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

FEDERAL DEFENDANTS' COMBINED OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND CROSS MOTION FOR SUMMARY JUDGMENT

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SUMMARY OF ARGUMENT

This case involves a U.S. Army Corps of Engineers permit for dredging and certain structures at an existing commercial shipping facility in the Corpus Christi Bay. Intervenor-Defendant Enbridge Ingleside Oil Terminal, LLC, formerly known as Moda Ingleside Oil Terminal, LLC, applied for this permit as part of its plan to both improve existing facilities and increase the width of its "West Ship Basin" to allow construction of additional docks.

The Corps' regulatory authority extends only to dredging activities and activities potentially affecting navigability of waters of the United States (such as pilings). Commensurate with the extent of its regulatory control and responsibility, the Corps prepared an environmental assessment examining the direct, indirect, and cumulative effects of the dredging and construction projects within its jurisdiction. That environmental assessment is 54 pages long and covers myriad issues. It explains the scope of the Corps' review, summarizes and responds to comments, discusses the purpose and need for the project, examines alternatives, discusses the impacts of the proposed permit action, and concludes, based on evidence concerning the nature and extent of those impacts, that the project's impacts would not be significant and would thus not require a more detailed and time-consuming Environmental Impact Statement. The Corps also examined all required factors under the Clean Water Act in its environmental assessment, including, as relevant here, its determination under the CWA that granting the permit was not contrary to the public interest. These conclusions were reasonable and are subject to substantial deference.

On this record, Plaintiffs cannot show the Corps' decision making was arbitrary and capricious. So, instead, Plaintiffs largely ignore the Corps' conclusions. For their National Environmental Policy Act claim, Plaintiffs argue that the Corps should have considered several

issues in more detail, such as the risk of oil spills due to increased vessel traffic at the terminal and the impact on climate change caused by the burning of fossil fuels carried abroad by the vessels. But the Corps does not regulate—and is not here approving—vessel traffic or crude oil transport, and the Corps concluded that its regulations required it to evaluate the environmental effects only of its own permitting action, not the broader consequences of Enbridge's or others' private and commercial activities. Plaintiffs do not even cite, much less meaningfully engage with, these regulations, and Plaintiffs' challenge therefore falls short under the APA. Plaintiffs' other NEPA arguments fail for a similar reason: the Corps analyzed the very issues Plaintiffs complain it did not, just in ways that differ from Plaintiffs' preference. Plaintiffs thus ask this Court to substitute their judgment for that of the Corps, which NEPA and the APA do not allow.

Plaintiffs' CWA arguments are similarly defective. Plaintiffs ignore the fulsome review the Corps conducted under Section 404 of the CWA and its consideration of all relevant factors in reaching its conclusion that granting the permit was not contrary to the public interest. Plaintiffs make no substantive showing that the Corps' analysis was incorrect, let alone arbitrary and capricious.

In sum, Plaintiffs' arguments misunderstand the facts in the administrative record, the law, or both. The Corps' permit decision is adequately supported by the explanations in the Corps' environmental assessment and administrative record; Plaintiffs have not demonstrated otherwise. Thus, this Court should grant summary judgment in favor of Federal Defendants.

STATUTORY AND REGULATORY FRAMEWORK

I. The Clean Water Act ("CWA")

Congress enacted the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To that end, the CWA prohibits the "discharge of any pollutant by any person" except as authorized, by the statute itself or by a

permit granted by the Corps, the Environmental Protection Agency ("EPA"), or an authorized State. *See id.* § 1344 (dredged or fill materials); *id.* § 1342 (other pollutants). The term "Pollutant" is defined to include "dredged spoil . . . rock [and] sand . . . ," and "discharge of a pollutant" means "any addition of any pollutant to navigable waters from any point source." *Id.* §§ 1362(6), (12). Section 404 of the Clean Water Act, *id.* § 1344, authorizes the Corps to issue permits for the discharge of dredged or fill material into waters of the United States when certain conditions are met. *Id.* §§ 1311(a); 1344. The Corps may authorize such permits if the proposed project complies with "all applicable substantive legal requirements, including . . . application of the section 404(b)(1) guidelines." 33 C.F.R. § 336.1(a).

The Corps issues these permits under the guidance and requirements imposed by its regulations, 33 C.F.R. Pt. 320, as well as the CWA Section 404(b)(1) Guidelines developed by the Environmental Protection Agency and the Corps, 40 C.F.R. Pt. 230. The Section 404(b)(1) Guidelines specify that the Corps must ensure that the proposed discharge of dredged or fill material will not cause any significantly adverse effects on human health or welfare, aquatic life, aquatic ecosystems, or recreational, aesthetic, or economic values. 40 C.F.R. § 230.10(c)(1)-(4).

II. The National Environmental Policy Act ("NEPA")

NEPA is a procedural statute requiring federal agencies to consider the potential environmental impacts of their proposed actions, while at the same time providing for public input as to those potential impacts. *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." *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983) (citation omitted). As the Supreme Court has explained, "[i]f the adverse environmental effects of the proposed action are adequately

identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs." *Robertson,* 490 U.S. at 350.

While an environmental impact statement ("EIS") is required for "major Federal actio[ns] significantly affecting the quality of the human environment," NEPA regulations provide that an agency may prepare "a shorter" environmental assessment ("EA") to determine whether an EIS is necessary, and issue a Finding of No Significant Impact ("FONSI") "if [the agency] determines . . . that the proposed action will not have a significant impact on the environment." *Winter v. Nat. Res. Def. Council Inc.*, 555 U.S. 7, 15-16 (2008) (quoting 42 U.S.C. § 4332(2)(C) (2000) and citing 40 C.F.R. §§ 1508.9(a), 1508.13 (2007));[1] *In re Katrina Canal Breaches Litig.*, 696 F. 3d 436, 449 (5th Cir. 2012). An EA is to include "brief discussions of the need for the proposal, of alternatives as required by [42 U.S.C. § 4332(2)(E)], of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted." 40 C.F.R. § 1508.9(b). An EA is intended to be less-detailed than an EIS and "designed to show whether a full-fledged environmental impact statement . . . is necessary." *Spiller v. White*, 352 F.3d 235, 237 (5th Cir. 2003) (internal quotation marks and citation omitted). Where an EA results in a determination that an EIS is not required, the agency must issue a FONSI. *Coliseum Square Ass'n, Inc. v. Jackson*, 465 F.3d 215, 224 (5th Cir. 2006) (quoting *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 757 (2004)).

[1] The Council on Environmental Quality ("CEQ") published a new rule in September 2020 revising earlier NEPA regulations, and issued a phase 1 final rule in April 2022 largely restoring pre-2020 provisions. However, the decision challenged here was subject to the CEQ regulations that preceded these changes. Thus, all citations to CEQ regulations in this brief refer to the regulations codified at 40 C.F.R. Part 1500 (2018), attached as Appendix A to Federal Defendants' Opposition to Plaintiffs' Motion to Permit Extra-Record Evidence and Take Judicial Notice, ECF No. 44-1.

BACKGROUND

I. Factual Background

In January 2020, Intervenor-Defendant Enbridge Ingleside Oil Terminal, LLC ("Enbridge") submitted to the Corps an application for a permit under CWA Section 404 and Section 10 of the Rivers and Harbors Act, 33 U.S.C. § 403, to allow Enbridge to make improvements to its commercial shipping facility in the Corpus Christi Bay.[2] AR000843-901.[3] Specifically, Enbridge requested to dredge the seafloor near its facility to increase the size of its West Ship Basin and to construct a new deep-water ship dock. AR000003. Additionally, Enbridge sought to conduct maintenance dredging operations and to make structural improvements within the East Ship Basin.[4] AR000003.

On April 2, 2021, the Corps issued a Memorandum for Record constituting its Environmental Assessment under NEPA, its evaluation of guidelines issues under Section 404(b)(1) of the CWA, its public interest review, and its statement of findings. AR000101–54. The Corps' EA, comprising 54 pages, considered extensive public comment—including from Plaintiff Ingleside on the Bay Coastal Watch Association—and input from other government agencies, including U.S. Environmental Protection Agency, U.S. Fish and Wildlife Service,

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[2] The Rivers and Harbors Act of 1899 ("RHA") is designed to preserve and protect the Nation's navigable waterways. *United States v. Pa. Indus. Chem. Corp.*, 411 U.S. 655, 663 (1973) (citation omitted). Section 10 of the RHA (codified at 33 U.S.C. § 403) makes it unlawful to, among other things, "excavate or fill, or in any manner to alter or modify the . . . capacity of . . . the channel of any navigable water of the United States, unless" approved by the Corps. 33 U.S.C. § 403; 33 C.F.R. § 322.3(a).

[3] The administrative record is cited using the format in the text accompanying this footnote.

[4] Technically, Enbridge's application was for an amendment to permit SWG-1995-02221 (formerly 17847), issued 15 December 1987, that authorized a dredging and filling operation, construction of a pier and bulkhead, periodic maintenance dredging and transportation of dredged material for the purpose of offshore disposal, and mitigation. AR000103. Since 1987, this permit has been repeatedly amended for various projects. AR000103-04.

Texas Commission on Environmental Quality, and Texas Parks and Wildlife Department. *See* AR000106-26. After considering the information provided by the applicant and all interested parties and assessing the environmental impacts of the proposed permit action, the Corps issued a FONSI. AR000153. The Corps also determined that, with the inclusion of certain measures to minimize adverse effects to the affected ecosystem, the proposed discharge complied with Guidelines issued under Section 404(b)(1) of the CWA and was not contrary to the public interest. AR000153-54. On May 5, 2021, the Corps issued the Section 404 and Section 10 Permit to Enbridge. AR000003-06.

II. Procedural Background

In August, 2021, Plaintiffs filed this action, claiming the Permit was arbitrary and capricious under the APA. Compl., ECF No. 1. Plaintiffs set forth seven theories of liability for their APA claim. *Id.* ¶¶ 91-182 (describing these seven theories as "causes of action" and "claims for relief" (capitalization altered)).

In December 2021, the Corps filed the administrative record, comprising 121 documents and a total of 1,431 pages. Certified Index Admin. R., ECF No. 36-2. Following conferral with the other Parties about the contents of that record, *see* Scheduling Order, ECF No. 33, the Corps filed an amended index with twelve additional documents that were inadvertently omitted from the original administrative record index.[5] *See* Corrected Certified Index Admin. R., ECF No. 39.

In February 2022, Plaintiffs filed their motion asking the Court to evaluate the Corps' decision using evidence outside the administrative record. Pls.' Mot. to Permit Extra-Record Ev. And Take Jud. Not. of Relevant Facts 2-3, ECF No. 43. The Corps and Enbridge filed separate

[5] As stated in the notice of filing the amended record certification, the Corps provided copies of the full amended administrative record to Plaintiffs and to Enbridge. The Corps also provided a copy of the administrative record to the Court via a thumb drive.

responses opposing Plaintiffs' motion. Fed. Defs.' Opp'n to Pls.' Record Mot., ECF No. 44; Enbridge's Opp'n to Pls.' Rec. Mot., ECF No. 45. The Court has deferred ruling on Plaintiffs' record motion pending adjudication of the motions for summary judgment.

Plaintiffs filed their motion for summary judgment on June 9, 2022. Pls.' Mot. for Summ. J., ECF No. 52 ("Pls.' Br."). In that motion, Plaintiffs press eight arguments for why the Corps' permit action was arbitrary and capricious. Pls.' Br. 13-40. Notably, Plaintiffs do not make arguments relating to Claims 3, 4, and 5 of their Complaint. *See* Compl., ¶¶135-62. With respect to the arguments they do press, Plaintiffs largely fail to distinguish between their arguments under NEPA and their arguments under the CWA. Pls.' Br. 13-39. For clarity, this brief separates these statutes—which have differing requirements. Finally, Plaintiffs include "undisputed material facts" in each of their argument sections. *E.g.*, *Id.* at 13. Because the summary judgment "dispute of fact" paradigm is inapplicable to APA cases, *see infra* Standard of Review, this brief does not respond to these statements separately, but incorporates any response in the relevant argument section.

STANDARD OF REVIEW

Judicial review under the APA is limited to the administrative record. 5 U.S.C. § 706 ("[T]he court shall review the whole record or those parts of it cited by a party . . . ."); *Camp v Pitts*, 411 U.S. 138, 142 (1973); *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971); *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 905 (5th Cir. 1983). Under the APA, the district court sits effectively as an appellate tribunal reviewing the agency's record, rather than acting in a de novo fact-finding capacity. *Statoil USA E&P Inc. v. United States Dep't of the Interior*, 352 F. Supp. 3d 748, 757 (S.D. Tex. 2018) (quoting *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083-84 (D.C. Cir. 2001). As such, "summary judgment is the proper

mechanism for deciding, as a matter of law, whether an agency action is supported by the administrative record and consistent with the APA standard of review." *Tex. v. E.P.A.*, 389 F. Supp. 3d 497, 503 (S.D. Tex. 2019) (internal alterations, citations, and quotations omitted). The ordinary Rule 56 standard does not apply. *Louisiana v. Salazar*, 170 F. Supp. 3d 75, 83 (D.D.C. 2016).

Under the APA, the Court must "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The arbitrary-and-capricious standard is "highly deferential" to the agency's decision. *Coastal Conservation Ass'n. v. U.S. Dep't of Com.*, 846 F.3d 99, 111 (5th Cir. 2017). The only question for the Court is "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Sierra Club v. U.S. Dep't of Interior*, 990 F.3d 909, 913 (5th Cir. 2021) (quoting *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989)). The Corps' decision must be upheld so long as its "path could 'reasonably be discerned.'" *Atchafalaya Basinkeeper v. U.S. Army Corps of Eng'rs*, 894 F.3d 692, 699 (5th Cir. 2018).

The APA's deferential standard of review applies equally to claims challenging federal decision making under NEPA and the CWA. *Coliseum Square Ass'n,*, 465 F.3d at 228; *Avoyelles Sportsmen's League*, 715 F.2d at 904. In reviewing the Corps' determinations under either statute, a court "must look at the decision not as a chemist, biologist, or statistician . . . , but as a reviewing court exercising [its] narrowly defined duty of holding agencies to certain minimal standards of rationality." *Gulf Restoration Network v. U.S. Dep't of Transp.*, 452 F.3d 362, 368 (5th Cir. 2006) (quoting *Avoyelles Sportsmen's League*, 715 F.2d at 905). Indeed, the deference owed to an agency is at its height when a court reviews the agency's technical judgments and

predictions. *Balt. Gas & Elec. Co.*, 462 U.S. at 103. An agency is entitled to select the methodology that, in its judgment, it finds appropriate and to rely on the reasonable opinions of its own experts:

> 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 agency may even rely on the opinions of its own experts, so long as the experts are qualified and express a reasonable opinion. 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.

Sabine River Auth. v. U.S. Dept. of Interior, 951 F.2d 669, 678 (5th Cir. 1992) (citing *Marsh v. Oregon Natural Resources*, 490 U.S. 360, 377 (1989)). A "battle of the experts" is inappropriate in a court's review under the APA. *Spiller*, 352 F.3d at 244.

ARGUMENT

I. The Court Should Strike Exhibits to Plaintiffs' Summary Judgment Motion that Are Not Part of the Administrative Record.

The Court should decline to consider the documents Plaintiffs cite in their motion for summary judgment that are not part of the administrative record. APA review is limited to the administrative record, and, therefore, these extra-record materials are irrelevant to the Court's review. *See* Federal Defs.' Opp'n to Pls.' Mot. to Permit Extra-Record Ev., ECF No. 44.

A. Plaintiffs Failed to Follow Court-Ordered Procedures.

The Court should decline to consider the following list of citations and exhibits because, in addition to not being a part of the administrative record, Plaintiffs failed to follow the Court-ordered process to seek judicial consideration of these documents. *See* Scheduling Order, ECF No. 33 at 2. Specifically, Plaintiffs failed (1) to request that the Corps add these documents to the record and/or (2) to move for the Court's consideration of these documents. *See id.*

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

- This webpage is cited at Pls.' Br. 2 n.2.

- Plaintiffs' Ex. 1, "Carr, Ingleside Rise to Crude Prominence (June 18, 2020)"
  - This "blogcast" is cited at Pls.' Br. 31.
- Plaintiffs' Ex. 2, Sanchez Declaration; Ex. 3, Yetzirah Declaration Ex. 4, Nye Declaration
  - Federal Defendants agree that Plaintiffs' Exhibits 2-4 are admissible to show Article III jurisdiction, including standing. Strictly speaking, standing declarations are not extra-record evidence because they are not proffered for the merits of Plaintiffs' claims under the APA. However, the Court should reject Plaintiffs' attempt to use these exhibits on the merits. *See* Pls.' Br. 13, 19.
- Plaintiffs' Ex. 8, "Ingleside on the Bay Coastal Watch Supplemental Comments, Spring 2021"
  - This slideshow is cited at Pls.' Br. 16.
- Plaintiffs' Ex. 10, "Carr, Leaders of the Pack (March 2, 2021)"
  - This webpage is cited at Pls.' Br. 31.
- Plaintiffs' Ex. 11, Public Notice - Corpus Christi Ship Channel Improvement Project
  - This notice is cited at Pls.' Br. 36.
- https://www.hartenergy.com/exclusives/private-equitys-growing-role-180245
  - This webpage cited at Pls.' Br. 17.

B. Plaintiffs' Motion to Permit Extra-Record Evidence and Take Judicial Notice Should Be Denied.

Next, the Court should deny Plaintiffs' pending Motion to Permit Extra-Record Evidence and to Take Judicial Notice of Relevant Facts 2-3, ECF No. 43, and decline to consider the following list of extra-record citations for the reasons stated in Federal Defendants' Response in Opposition to Plaintiffs' Motion to Permit Extra-Record Evidence and Take Judicial Notice, ECF No. 44.

- Plaintiffs' Ex. 5, "Excerpts of NOAA Chart 11307"
    - The Court should decline to take judicial notice of this exhibit, which Plaintiffs cite at Pls.' Br. 13, for the reasons stated at Federal Defs.' Opp'n to Pls.' Record Mot. 15-16, ECF No. 44.
- Plaintiffs' Ex. 6, "Tamez, Tanker Accident in Port Damages Pier"
    - The Court should decline to take judicial notice of this exhibit, which Plaintiffs cite at Pls.' Br. 13, for the reasons stated at Federal Defs.' Opp'n to Pls.' Record Mot. 15, ECF No. 44.
- Plaintiffs' Ex. 7, Cammarata Declaration
    - The Court should decline to consider this exhibit, which Plaintiffs cite at Pls.' Br. 15-20, for the reasons stated at Federal Defs.' Opp'n to Pls.' Record Mot. 8-13, ECF No. 44.
- Plaintiffs' Ex. 9, "April 14, 2021, letter, with attachment, from Patrick Nye to Mark Pattillo, Project Manager, U.S. Army Corps of Engineers"
    - The Court should decline to consider this exhibit, which Plaintiffs cite at Plaintiffs' Br. 16, for the reasons stated at Federal Defs.' Opp'n to Pls.' Record Mot. 8-11, ECF No. 44.
- U.S. Global Change Research Program, Fourth National Climate Assessment (2018), available at https://nca2018.globalchange.gov/.
    - The Court should decline to consider this document, which Plaintiffs cite at Plaintiffs' Br. 31, for the reasons stated at Federal Defs.' Opp'n to Pls.' Record Mot. 15, ECF No. 44.

II. The Corps' Permit Complies with NEPA.

Plaintiffs fail to establish that the Corps violated NEPA in issuing the permit. Most fundamentally, the bulk of Plaintiffs' arguments fail to recognize the threshold scoping decision the Corps made with respect to its NEPA analysis. Namely, the Corps applied its own binding regulations to conclude that its NEPA review should encompass dredging and related construction work. Each of the specific impacts Plaintiffs say the Corps should have analyzed is beyond the scope of the Corps' NEPA analysis. Yet, Plaintiffs do not even mention that scoping decision, much less establish that the Corps acted arbitrarily and capriciously in making it.

Therefore, each of Plaintiffs' arguments that implicates the Corps' scoping decision—including those relating to impacts from an increased risk of oil spills (Pls.' Br. 13-15), impacts to seagrasses (*id.* at 15-25), impacts to the neighboring community (Pls.' Br. 25-29), and climate change impacts of crude oil export (*id.* at 31-33)—necessarily fail. *See infra* Arg. II.A-B, D. Properly considered in light of the Corps' unchallenged scoping decision, the Corps took the required hard look at each area of environmental effects Plaintiffs raise. *See* Arg. II.B, D, *infra*.

Plaintiffs' remaining arguments fare no better. Plaintiffs argue that the Corps' EA should have included a cost-benefit analysis, but NEPA does not require one. Plaintiffs argue the Corps' cumulative impacts analysis should have included more detail on the potential cumulative actions it identified, but the Corps' EA included a cumulative impacts analysis that meets applicable standards. And Plaintiffs argue the Corps should have prepared an EIS, but they fail to demonstrate the Corps acted arbitrarily in concluding that impacts from its action would not be significant.

Thus, as discussed in detail in the following sections, Plaintiffs' NEPA arguments fail.

A. The Corps' Reasonable (and Unchallenged) Scoping Decision Precludes Plaintiffs' Arguments Focused on Impacts from Vessel Traffic.

Plaintiffs argue that the Corps should have considered the risk that vessels using the Ingleside Terminal will spill oil, that those vessels' propeller wash will impact seagrasses in the area, that these vessels will cause noise and light pollution for the neighboring community, and that vessel traffic will increase air pollution from vessel exhaust. Pls.' Br. 11-29. Each of these arguments is premised on the theory that the Corps was required to assess impacts from vessel traffic. True, agencies must consider effects of their actions that are "reasonably foreseeable." *See* 40 C.F.R. §§ 1508.7, 1508.8. But, "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions," the agency may reasonably

exclude that effect from its NEPA analysis. *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 765-70 (2004), *see also Save the Bay, Inc. v. U.S. Corps of Engineers*, 610 F.2d 322, 327 (5th Cir. 1980) (concluding that NEPA did not require the Corps to review effects from the entirety of a private project). The scope of a NEPA analysis "is a delicate choice and one that should be entrusted to the expertise of the deciding agency." *Selkirk Conservation All. v. Fosgren*, 336 F.3d 944, 962 (9th Cir. 2003).

Appendix B of the Corps' NEPA implementing regulations governs the scope of the Corps' NEPA analysis for permit applications. 33 C.F.R. Part 325, App. B. The regulations recognize there may be situations in which "a permit applicant . . . propose[s] to conduct a specific activity requiring a . . . permit (e.g., construction of a pier in a navigable water of the United States) which is merely one component of a larger project (e.g., construction of an oil refinery on an upland area)." *Id.* § 7(b)(1). In these situations, "[t]he district engineer should establish the scope of the NEPA document . . . to address 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." *Id.* In determining the scope of the Corps' "control and responsibility," the Corps considers four "[t]ypical factors" that relate to the extent of federal and Corps regulatory jurisdiction. *Id.* § 7(b)(2).

Here, the Corps applied its Appendix B regulations to scope its NEPA review to include the "structural improvements to the East Basin; the 491-foot bulkhead extension area along the shoreline; the structural improvements and 43-acre dredging footprint (including side slopes) in the West Basin;" as well as compensatory mitigation areas. AR000104-05. This scoping conclusion makes sense, because "[t]he Corps' jurisdiction under CWA is limited to the narrow issue of the filling of jurisdictional waters." *Ohio Valley Env't Coalition v. Aracoma Coal Co.*,

556 F.3d 177, 195 (4th Cir 2009); *see also Atchafalaya Basinkeeper v. U.S. Army Corps of Eng'rs*, 894 F.3d 692, 701 (5th Cir. 2018) ("the Corps' responsibility under the CWA is to ensure the protection of aquatic functions and services, which does not include the protection of tree species as such"); 33 U.S.C §§ 403, 1344. The laundry list of effects Plaintiffs argue the Corps should have considered—all of which are premised on the assumption that vessel traffic will increase as a result of the Ingleside Terminal expansion—fall outside the scope the Corps reasonably determined should apply to its NEPA review here. *See Ctr. for Biological Diversity v. U.S. Army Corps of Engineers*, 941 F.3d 1288, 1295 (11th Cir. 2019) (upholding NEPA scoping that "dr[e]w the line at the reaches of [Corps] jurisdiction"); *Kentuckians for the Commonwealth v. U.S. Army Corps of Eng'rs*, 746 F.3d 698, 710 (6th Cir. 2014) (upholding similarly limited scoping); *Ohio Valley Environmental Coalition v. Aracoma Coal Co.*, 556 F.3d 177, 197 (4th Cir 2009) (similar); *see also City of Shoreacres v. Waterworth*, 420 F.3d 440 (5th Cir. 2005) (recognizing, though ultimately not deciding, same principle).

Tellingly, Plaintiffs do not cite—much less engage with—the Corps' scoping regulations in Appendix B. *See* Pls.' Br. 13-29. That failure is dispositive of their vessel traffic theory. Under the APA, "[a]n agency's decision is presumptively valid; the plaintiff bears the burden of showing otherwise." *Texas Tech Physicians Assocs. v. U.S. Dep't of Health & Hum. Servs.*, 917 F.3d 837, 844 (5th Cir. 2019) (citation omitted). A complete failure to engage with the scoping decision plainly fails this burden. Moreover, "failure to brief an argument in the district court waives that argument in that court." *Lopez v. River Oaks Imaging & Diagnostic Grp., Inc.*, 542 F. Supp. 2d 653, 659 n.9 (S.D. Tex. 2008); *see also United States v. Jackson*, 426 F.3d 301, 304 n.2 (5th Cir. 2005) (arguments raised for the first time in reply are waived). Because the Plaintiffs wholly ignore the Corps' scoping determination under Appendix B, Plaintiffs' vessel

traffic arguments—including their oil spill, seagrass, noise and light pollution, and air pollution contentions—necessarily fail. Pls.' Br. 13-29, 31-32.

B. The Corps Took the Requisite Hard Look at All Reasonably Foreseeable Impacts Resulting from Its Permit Action.

Properly considered in light of the Corps' unchallenged scoping decision, the EA took the requisite hard look at potential environmental effects of the proposed dredging work and the related construction. NEPA regulations require that an EA consider direct, indirect, and cumulative impacts flowing from the proposed federal action. 40 C.F.R. § 1508.9(b). "The Supreme Court has held that an agency takes a sufficient 'hard look' [at impacts of its action] when it obtains opinions from its own experts, obtains opinions from experts outside the agency, gives careful scientific scrutiny and responds to all legitimate concerns that are raised." *Hughes River Watershed Conservancy v. Johnson*, 165 F.3d 283, 288 (4th Cir. 1999) (citing *Marsh*, 490 U.S. at 378-85). In each area Plaintiffs identify, the Corps' EA does exactly this.

Plaintiffs contend that additional detail was required for each area they identify. Pls.' Br. 13-29. But "NEPA does not require maximum detail." *Tinicum Twp., Pa. v. U.S. Dep't of Transp.*, 685 F.3d 288, 296 (3d Cir. 2012). Instead, NEPA review involves "a series of line-drawing decisions," each of which is entitled to deference. *Id.*; *see Atchafalaya Basinkeeper*, 894 F.3d at 699 ("Perhaps the Corps' discussion might have been improved with the addition of certain details, but the Corps' path could reasonably be discerned." (internal quotation omitted)).

As demonstrated below, the Corps discussed each issue in a manner proportionate to its importance to the Corps' permit action. *Cf.* 40 C.F.R. § 1502.2(b) (for an EIS, "[i]mpacts shall be discussed in proportion to their significance. There shall only be brief discussion of other than significant issues."); *Hapner v. Tidwell*, 621 F.3d 1239, 1245 (9th Cir. 2010) (same proportionality requirement in context of environmental assessment).

Risks of oil spills, leaks, and accidents. The Corps determined that the risk of oil spills and other similar hazards resulting from the Corps' action to permit dredging in the existing terminal were negligible.[6] AR000126, 137-40. That is unsurprising given the Corps' action approved construction activities relating to regulated dredging rather than aspects of the broader expansion project—like whether the terminal will in fact see an increase in traffic of vessels carrying crude oil. *See* AR00105. Given the scope of the Corps' analysis, it was reasonable not to include an in-depth discussion of the risk of oil spills, since the risk of an oil spill occurring because of the construction activities the Corps permitted is low. *See* AR000126, 137-40; *cf. Hapner*, 621 F.3d at 1245 (observing that NEPA does not require in-depth discussion of minor impacts). Plaintiffs do not contend otherwise. Pls.' Br. 14-15. Indeed, Plaintiffs do not argue that the risk of an oil spill from the construction activities the Corps considered was greater than the Corps estimated. Instead, Plaintiffs fall back on the faulty assumption—without supporting argument—that the Corps should have considered the effects of vessel traffic and onshore facilities that it did not authorize. *Id.* at 14 (arguing the Corps should have disclosed risks of oil spill from "[t]he number of tankers and the volume of oil" and "[t]he expanded onshore facilities"). As discussed, the Corps reasonably concluded these issues were beyond the scope of its NEPA analysis, and Plaintiffs do not directly contend otherwise.[7] *See supra* Arg. II.A.

[6] Plaintiffs make much of a handful of passing references in the EA to liquefied natural gas rather than crude oil transportation. Such technicalities or typographical errors are not a basis for relief under the APA. *See, e.g.*, *PAM Squared At Texarkana, LLC v. Azar*, 436 F. Supp. 3d 52, 59 (D.D.C. 2020) (noting that "[a] missed citation or clerical mistake may be 'harmless error'" (quotation omitted)).

[7] Plaintiffs' cite to NOAA charts and a news article about an oil tanker that lost power. The documents are extra-record evidence the Court should not consider.S*ee supra* Arg. I,. Plaintiffs' reference to them also relies upon the assumption that vessel traffic was relevant to the Corps' analysis. That is incorrect. *See supra* Arg. II.A.

Plaintiffs principally rely on *Ocean Advocates v. U.S. Army Corps of Engineers*, 402 F.3d 846 (9th Cir. 2005) for their contrary argument. Pls.' Br. 14. But this out-of-circuit decision is non-binding and, in any event, distinguishable. True, the Ninth Circuit determined in *Ocean Advocates* that the Corps should have analyzed the risk of oil spills in detail because that risk was reasonably foreseeable. 402 F.3d at 868-69, 875. And though Plaintiffs do not cite the case for this proposition, the Ninth Circuit also determined in *Ocean Advocates* that the risk of oil spills had a sufficiently close causal relationship that the Corps should have analyzed it. *Id.* But the Ninth Circuit reached this conclusion without reference to the Corps' NEPA scoping regulations in Appendix B. Given Plaintiffs' failure to brief the issue here, Plaintiffs' reliance on *Ocean Advocates* is misplaced.

Plaintiffs also cite *Sierra Club v. Sigler*, 695 F.2d 957, 975 (5th Cir. 1983), where the Fifth Circuit concluded a Corps permit was invalid for failing to include a worst-case scenario analysis of oil tanker spills. Pls.' Br. 14. But subsequent changes to the NEPA regulations struck the worst-case scenario requirement. *See Robertson*, 490 U.S. at 354 ("[A] 'worst case analysis' was required at one time by CEQ regulations, but those regulations have since been amended.").

In sum, the Corps' discussion of the risk of oil spills in its EA, though brief, was reasonable in light of the scope of the Corps' analysis and given the Corps' conclusion that the risk of an oil spill from the permitted construction activities was not significant.

Impacts to water quality and seagrasses. The Corps analyzed and discussed impacts of the proposed construction activities on seagrasses. As the EA acknowledges, "the West Slip area does have a seagrass area . . . that would be impacted by the proposed dredging and bulkhead extension." AR000103. Specifically, "[t]he impacts that are expected in that area from the proposed project are the dredging of 43 acres of aquatic habitat, which includes 8.86 acres of

submerged aquatic vegetation." *Id.* In its discussion of alternatives, the EA describes each potential alternatives' total dredge area and, for on-site alternative 2, noted greater impacts to aquatic vegetation. AR000129-30. The Corps' EA also observed that the proposed dredging operations would likely cause "temporary impacts to benthic populations and temporary turbidity." *Id.* As the Corps' EA notes, however, Enbridge "will employ turbidity curtains to minimize any impacts to adjacent seagrasses" and "[a]ny turbidity that will result from the project will be localized and settle out of the water quickly." AR000131. Similarly, the EA describes Enbridge's proposal to "install approximately 1,350 linear feet of 44-foot-wide articulated block mattress to stabilize the dredge side slope to prevent erosion that might affect nearby seagrass beds" and a plan to monitor these adjacent beds for five years. AR000102; AR000003-04. After describing these impacts and project components, the Corps' EA notes that it considers effects of turbidity and effects on vegetated shallows to be negligible. AR000132-33.

This discussion constitutes the required hard look, and Plaintiffs do not meaningfully contend otherwise. Pls.' Br. 21. Rather, Plaintiffs again argue that the Corps should have considered an entirely separate category of effects: "impacts from current and increased vessel operations." *Id.* As discussed, the Corps reasonably concluded that vessel operations are beyond the scope of the Corps' analysis, which focuses on impacts from dredging and related construction. *See supra* Arg. II.A.

Plaintiffs' arguments that the Corps' analysis constitutes no more than bare assertions and does not "supply hard data" fail for this same reason. *See* Pls.' Br. 22. The Corps provided hard data about the total acreages, locations, and impacts to seagrass beds caused by dredging and related construction work. AR000103, 129-33. No more was required under the "rule of reason" governing NEPA review. Under that rule, courts "refuse[] to 'flyspeck' the agency's findings in

search of 'any deficiency no matter how minor.'" *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1322-23 (D.C. Cir. 2015) (citations omitted); *see also City of Shoreacres v. Waterworth*, 332 F. Supp. 2d 992, 1005 (S.D. Tex. 2004), *aff'd*, 420 F.3d 440 (5th Cir. 2005) ("[C]ourts should not 'fly speck' environmental impact statements—courts should be guided by a rule of reason."). Given the extensive discussion of seagrass impacts contained in the Corps' EA, Plaintiffs' attempt to paint that analysis as deficient on an issue beyond the scope of the Corps' NEPA analysis fails.

Plaintiffs' contention that the Corps improperly disregarded impacts identified by other agencies fails for this same reason. Pls.' Br. 23. It is true that state and federal agencies identified adjacent seagrasses as a potential area of impact.[8] AR000122; AR000268; AR001440-42; AR000634-354. But these comments, like Plaintiffs' arguments here, concerned impacts from vessel traffic, which are beyond the scope of the Corps' EA. *See supra* Arg. II.A. In the context of an EIS, NEPA requires only that "[t]he Corps . . . consider the comments of other agencies." *Roanoke River Basin Ass'n v. Hudson*, 940 F.2d 58, 64 (4th Cir. 1991). "[I]t need not defer to them when it disagrees." *Id.* Rather, the Corps need only "address[] the specific comments of the other agencies, and explain[] why it found them unpersuasive." *Id.*; *see also Akiak Native Cmty. v. U.S. Postal Serv.*, 213 F.3d 1140, 1146-47 (9th Cir. 2000) (same); *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 201 (D.C. Cir. 1991) ("[U]nder the rule of reason, a lead agency does not have to follow the EPA's comments slavishly—it just has to take them seriously"). As in other areas, these requirements are relaxed when an agency prepares an EA rather than an EIS.

[8] These agency comments also make Plaintiffs' duplicative extra-record submissions on seagrass impacts unnecessary. *See* Fed. Defs.' Opp'n to Pls' Record Mot. 8-13, ECF No. 44. Indeed, Plaintiffs largely cite their own extra-record evidence alongside agency comments in their factual recitation concerning seagrass impacts (Pls.' Br. 15-21).

See Cal. Trout v. FERC, 572 F.3d 1003, 1016 (9th Cir. 2009) ("NEPA does not require federal agencies to assess consider and respond to public comments on an EA to the same degree as it does for an EIS . . . ." (quotations and alterations omitted)).

The Corps' treatment of agency comments satisfies NEPA. The Corps' EA summarized each of the other agencies' comments in detail, included Enbridge's responses to those comments, provided the Corps' own responses, and referred to the sections of the EA that addressed specific concerns. *See* AR000106-125. The administrative record reflects that the Corps coordinated with these other agencies to provide them an opportunity to say whether Enbridge had addressed their concerns. AR000119 (noting that "[t]he applicant's response was forwarded to the commenting agencies"); AR000363-73 (correspondence with state and federal agencies). The Corps then summarized these follow-on comments and addressed them in the EA. AR000119-25. This level of coordination satisfies NEPA.

Take, for example, the Corps' coordination with the Fish and Wildlife Service. After reviewing Enbridge's responses to its first round of comments, the Fish and Wildlife Service, raised only "three points of clarification." AR000366. The first of these points concerned the long-term effects of sedimentation on seagrasses in the area due to vessel traffic. AR000366. The Service recommended "an adaptive management plan which includes a minimum of 5 years of monitoring the sea grasses" and "actions to take if the sea grasses are shown to decline." *Id.* Though this impact is beyond the scope of the Corps' EA, the Corps noted that Enbridge adopted the Service's suggestion in full. AR000122. This sequence of events demonstrates that Plaintiffs misuse these other agencies' comments. Plaintiffs seek to use the Service's comments to show that the Corps failed to consider seagrass impacts while at the same time ignoring that the

specific recommendations the Service made were actually adopted by Enbridge and described in the Corps' EA.

Finally, Plaintiffs seize on the inclusion in the Corps' EA of a statement from Enbridge's engineers determined "'the slope stabilization measures provide adequate protection to avoided seagrasses'" as demonstrating that the Corps' analysis lacked independence. Pls.' Br. 21-22. But Enbridge made this point in responding to the Fish and Wildlife Service's concern about seagrass impacts from "vessel wakes." AR000108. Again, the Corps reasonably concluded that impacts from vessel traffic were beyond the scope of the Corps' NEPA analysis.

Nor do Plaintiffs actually demonstrate a lack of independence on this issue. Plaintiffs invoke 40 C.F.R. § 1506.5. That regulation requires that the agency "independently evaluate the information submitted," "be responsible for [environmental documents'] accuracy, scope, and contents," and list agency personnel who prepared environmental documents and verified information submitted by applicants. 40 C.F.R. § 1506.5(b)(2). As the Fifth Circuit has noted, "[t]he intent of the controlling regulations is that acceptable work completed by parties outside the agency not be redone." *Save Our Wetlands, Inc. v. Sands*, 711 F.2d 634, 642 (5th Cir.1983) (quotation and alteration omitted). "If the Corps independently and carefully reviewed [outside information] and verified its data, then the Corps properly performed its regulatory function." *Id.* at 643. The Corps' EA includes a separate section for the "Corps' evaluation of [Enbridge's] response," summarizing the subject matter of the various comments and noting whether commenter concerns were satisfied and where the EA contains additional discussion. AR000125. This discussion presumptively indicates the Corps conducted an independent analysis, and Plaintiffs point to nothing in the record—as is their burden—to contradict this presumption. *See Coliseum Square*, 465 F.3d at 236 (holding "plaintiffs have not shown that . . . [agency's]

reliance on [outside] study . . . [was] arbitrary and capricious"); *Tex. Oil & Gas Ass'n v. U.S. E.P.A.*, 161 F.3d 923, 934 (5th Cir. 1998) (noting "presumption of regularity" that attaches to administrative action "places a considerable burden on the challenger" (quotations omitted)). Plaintiffs' independence argument thus fails.

In sum, the Corps' EA adequately considered effects on seagrasses stemming from its proposed permit action under NEPA.

Impacts of noise, air, and light pollution on neighboring communities. The Corps' EA also analyzed impacts flowing from its permit action to neighboring communities, including potential noise, air, and light pollution.[9] On the subject of noise and light pollution, the Corps' EA recognizes that "[d]uring construction activities, there would be short term, temporary adverse impact upon the aesthetics and land use of the project site caused by the presence of construction equipment and the generation of noise," but "the activities would be performed during daylight hours, be temporary, and be within normal ranges for construction equipment." AR000139. Thus, the Corps determined that impacts to aesthetics and land use would be negligible. AR000137. With respect to air pollution, the Corps determined that the construction and dredging activities authorized by the permit would not exceed de minimis levels under the Clean Air Act. AR000152. Moreover, the Corps' EA described temporary emissions associated with the operation of construction equipment in conjunction with its discussion of climate change. AR000139.

Plaintiffs again argue that this discussion was insufficient because it does not "provide hard data and analysis of light and noise impacts of existing and expanded operations" and does

[9] Plaintiffs separate their argument on air pollution into a separate section in their brief. Pls.' Br. 27-29. This brief analyzes this issue together with other alleged impacts to neighboring communities, as Plaintiffs' impacts-related arguments all fail for the same reason.

not provide "hard data on vessel numbers and actual emission rates." Pls.' Br. 27, 28. But, again, Plaintiffs focus on an issue beyond the scope of the Corps' analysis—future operation of the terminal and the spectre of increased vessel traffic. These arguments thus fail for the reasons already discussed. *See supra* Arg. II.A.

Plaintiffs' arguments also fail because the Corps' EA *does* discuss potential impacts of vessel traffic on the neighboring community. Specifically, even though not required under the Corps' scope determination, the Corps' EA notes that light and sound impacts from vessel traffic will be mitigated by the preservation of "70 acres of forested habitat separating [the terminal] from [Ingleside on the Bay] to reduce the light and sound impacts to the community" and this "buffer [will] remain[] in perpetuity." AR000124. Likewise, the Corps' EA notes that potential air pollution in the form of nitrous dioxide is "well under EPA's 50 parts per billion threshold for health risks," and Enbridge "has air monitoring systems in place as well as all required safety plans," which "have been developed to meet all local, state, and federal requirements." AR000124-125. This information was provided in the Corps' EA as Enbridge's responses to comments; nonetheless, the Corps noted that it believed these responses satisfied all relevant concerns. AR000125. Thus, even though not required to do so under the Corps' scope of review, the fact that the Corps' EA discusses impacts to the neighboring community from vessel traffic belies Plaintiffs' arguments on this point.

C. Plaintiffs' Argument that the EA Should Have Documented and Weighed Costs and Benefits Is Unfounded.

Plaintiffs next argue that the Corps' EA violates NEPA by discussing economic benefits without balancing them against costs like the risk of oil spills and climate change. Pls.' Br. 29-30. But NEPA does not require a formal or quantified cost-benefit analysis. *See Webster v. U.S. Dep't of Agric.*, 685 F.3d 411, 430 (4th Cir. 2012) ("[A]n agency need not include a cost-benefit

analysis in an EIS when comparing the different alternatives."); 40 C.F.R. § 1502.23 (listing requirements "*[i]f* a cost-benefit analysis . . . is being considered" (emphasis added)). Indeed, even in the context of an EIS, the Corps' regulations prohibit such an analysis. 33 C.F.R. Part 325, App. B(9)(b)(5)(d) ("The Corps shall not prepare a cost-benefit analysis for projects requiring a Corps permit.").

Importantly, the section of the EA Plaintiffs cite is the Corps' analysis of public interest factors under the CWA, not NEPA. *See* AR000137-38; 33 C.F.R. § 320.4(a) (setting out required public interest review); 33 C.F.R. Part 325, App. B(7) ("The EA should normally be combined with other required documents."); Pls.' Br. 19. In another case where the Corps reasonably limited the scope of its analysis under Appendix B, the Sixth Circuit rejected the argument "that the Corps violated its NEPA regulations by considering the positive economic impacts of the overall mining project without considering the public health impacts of the overall mining operation." *Kentuckians*, 746 F.3d at 711. As the court pointed out, "[t]his argument fails to take into account that the Corps has other obligations besides . . . NEPA," including "analyses required by the [CWA]." *Id.* The same is true here—the Corps considered economic benefits under its CWA analysis; this does not trigger a requirement under NEPA to analyze costs or impacts that are otherwise beyond the EA's scope. *See id.*[10]

Plaintiffs cite *Sierra Club v. Sigler*, 695 F.2d 957, 977-78 (5th Cir. 1983), for their contrary argument. There, the Fifth Circuit concluded that once the Corps decided to discuss possible benefits, it should have included some discussion of costs. *Sigler*, 695 F.2d at 979. But

[10] NEPA's implementing regulations encourage combining NEPA analysis with other required analysis; here, the Corps did so in analyzing NEPA and the CWA in one document. *See* 40 C.F.R. § 1506.4 ("Any environmental document in compliance with NEPA may be combined with any other agency document to reduce duplication and paperwork.").

Sigler did not involve a combined EA and CWA decision document as here; rather, it evaluated an EIS, where NEPA's requirements are more stringent. And, unlike in *Sigler*, the "costs" Plaintiffs contend should have been discussed here—climate change impacts from the burning of fossil fuels and the risk of oil spill—were excluded based on the Corps' reasonable and unchallenged scoping decision. *See supra* Arg. II.A. Finally, even if applicable, *Sigler* does not require "a formal monetary analysis," but only "a broad, informal cost-benefit analysis" that need not take any particular form. *Id.* at 978, 979 n.15. The Corps' EA identifies relevant negative effects of the proposed dredging and construction activities, including risks to public health and safety and climate change, in addition to discussing benefits as required under the CWA. *See supra* Arg. II.B (discussing hard look at various impacts).

D. The Corps' EA Includes a Sufficient Discussion of Climate Change.

Plaintiffs are also wrong that the EA's climate change discussion was insufficient. *See* Pls.' Br. 31-34. The Corps noted in its EA that "[t]he proposed activities within the Corps federal control and responsibility likely will result in a negligible release of greenhouse gases into the atmosphere when compared to global greenhouse gas emissions" that contribute to climate change. AR000139. Specifically, "[a]quatic resources can be sources and/or sinks of greenhouse gases," as some "sequester carbon dioxide whereas others release methane," such that "authorized impacts to aquatic resources can result in either an increase or decrease in atmospheric greenhouse gas." *Id.* In any event, the Corps concluded, "[t]hese impacts are considered de minimis." *Id.* Emissions from fossil fuels used to operate construction equipment were also considered, but these impacts "likely would result in a negligible release of greenhouse gases into the atmosphere when compared to global greenhouse gas emissions." AR000139. NEPA requires a level of analysis proportionate with the seriousness of impacts. *See Hapner*, 621 F.3d at 1245 (discussion of climate change was adequate because it was "in proportion to its

significance" where project involves relatively minor impacts). In light of the Corps' conclusion that greenhouse gas emissions resulting from its permit action were de minimis and negligible, the Corps' discussion of those potential impacts was reasonable.

Plaintiffs cast all this analysis aside by arguing that the Corps' failure to analyze the climate change impacts of increased oil exports was arbitrary and capricious. Pls.' Br. 32, 34 (faulting "[t]he Corps' failure to consider the climate change impacts of oil exports"). But, as discussed, the Corps reasonably scoped its NEPA analysis to focus on impacts from dredging and related construction. *See supra* Arg. II.A. As the Corps explained in its climate change analysis, its climate change analysis instead would focus on "[g]reenhouse gas emissions from the Corps action." AR000139. Though Plaintiffs clearly disagree with the Corps' decision to analyze the climate change impacts "from the Corps action" rather than broader impacts from the private project, they have provided no basis for holding that scoping decision arbitrary and capricious. Indeed, Plaintiffs utterly fail to engage with the Corps' binding regulations dictating the scope of NEPA review. *See supra* Arg. II.A.

Plaintiffs also misconstrue the authorities they cite. Plaintiffs contend that *Columbia Riverkeeper v. U.S. Army Corps of Engineers*, 2020 WL 6874871 (W.D. Wash. Nov. 23, 2020), an unpublished case from a district court in the Ninth Circuit, is "directly analogous." Pls.' Br. 32. That case rejected an agency's decision to analyze climate change on a localized, rather than global, scale. 2020 WL 6874871, at *4. Here, the Corps' analysis was in fact global—the Corps expressly reviewed and disclosed the impacts of greenhouse gas emissions "within the Corps federal control and responsibility . . . compared to *global* greenhouse gas emissions." AR000139 (emphasis added). Moreover, *Columbia Riverkeeper* concerned construction of a new facility rather than, as here, an expansion of an existing commercial facility. *Id.* at *1.

The remaining authorities Plaintiffs discuss are readily distinguishable. Plaintiffs cite three cases involving natural gas pipelines and terminals regulated by the Federal Energy Regulatory Commission ("FERC").[11] *See* Pls.' Br. 33-34 (citing *Food & Water Watch v. FERC*, 28 F.4th 277, 289 (D.C. Cir. 2022); *Sierra Club v. FERC*, 867 F.3d 1357, 1372 (D.C. Cir. 2017); *Vecinos para el Bienestar de la Comunidad Costera v. FERC*, 6 F.4th 1321, 1329 (D.C. Cir. 2021)). But, as the District Court for the District of Columbia has explained, natural gas facilities are "subject to a federal permitting scheme under the Natural Gas Act," whereas the Corps has no analogous comprehensive regulatory authority over oil and gas facilities. *Sierra Club v. United States Army Corps of Engineers*, 64 F. Supp. 3d 128, 155 (D.D.C. 2014), *aff'd sub nom. Sierra Club v. U.S. Army Corps of Engineers*, 803 F.3d 31 (D.C. Cir. 2015). In *Sierra Club*, the court declined "to require the Federal Defendants to conduct an environmental impact assessment of the parts of the . . . [p]ipeline [at issue in that case] over which the federal government has no control." *Id.* The same principle applies to Plaintiffs' argument here: the Corps' authorization relates to dredging and related construction work, not "emissions that result from the combustion of fossil fuels." AR000139. And it scoped its analysis to review dredging and related construction activities. AR000104-05. These FERC-related cases are thus inapposite.

The other four cases Plaintiffs cite are of the same ilk because they relate to decisions to approve activities on federal land, not, as here, to a permitting decision for limited aspects of a commercial facility on private land, over which the Corps does not otherwise possess regulatory

[11] Even the case law relating to FERC's NEPA analyses is more mixed than Plaintiffs indicate. The D.C. Circuit has held that "FERC, in licensing physical upgrades for an LNG terminal," need not "evaluate the climate-change effects of exporting natural gas," because "FERC had no legal authority to consider the environmental effects of those exports, and thus no NEPA obligation stemming from those effects." *Sierra Club*, 867 F.3d at 1372 (explaining three prior D.C. Circuit cases) (citations omitted). As discussed, this same rule applies here. *See supra* Arg. II.A.

authority. *See 350 Montana v. Haaland*, 29 F.4th 1158, 1164 (9th Cir. 2022) (relating to approval "to expand coal development and mining operations into 2,539.76 acres of the remaining federal coal lands"); *Sovereign Inupiat for a Living Arctic v. Bureau of Land Mgmt.*, 555 F. Supp. 3d 739, 751 (D. Alaska 2021) (requiring the Bureau of Land Management to analyze downstream greenhouse gas emissions before deciding whether to approve "oil and gas development . . . under leaseholds in the northeast area of the National Petroleum Reserve in Alaska"); *Ctr. for Biological Diversity v. Bernhardt*, 982 F.3d 723, 731, 738-39 (9th Cir. 2020) (analyzing Bureau of Ocean Energy Management decision to approve oil exploration lease on federally-held outer continental shelf); *Utah Physicians for a Healthy Env't v. U.S. Bureau of Land Mgmt.*, 528 F. Supp. 3d 1222, 1225, 1227 (D. Utah 2021) (analyzing Bureau of Land Management approval of a lease expansion to "expand onto federal lands and implicate federal mineral rights"). Equally revealing, none of these decisions involves a scoping analysis similar to the Corps' determination here that it should, under its binding regulations, evaluate the effects of construction and should not include in its analysis the export of crude oil, which the Corps has no authority to authorize. *See id.*; AR000139. Plaintiffs' analogy thus fails.

E. The Corps' Cumulative Impacts Analysis Complied with NEPA.

Plaintiffs also fault the Corps' cumulative impacts analysis. Pls.' Br. 34-37. Cumulative impacts are "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. A cumulative impacts analysis focuses only on those areas in which the agency's action would have an effect. *See Nw. Envt'l. Advocates v. Nat'l Marine Fisheries Serv.*, 460 F.3d 1125, 1140 (9th Cir. 2006) (observing that no assessment at the cumulative impact level is required for environmental issues on which agency action would have no effect); *Inland Empire Pub. Lands Council v. U.S. Forest Serv.*, 88 F.3d 754, 764-66 (9th Cir. 1996) (approving agency

limitation of cumulative impacts analysis limited to watershed). As with other areas in the EA, the Corps' analysis of cumulative impacts is properly limited to those resulting from those aspects of a private project that are within the Corps' control and responsibility. *See supra* Arg. II.A.

Here, the Corps' EA included a description of the geographic scope of its cumulative effects assessment, the North Corpus Christi Bay watershed (AR000143); a description of the environmental effects from the proposed action (AR000143-44); a summary of other past and reasonably foreseeable future actions within the North Corpus Christi Bay watershed both outside and within Corps jurisdiction (AR000143-44), a description of the impacts of these other actions (AR000144-45); and disclosed "the overall impacts that will result from the proposed activity, in relation to the overall impacts from past, present, and reasonably foreseeable future activities" (AR000146). Based on this analysis, the Corps concluded that "the incremental contribution of the proposed activity to cumulative impacts in the [North Corpus Christi Bay watershed], are not considered to be significant." AR000146.

Plaintiffs muster no specific criticism of this cumulative impacts analysis beyond a bare demand for more detail. Plaintiffs make the conclusory claim that "[t]he Corps . . . plainly has information about the past and reasonably foreseeable future projects within its jurisdiction, but there is no quantified or specific information about the [*sic*] things." Pls.' Br. 37. Plaintiffs provide no authority for the proposition that the form they prefer for a cumulative impacts analysis was required. Indeed, the EA's cumulative impacts analysis includes each of the five elements the D.C. Circuit has identified, in the context of an EIS, as hallmarks of a meaningful cumulative impacts analysis. *See TOMAC, Taxpayers of Michigan Against Casinos v. Norton*, 433 F.3d 852, 864 (D.C. Cir. 2006) (listing five items "that a 'meaningful cumulative impact

analysis must identify'" (citation omitted)). Importantly, however, the standards applicable here are not the same as for an EIS. Rather, the Fifth Circuit has upheld a less fulsome cumulative impacts analysis where, as here, the agency makes a finding that cumulative impacts will not be significant. *Fath v. Tex. Dep't of Transp.*, 924 F.3d 132, 139-40 (5th Cir. 2018) (holding that a full cumulative impacts analysis is unnecessary "where . . . [the agency] does not expect a project to have any significant environmental impact that can 'accumulate' with the impacts of other actions"); *Atchafalaya Basinkeeper*, 894 F.3d at 704 ("[A] finding of no incremental impact relieves an agency of the necessity of extensive and ultimately uninformative discussion of cumulative effects . . . ."). Because the Corps' EA passes muster under either standard, Plaintiffs cannot show it was arbitrary and capricious in its consideration of cumulative impacts.

Revealingly, Plaintiffs do not point to a single action—Corps-authorized or otherwise—that the Corps' EA failed to consider in its cumulative impacts analysis. Pls.' Br. 37. Plaintiffs contend that the Port of Corpus Christi Authority Channel Deepening Project was available and thus should have been included in the EA's cumulative impacts analysis. *Id.* But the Corps' EA identified "expansion of the Port of Corpus Christi facilities" and "the CCSC Improvement Project" as potentially cumulative actions. AR000145. A brief discussion sufficient to identify potentially cumulative actions is all that is required. *See TOMAC*, 433 F.3d at 864. For their contention that more is required, Plaintiffs cite only cases evaluating EISs, which are held to a higher standard than the EA at issue here. Pls.' Br. 36 (citing *Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372, 1379 (9th Cir. 1998); *Tex. Comm. on Nat. Res. v. Van Winkle*, 197 F. Supp. 2d 586, 619 (N.D. Tex. 2002)); *see Spiller*, 352 F.3d at 237 (An "EA is a rough-cut, low-budget environmental impact statement designed to show whether a full-fledged environmental impact statement . . . is necessary.").

In two sentences (also without legal authority), Plaintiffs contend that "[t]here is no regulation or other authority that allows the Corps to restrict its consideration of cumulative impacts and reasonably foreseeable future impacts to five years in the past and five years in the future." Pls.' Br. 37. This argument has the burden exactly backwards. It is Plaintiffs that must submit legal authority to demonstrate the Corps' approach was arbitrary and capricious, not the other way around. Indeed, "[t]he selection of the scope of . . . [NEPA review] is a delicate choice and one that should be entrusted to the expertise of the deciding agency." *Selkirk Conservation All. v. Forsgren*, 336 F.3d 944, 962 (9th Cir. 2003) (citation omitted) (upholding three-year temporal scope); *see also Barnes v. FAA*, 865 F.3d 1266, 1274 (9th Cir. 2017) (upholding "five to ten years" as "forecasting time frame for this project"). Plaintiffs have provided nothing to rebut the presumption that the Corps' decision on this point was correct, and this undeveloped contention therefore fails.

F. The Corps Reasonably Concluded that Any Environmental Impacts from Its Action Were Not "Significant," and, Thus, that an EIS Was Not Required.

Plaintiffs have also failed to show that the Corps acted arbitrarily in its decision not to undertake an EIS. While an EIS is required for "major Federal action[s] significantly affecting the quality of the human environment," the applicable regulations provide that an agency may prepare "a shorter" EA to determine whether an EIS is necessary, and issue a [FONSI] "if it determines . . . that the proposed action will not have a significant impact on the environment." *Winter*, 555 U.S. at 15-16 (quoting 42 U.S.C. § 4332(2)(C) (2000) and citing 40 C.F.R. §§ 1508.9(a), 1508.13 (2007)). Under the NEPA regulations applicable here, agencies are to consider both context and intensity in determining whether a project's effects are significant enough to require an EIS. 40 C.F.R. § 1508.27. These regulations list ten factors for an agency's consideration of intensity. *Id.* These factors are not categorical rules, but guide the agency's

determination. *Spiller*, 352 F.3d at 243. "Under the highly deferential standard afforded to agencies pursuant to NEPA, . . . it is not the job of the federal courts to intervene" in the significance determination, which should be upheld as long as it is reasonable. *Id.* at 243-44; *see also Marsh*, 490 U.S. at 376-77.

The Corps' significance determination should be upheld so long as "each factor was 'in some way addressed and evaluated.'" *Coliseum Square Ass'n*, 465 F.3d at 240 (quoting *Spiller*, 352 F.3d at 243). Here, the Corps reasonably concluded, "[a]fter reviewing . . . agency comments, the applicant's responses, the project plans, and the mitigation, . . . that an EIS is not required."[12] AR000126.

Plaintiffs contend the impacts here trigger five of the ten intensity factors, though Plaintiffs provide only one sentence of explanation on three of these factors. Pls.' Br. 38-39. Plaintiffs' largely conclusory contentions on specific intensity factors also fail on their own merits:

Controversy. One intensity factor is "[t]he degree to which the effects on the quality of the human environment are likely to be *highly* controversial." 40 C.F.R. § 1508.27(b)(4) (emphasis added). But "'controversial' is usually taken to mean more than some public opposition . . .—rather it requires a substantial dispute as to the size, nature, or effect of the major federal action." *Coliseum Square*, 465 F.3d at 234 (internal quotations, alterations, and citation omitted). Though Plaintiffs point to comment letters from the general public and other agencies concerning the project, they cite to nothing indicating that the "size, nature, or effect" of the Corps' permit action is in dispute. Indeed, the two agency comments Plaintiffs cite—

[12] This conclusion, as well as the Corps' EA as a whole, belies Plaintiffs' conclusory statement that "[t]he Corps essentially deferred to the applicant's assertion that no EIS was required." Pls.' Br. 39.

comments from EPA and FWS—do not present evidence disputing the Corps' determination of the nature and size of effects from the proposed dredging and bulkheading permit. *See* AR000107-09 (summary of agency comments). Importantly, the EA demonstrates that the Corps did what it was required to with these comments—it "addressed and evaluated" them. AR000113-25; *Coliseum Square*, 465 F.3d at 234. Because "[P]laintiffs do not adduce evidence suggesting that [the Corps'] evaluation was insufficient, but simply assert disagreement," their controversy arguments fail. *Id.*

Unique Characteristics. Another intensity factor is "[u]nique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas." 40 C.F.R. § 1508.27(b)(3). Plaintiffs point to seagrasses and cultural resources as supporting their showing on this factor. But Plaintiffs ignore that the EA addressed both, concluding that impacts to seagrasses and cultural resources would not be significant. *See* AR000102-03, 129-31; *supra* Arg. II.B. It specifically concluded that the area of cultural importance to the Karankawa descendants is in the upland and not implicated by the Corps' permit. AR000138. And the potential uniqueness of wetlands cannot, standing alone, equate to significance. After all, "it was the project's impact on wetlands that required a permit from the Corps in the first place." *Sierra Club v. Van Antwerp*, 661 F.3d 1147, 1154 (D.C. Cir. 2011), *as amended* (Jan. 30, 2012). The Fifth Circuit has repeatedly upheld under NEPA Corps EAs analyzing permits impacting wetlands. *See, e.g.*, *Atchafalaya Basinkeepers*, 894 F.3d at 698-99; *Louisiana Crawfish Producers Ass'n-W. v. Rowan*, 463 F.3d 352, 359 (5th Cir. 2006).

Uncertainty. Plaintiffs contend the Corps' action is highly uncertain "because [Enbridge] supplied no information about vessel traffic and other critical issues." Pls.' Br. 39. But, even if

Plaintiffs had seriously engaged on this argument, the vessel traffic issue Plaintiffs raise is beyond the scope of the Corps' EA. *See supra* Arg. II.A.

Other actions. Plaintiffs say this action is "'related to other actions' like the expansion of the Corpus Christi ship channel." Pls.' Br. 39. That misstates this intensity factor, which asks whether "the action is related to other actions with individually insignificant but cumulatively significant impacts." 40 C.F.R. § 1508.27(b)(7). Plaintiffs offer no evidence that any expansion of the Corpus Christi ship channel is a "related" project. And, as discussed, the Corps reasonably concluded that the proposed action would not have any significant impacts when considered cumulatively with other actions, including the ship channel expansion. *See supra* II.E.

Public health or safety. Plaintiffs point to "light and noise impacts on the neighboring community, the possibility of oil spills, and not least [the action's] clear connection to climate change." Pls.' Br. 39. This single sentence is insufficient to demonstrate the Corps did not adequately consider this factor. In any event, as shown throughout this brief, the Corps discussed each of these issues and determined they did not rise to the level of significance under NEPA. *See supra* II.B, D.

Thus, Plaintiffs cannot show the Corps' treatment of the intensity factors was arbitrary and capricious.

III. The Corps' Permit Complies with the CWA.

Plaintiffs likewise fail to establish that the Corps' permitting violated the CWA.

As an initial matter, several of Plaintiffs' purported CWA claims should be rejected for failing to set forth reasoned argumentation. In several instances, Plaintiffs claim aspects of the Permit violate the CWA and NEPA, but then discuss only the relevant NEPA standard. For example, Plaintiffs argue that the Corps' permit violates both statutes by failing to take a "hard look" at oil-spill risks. *See* Pls.' Br. 13-14 (Arg. § 6). However, the "hard look" standard arises

out of NEPA alone, *Robertson*, 490 U.S. at 350, and Plaintiffs' argument relies solely on NEPA cases, *see* Pls.' Br. 13-14 (Arg. § 6). Thus, Plaintiffs' statements that the Corps' oil-risk analysis also violates the Clean Water Act—without any CWA support whatsoever—are insufficient to state a claim. *See Hernandez v. Reno*, 91 F.3d 776, 780 n.14 (5th Cir. 1996) ("No authority is cited nor is a reasoned argument advanced and we do not consider these issues."). Plaintiffs repeat this conflation error throughout their brief. *See*, *e.g.*, Pls.' Br. 29-30 (Arg. § 10) (contending that the Corps' climate-change analysis violates the CWA but citing and discussing only NEPA authorities). The Court should decline to consider Plaintiffs' conclusory arguments that invoke the CWA in name only. *See United States v. Griffith*, 522 F.3d 607, 610 (5th Cir. 2008) (observing that failure to raise an issue constitutes a waiver of that argument).

On the merits, Plaintiffs' brief can be interpreted as raising two CWA arguments: (A) the Corps' public interest review underestimated costs to seagrasses and failed to engage in a reasoned balancing in violation of 33 C.F.R. § 320.4(a)(1), (b)(4), *see* Pls.' Br. 25-29; and (B) the Corps' cumulative impacts analysis inadequately considered certain impacts in violation of 33 C.F.R. § 230.1(c), Pls.' Br. 37-38. These arguments lack merit. The Corps' public interest analysis, its balancing, and its cumulative impacts analysis met all applicable requirements of the CWA, its regulations, and the 404(b)(1) Guidelines.

A. The Corps' Public Interest Review Was Not Arbitrary or Capricious.

Plaintiffs challenge the Corps' public interest review. *See* Pls.' Br. 25, 29–30. The CWA requires that "a permit *will* be granted unless the district engineer determines that it would be contrary to the public interest." 33 C.F.R. § 320.4(a)(1) (emphasis added). In conducting its public interest review, the Corps evaluates the probable impacts of a project for which a permit is requested, based on a list of factors that include general environmental concerns, wetlands, floodplain values, and safety. *See id.* The Corps balances the benefits that reasonably may be

expected to accrue from the proposal against its reasonably foreseeable detriments and then decides whether to authorize a proposal. *Id.* In permits involving the alteration of certain wetlands, the Corps also considers whether the benefits outweigh the damage to the relevant wetlands resources. 33 C.F.R. § 320.4(b)(4).

Here, the Corps considered all relevant factors and determined that the Ingleside Terminal expansion proposal was not contrary to the public interest. AR000137-40. The project's benefits include, *inter alia*, improved navigation along the La Quinta Channel, the increased supply and availability of energy and petroleum products, and economic benefits for the applicant. AR000138. The Corps determined that these benefits would be permanent and "more than minimal." AR000140. As for the detriments, the Corps determined that construction activities would lead to increased turbidity in the water column, more noise, and an added human presence to the natural environment. AR000138. However, "[a]ll of these effects would return to normal levels once the project is complete and construction activities have ceased." AR000138. The Corps therefore determined that the project would have "negligible effects" on the environment. AR000138. In sum, the Corps determined that the project's benefits outweighed its detriments. AR000138; *see also* AR000150 (concluding that the benefits outweighed the damage to the relevant wetlands resources under 33 C.F.R. § 320.4(b)(4)).

In their brief, Plaintiffs contend that the Corps' public interest review was insufficient. *See* Pls.' Br. 25, 29-30. Specifically, Plaintiffs complain that (1) the analysis failed to account for damage to seagrass beds, including damage from existing terminal operations, *id.* at 21-25; (2) the "EA contains no data or analysis showing that the public's needs and welfare will benefit" from the permit, *id.* at 29-30; and (3) that the Corps failed to provide a reasoned analysis for its cost-benefit balancing, *see id.*. Plaintiffs are wrong on all three contentions.

First, the Corps *did* account for damage to the seagrass beds. *See supra* 18-20; AR000103. The Corps squarely acknowledged both direct and indirect impacts of the proposed project. *See supra* 18-20; AR000103 (estimating the proposed project would impact "8.86 acres of submerged aquatic vegetation and 0.80 acre of estuarine emergent wetlands," and that "[a]n additional 0.15 acre of estuarine emergent wetland will be lost due to indirect impacts resulting from the project"). While Plaintiffs say the Corps should have given more consideration to the effects of turbidity from *existing* terminal operations, existing terminal operations are beyond the scope of the Corps' permit decision. *See supra* Arg. II.A; *see also Water Works & Sewer Bd. of the City of Birmingham v. U.S. Dep't of Army, Corps of Eng'rs*, 983 F. Supp. 1052, 1068 (N.D. Ala. 1997), *aff'd*, 162 F.3d 98 (11th Cir. 1998) ("[T]he 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).") Furthermore, Plaintiffs' contention about impacts from existing terminal operations is based on the Cammarata Declaration—which is extra-record evidence that Plaintiffs failed to submit to the Corps and is irrelevant for purposes of APA review. *See* Fed. Defs.' Opp'n to Pls.' Rec. Mot. 8-13, ECF No. 44.

Second, Plaintiffs' unsupported contention that the expanded terminal has *no benefits* is flatly contradicted by the record. *See* Pls.' Br. 29–30. The project would result in several benefits that Plaintiffs ignore, such as improved navigation along the La Quinta Channel, economic benefits for the applicant, and increased the supply and availability of energy for the general public. AR000138. Plaintiffs attempt to discount this last stated benefit—the increased supply of energy—on the ground that the Enbridge facility is an export terminal. Pls.' Br. 29-30. But the Corps' statement is accurate on its face; more oil exported into the international market increases

the supply of energy, which benefits the general public. AR000138. Plaintiffs' attempts to downplay and outright ignore the benefits of the project are unpersuasive.

Third, Plaintiffs' conclusory argument that the Corps failed "to provide any reasoned analysis" for its balancing decision is simply false. As described above, the Corps considered all relevant factors and determined that the Ingleside Terminal expansion proposal was not contrary to the public interest. AR000137-40. While Plaintiffs clearly disagree with the outcome of the Corps' "weighing of all [the] factors," the Corps' decision was neither arbitrary nor capricious. *U.S. Sugar Corp. v. EPA*, 830 F.3d 579, 606 (D.C. Cir. 2016) (quoting *Nat'l Ass'n of Clean Air Agencies v. EPA*, 489 F.3d 1221, 1228 (D.C. Cir. 2007)).

B. The Corps' CWA and 404(b)(1) Guidelines Cumulative Impacts Analyses Were Appropriate and Neither Arbitrary Nor Capricious.

Plaintiffs contend that the Corps' cumulative impacts analyses were arbitrary or capricious under the CWA on the ground that the analysis underestimated adverse effects to seagrasses and "provides no information about how past and probable future activities" have adversely affected "special aquatic sites and water qualities." Pls.' Br. 37. Plaintiffs neither elaborate on these allegations nor set forth any legal authority supporting them. This CWA cumulative analysis argument, which is simply tacked on to the end of Plaintiffs' NEPA cumulative analysis, fails to meets their burden to set forth reasoned argumentation and is therefore waived. *See Hernandez*, 91 F.3d at 780 n.14 ("No authority is cited nor is a reasoned argument advanced and we do not consider these issues." (citation omitted)).

Even if Plaintiffs had properly set forth their argument, it would fail as it is contradicted by the Corps' decision document. As described above, the Corps expressly conducted a cumulative effects assessment. *See* AR000142-47; *supra* Arg. II.E. The Corps' EA included a summary of other past and reasonably foreseeable future actions within the North Corpus Christi

Bay watershed both outside and within Corps jurisdiction, AR000143-44, explained that impacts from the Corps' approval of dredging here would be short-term, AR000145, and concluded that "[w]hen considering the overall impacts that will result from the proposed activity, in relation to the overall impacts from past, present, and reasonably foreseeable future activities, the incremental contribution of the proposed activity to cumulative impacts in the [North Corpus Christi Bay watershed], are not considered to be significant," AR000146.

The Corps' cumulative impacts assessment is consistent with the Fifth Circuit's most recent precedent on the issue. In *Atchafalaya*, the Fifth Circuit observed that the Corps' approach was sufficient where it considered "past, present and reasonably foreseeable future actions" and relied on a mitigation plan to minimize effects. *Atchafalaya*, 894 F.3d at 703. The Corps took the same approach here. *See* AR000145-46.

The Corps properly applied the requirements of the CWA, its regulations, and the Section 404 Guidelines when making its cumulative impact determinations. The Corps' action is appropriate and neither arbitrary nor capricious. Plaintiffs' cumulative impacts arguments as to the CWA for Ingleside Terminal permit are without merit.

CONCLUSION

Plaintiffs fail to demonstrate that the Corps failed to consider a required factor or otherwise committed a clear error of judgment. To the contrary, the record amply supports the Corps' conclusions on each point Plaintiffs raise, and, therefore, the Corps' permit should be upheld. Accordingly, this Court should deny Plaintiffs' motion for summary judgment and grant summary judgment to Federal Defendants.

Respectfully submitted,

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