, 800 F.2d at 835. Here, the Corps solicited comments from other agencies and the general public,

AR757, and certain of those comments from third parties confirmed project need, AR612-14. NEPA requires nothing more.

Plaintiffs' related Clean Water Act claim also fails. Plaintiffs allege, without any factual support or additional explanation, that the Corps "failed to independently evaluate [Enbridge's] asserted purpose and need and ensure the [P]roject was in the public interest," and that the asserted purpose was "vague and ambiguous." Dkt. No. 1 at 35 ¶¶ 138, 140. Plaintiffs again ignore the evidence of project need the Corps had before it when it reviewed Enbridge's stated purpose, AR106, 612-14, and as described in Section VII.B below, the project purpose was not defined so as to "preclude the existence of any alternative sites and thus make what is practicable appear impracticable," *Sylvester v. U.S. Army Corps of Eng'rs*, 882 F.2d 407, 409 (9th Cir. 1989).

Moreover, under 33 C.F.R. § 320.4(a), the Corps must determine the basic project purpose and overall project purpose pursuant to the 404(b)(1) Guidelines as set forth in 40 C.F.R. § 230.10(a). Plaintiffs suggest that the Corps failed to independently evaluate the project purpose, but they overlook that the Corps itself authored the statements of the basic project purpose and the overall project purpose. AR106. When doing so, the Corps had an obligation to consider the applicant's purpose, *York*, 761 F.2d at 1048, which in this case was supported by other record evidence, AR612-14. Plaintiffs ignore this record evidence in their conclusory suggestion that the Corps did not independently evaluate the statement of purpose.

**B. The Corps' alternatives analysis satisfied NEPA and the Clean Water Act.**

Before issuing the Amendment, the Corps evaluated a no action alternative, potential siting alternatives at three offsite locations, and four onsite alternatives with different configurations. AR126-31. The Corps developed and applied various site selection and screening criteria to determine which alternatives were "reasonable" under NEPA, 40 C.F.R. § 1502.1, and "practicable" under the 404(b)(1) Guidelines, *id.* § 230.10(a)(2). As the EA illustrates, the Corps

engaged with various state and federal agencies on the alternatives analysis, including EPA (AR107-08, 113, 119), FWS (AR108-09, 114-15, 119-20), and the Texas Parks and Wildlife Department (AR109-11, 115-17, 120), among others. The Corps prepared a reasonable "brief discussion[]" of alternatives that CEQ's regulations require, and that discussion was also adequate to satisfy the 404(b)(1) Guidelines. AR126-30; 40 C.F.R. §§ 230.10(a), 1508.9(b).

Moreover, the Corps ensured that the project purpose was not defined so narrowly as to preclude the possibility of alternatives. *Citizens Against Burlington*, 938 F.2d at 196; *Gulf Coast Rod, Reel, & Gun Club*, 676 F. App'x at 251. By way of example, in *Sierra Club v. Federal Highway Administration*, the Fifth Circuit upheld a statement of purpose and need that, even though it resulted in the agency only reviewing a no action alternative and the preferred alternative, did not foreclose any reasonable alternative, as the agency fully considered alternative locations for the new highway. 435 F. App'x at 374. Here, the Corps considered eight alternatives, which is more than a reasonable range of alternatives and confirms that the Corps did not use a statement of purpose and need that defined competing "reasonable alternatives" out of consideration or out of existence, as Plaintiffs suggest. *See* Dkt. No. 1 at 36 ¶ 143 (citing *Simmons v. U.S. Army Corps of Eng'rs*, 120 F.3d 664, 666 (7th Cir. 1997)).

Plaintiffs claim the Corps' analysis was deficient because the Corps rejected an alternative for a new berth at the Terminal's existing East Basin. In their Complaint, Plaintiffs falsely state the FWS recommended that expansion into the West Basin be denied (a claim not supported by the record), and they misquote FWS as saying the East Basin was "sufficiently large" for the Project. Dkt. No. 1 at 37 ¶ 146. What FWS actually said was that the East Basin appeared to be "sufficiently *wide*." AR712 (emphasis added). Regardless of width, placing a dock there would result in the tail end of vessels impermissibly intruding into the existing Corpus Christi Ship

Channel, rendering that alternative infeasible. *See* AR114, 124; *see also* AR441 (figure depicting the degree of encroachment into the ship channel's setback zone). In response to FWS and similar comments from the Texas Parks and Wildlife Department, Enbridge explained that it studied various configurations in the East Basin in coordination with pilots responsible for navigating vessels into harbor and tug service providers, and ultimately found there to be inadequate space for Suezmax vessels. AR390, 397, 435.

Under the 404(b)(1) Guidelines, a potential alternative is only practicable if it is "available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes." 40 C.F.R. § 230.10(a)(2); *Waterworth*, 420 F.3d at 448. The Corps may reject an alternative when it requires land that is not available or when it would be logistically infeasible to implement. *See id*. Here, the Corps reasonably determined that an East Basin alternative was "not a feasible project plan" because it would result in docked ships intruding into the ship channel's setback zone, AR130, an encroachment into an area not available to the terminal for the Project. This was sufficient reason to disregard this alternative.

The Corps also explained that the East Basin alternative would eliminate an existing berth and result in only one new dock. AR114, 124, 127. The Corps reasonably determined that a single-berth design did not meet the criteria the Corps established for evaluating practicable alternatives. AR124, 130. At the root of Plaintiffs' claim is the notion that the Corps cannot use screening criteria that are any more specific than the underlying statement of purpose lest the Corps "unduly restricts and precludes other alternatives." Dkt. No. 1 at 37-38 ¶¶ 147-49. The Corps' review of eight alternatives rebuts any suggestion of precluded alternatives. *See* AR126-30. Moreover, when analyzing potential alternatives, the Corps "has a duty to take into account the objectives of the applicant's project." *York*, 761 F.2d at 1048. The Corps rationally concluded that the overall

project purpose required at least two additional berths, and therefore, an East Basin alternative providing only a single berth was not practicable. AR130. Courts are "highly deferential" to agency decisions, inquiring only as to whether the agency found a rational connection between its decisions and the facts found. *Gouger v. U.S. Army Corps of Eng'rs*, 779 F. Supp. 2d 588, 602 (S.D. Tex. 2011) (quoting *Hayward v. U.S. Dep't of Labor*, 536 F.3d 376, 379-80 (5th Cir. 2008)). This determination is neither arbitrary nor capricious.

## VIII. In the event the Court finds merit in any of Plaintiffs' claims, it should invite further briefing on the appropriate remedy.

The Court should grant summary judgment to Defendants on all counts. However, in the unlikely event that the Court sustains any of Plaintiffs' summary judgment arguments, it should allow further briefing on the appropriate remedy. That briefing would show that the proper remedy (if any) would be to remand the matter to the Corps for additional analysis, without vacating the Permit. "The decision whether to vacate depends on [1] the seriousness of the order's deficiencies" and [2] "the disruptive consequences of an interim change that may itself be changed." *Allied-Signal, Inc. v. U.S. Nuclear Reg. Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993) (internal quotation marks omitted); *accord Tex. Ass'n of Mfrs. v. U.S. Consumer Prod. Safety Comm'n*, 989 F.3d 368, 389 (5th Cir. 2021); *Cent. & S. W. Servs. Inc. v. EPA*, 220 F.3d 683, 692 (5th Cir. 2000). Here, the procedural nature of most of the errors alleged by Plaintiffs would retain "at least a serious possibility that the [agency] will be able to substantiate its decision on remand," *Allied-Signal*, 988 F.2d at 151; *accord Tex. Ass'n of Mfrs.*, 989 F.3d at 389. Similarly, the highly disruptive effect of vacatur on the permitting, financing, construction, and operation of this important infrastructure improvement project would weigh heavily against vacatur here. *Allied-Signal*, 988 F.2d at 151; *Texas v. EPA*, 389 F. Supp. 3d at 506.

## CONCLUSION

Plaintiffs fail to meet their burden in demonstrating that the Corps was arbitrary and capricious in issuing the Permit. To the contrary, the record amply supports the Corps' conclusions on each point Plaintiffs raise, and, therefore, the Corps' action in issuing the Permit must be upheld. Accordingly, this Court should deny Plaintiffs' Motion and grant summary judgment to Defendants.

Respectfully submitted this 22nd day of July, 2022.

By: */s/ Kelly D. Brown*

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