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

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

PLAINTIFFS' RESPONSE TO FEDERAL DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

The Corps is charged under the National Environmental Policy Act with informing its own decision and the public by taking a "hard look" at the environmental impacts of the expansion of the Moda terminal. As the Plaintiffs' motion for summary judgment demonstrated, the Corps' review was far from the required hard look – so far that the Corps actually said the expansion was to allow for non-existent liquefied natural gas tankers.

In its response and cross-motion, the Corps' headline argument is that the Corps' permitting is so insignificant to the Moda expansion that the Court should not even review the Corps' treatment of oil spill risks, impacts to seagrasses and climate change from the vessel traffic that is the purpose of the expansion. According to the Corps, its conclusory and unsupported consideration of these impacts was actually a decision to limit its analysis to the direct impacts of dredging in the footprint of the expansion, and the Plaintiffs have not challenged that decision specifically enough.

This is a post-hoc argument of convenience that is directly contrary to the Corps' statements in the record. The stated purpose of the Moda expansion permit was to allow more and larger oil tankers to use the Moda terminal. NEPA's implementing regulations require that the Corps consider and inform the public of the direct, indirect and cumulative impacts of the federal action, which in this case is allowing more and larger tankers.

Numerous commenters, including other agencies, brought up the impacts of increased vessel traffic, but *never once* before filing its brief did the Corps claim it could not consider these impacts because it was confining its review to the direct impacts of dredging in the footprint of the expansion. In short, this post-hoc argument is an attempt to limit judicial review of a clearly inadequate NEPA document and dredge and fill permit decision.

Beyond its attempt to limit judicial review, the Corps relies heavily on general statements and appeals to deference to defend its conclusory analysis. Again, this is contrary to the agency's obligation to take a "hard look" at impacts to the human environment and inform the public of those impacts.

II. APPLICABLE LAW

Several principles of administrative review are relevant to reviewing the Corps' cross-motion. First, an agency decision must be affirmed on the grounds stated by the agency in the record, not on post-hoc rationalizations first made in the reviewing court. *E.g., Hill v. Norton,* 275 F.3d 98 (D.C. Cir. 2001). In this case the Corps relies almost exclusively on the idea that it was allowed to ignore indirect and cumulative impacts of its action by narrowing the scope of its NEPA process, a claim that was never articulated in the record.

Second, although the Court generally defers to properly supported agency determinations, the Court "must overturn agency actions which do not scrupulously follow the regulations and procedures promulgated by the agency itself." *Sierra Club v. Marin,* 168 F.3d 1, 4 (11th Cir. 1999) (citation omitted). Here, the Corps did not follow its own regulations, and this requires reversal and a remand.

Finally, the Corps cannot simply rely on *ipse dixits* and demand deference. If that were the case, the Court would have no role in reviewing the Corps' actions. As one court put it:

> As a result, allowing the Forest Service to rely on expert opinion without hard data either vitiates a plaintiff's ability to challenge an agency action or results in the courts second guessing an agency's scientific conclusions. As both of these results are unacceptable, we conclude that NEPA requires that the public receive the underlying environmental data from which a Forest Service expert derived her opinion. In so finding, we note that NEPA's implementing regulations require agencies to "identify any methodologies used and [] make explicit reference by footnote to the scientific and other sources relied upon for conclusions" used in any EIS statement. 40 C.F.R. § 1502.24.

Idaho Sporting Cong. v. Thomas, 137 F.3d 1146, 1150 (9th Cir. 1998), *partially overruled on other grounds, Lands Council v. McNair,* 537 F.3d 981 (9th Cir. 2008).

III. ARGUMENT

A. THE CORPS' CLAIM THAT IT HAD NO OBLIGATION TO CONSIDER RISKS FROM VESSEL TRAFFIC IS CONTRARY TO THE RECORD AND THE LAW.

The Corps argues that assessing increased vessel traffic and oil volumes and the impacts to the human environment that will flow from them are not required because the Corps has "limited statutory authority." Dkt. No. 53, pp. 12-13. The Corps did not raise this defense in response to comments about effects of terminal operations, or in its answer in this Court. There is a good reason it did not. This is a post-hoc rationalization of the Corps' failure to consider these key issues, and it is contrary to the governing law.

Although the Corps (twice) incorrectly defined the purpose of the action as accommodating Liquefied Natural Gas tankers, the record reflects that the purpose and benefit expected from this project is to accommodate more and larger oil tankers, including Suezmax tankers. *E.g.,* AR 128. Moda said the purpose was to "accommodate increasing demand," and "ensures the applicant meets the demands of current and future committed customers." AR 847, AR 118-19. The permit application specifically references Suezmax tankers. AR 847, 883. The Corps' summary judgment motion does not address the purpose of the Moda expansion.

The purpose is confirmed by the Moda Expansion EA's description of the benefits of the project:

> The proposed work would have economic benefits for the applicant since the applicant would be able to accommodate Suezmax vessels for the export of petroleum products. The project would also benefit the needs and welfare of the general public by increasing the supply and availability of energy. The proposed work would improve navigation along La Quinta Channel as the proposed work

will enhance navigational access to the site.

AR 138. The Moda Expansion EA goes on to state: "The beneficial effects of adequately meeting the public's need for the transportation of petroleum *via marine shipping* will continue until the public's need is no longer present." AR 140 (emphasis supplied).

Binding Fifth Circuit precedent requires the Corps to consider all of the risks that come along with the claimed benefits of the Moda expansion project. In *Sierra Club v. Sigler*, 695 F.2d 957, 968–75 (5th Cir. 1983), the Corps included the benefits of a dredging and oil terminal project in its NEPA document, but left out increased risk of collision and oil spill, pollution from the additional industrial development, fire and explosion hazards and general socio-economic costs. *Id.*at 976. That is exactly what the Corps has done here. *Sigler* stands directly for the proposition that the Corps must consider the impacts of the activity its permitting is designed to make possible.

The Corps' own regulations require the same thing as *Sigler.* The Corps' regulations at 33 C.F.R. Part 325, App. B confirm that vessel traffic and operations impacts must be considered. As noted above, the Corps defined the purpose and benefits of the project as accommodating increasing demand for oil, allowing Suezmax tankers, and transportation of petroleum by marine shipping. As the Corps' regulation states, "[i]n all cases, the scope of analysis used for analyzing both impacts and alternatives should be the same scope of analysis used for analyzing the benefits of a proposal." 33 C.F.R. pt. 325, App. B § (7)(b)(3). Those regulations also state that:

> Similarly, if an applicant seeks a DA permit to fill waters or wetlands on which other construction or work is proposed, the control and responsibility of the Corps, as well as its overall Federal involvement would extend to the portions of the project to be located on the permitted fill.

Id.

The Corps' "limited statutory authority" argument is typically raised in the context of upland developments such as golf courses or power lines, when the dredge and fill activity is limited to adjacent wetlands and other building takes place on uplands. The regulation that the Corps cites includes several factors to be considered to determine "control and responsibility," and these factors focus on activity outside waters of the United States:

> 1) [w]hether or not the regulated activity comprises "merely a link" in a *corridor type project (e.g. a transportation or utility transmission project);*
>
> 2) [w]hether there are aspects of *the upland facility* in the immediate vicinity of the regulated activity which affect the location and configuration of the regulated activity;
>
> 3) [t]he extent to which the entire project will be within Corps jurisdiction; and
>
> 4) [t]he extent of cumulative Federal control and responsibility.

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

Here, of course, essentially the entire project is within Corps jurisdiction; the dredge and fill permitted by the Corps is for the specific purpose of expanding the number and size of oil tankers using the expanded Moda terminal, and the impacts of that expanded traffic take place entirely in waters of the United States.

The Corps acknowledges, as it must, that under the Council on Environmental Quality NEPA regulations it is required to consider direct, indirect and cumulative impacts flowing from its proposed action. Dkt. No. 53, p. 15; 40 C.F.R. § 1508.9. Indirect impacts are those "which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R. § 1508.8(b). The Corps must also consider the direct, indirect, and cumulative impacts of "past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." *Id.* § 1508.7.

Again, as in *Sierra Club v. Sigler, supra,* this includes vessel traffic that the project is intended to make possible. Another example is *Fox Bay Partners v. U.S. Corps of Eng'rs*, 831 F. Supp. 605, 608 (N.D. Ill. 1993). There, the Corps rejected a marina proposal because it would "contribute to severe overcrowding of recreational boats on the Fox River and Chain-O-Lakes." The issue was not the relatively minor amount of dredge and fill associated with the permit, but the increase in vessel traffic the permitted activity would bring about.

Without the dredge and fill of waters of the United States, there would be no expansion of the terminal and no increase in number and size of tankers. The vessel impacts, lights, noise, transport of oil and other issues are not activities taking place "beyond the Corps' jurisdiction." They are taking place in the actual footprint of the project, in waters of the United States, in the area of the permitted dredge and fill. This is the exact area over which the Corps has "control and responsibility."

Under the governing federal regulations, the turbidity, noise, light pollution and other impacts of existing and future tanker traffic are at the least indirect and cumulative impacts. Expanding tanker traffic is the reason for the Corps action. There is no excuse for the Corps to ignore these impacts as "beyond its jurisdiction."

The cases cited by the Corps establish that the direct, indirect and cumulative impacts from vessel operations and increased oil throughput at the Moda terminal are required to be assessed under NEPA. *Dep't of Transportation v. Public Citizen*, 541 U.S. 752 (2004), examined whether the Federal Motor Safety Carrier Administration should have examined effects from Mexican trucks entering the United States. The Supreme Court found that the FMCSA had no authority to deny trucks entry if they met minimum requirements, and thus examining environmental impacts would not serve NEPA's purpose of informing the

decisionmaker. Per the Supreme Court, this was a situation in which "an agency has no ability to prevent a certain effect due to its limited statutory authority." 541 U.S. at 770. Per the Court, this meant there was no "reasonably close causal relationship" between the environmental effect and the federal action. The majority opinion stated that NEPA is governed by a rule of reason, and that the causation test is similar to proximate causation in tort law. *Id.* at 769.

Here, impacts from vessel traffic are both reasonably foreseeable and have considerably more than a "reasonably close causal relationship" with the Corps' action. An impact is "reasonably foreseeable" if a "person of ordinary prudence would take it into account in reaching a decision." *City of Shoreacres v. Waterworth*, 420 F.3d 440, 453 (5th Cir. 2005). In this case increased vessel traffic is the actual purpose of the Corps action, and impacts from vessel traffic was raised repeatedly. If there isn't going to be any increased vessel traffic or throughput, there is no reason to issue this permit. This permit is directly intended to support increased vessel traffic and oil transport from the Moda terminal.

Consistent with its emphasis on statutory authority, *Public Citizen* states that the usefulness of the information to the federal agency decision making process is a key factor. *See also Oregon Natural Desert Ass'n v. BLM*, 531 F.3d 1114, 1130 (9th Cir. 2008) (the considerations made relevant by the substantive statute driving the proposed action must be addressed in NEPA analysis). In this case the Corps has full authority to deny the permit and was directly required by its regulations to consider matters like the impacts from tanker traffic. Dredge and fill permits that have more than minimal adverse effects, or otherwise don't meet the CWA's substantive standards, cannot be issued. 33 U.S.C. § 1344(e)(1); 40 C.F.R. § 230.1(c). The Corps is prohibited from approving a project "unless it can be demonstrated that such a discharge [from the project] will not have an unacceptable adverse impact either individually or

in combination with known and/or probable impacts of other activities affecting the ecosystems of concern." 40 C.F.R. § 230.1(c).

The Corps' public interest review regulation requires "evaluation of the probable impacts, including cumulative impacts, of the proposed activity *and its intended use* on the public interest." 33 C.F.R. § 320.4(a)(1) (emphasis supplied). Regulations explicitly require close consideration of "secondary" effects, defined as "effects on an aquatic ecosystem that are *associated with* a discharge of dredged or fill materials, but do not result from the actual placement of the dredged or fill material." 40 C.F.R. § 230.11(h) (emphasis supplied). The Corps must deny a permit if it finds that it is not in the "public interest." The Corps cannot simply ignore these impacts under either NEPA or the Clean Water Act.

The Corps has full authority to deny the permit based on the direct and indirect effects of the action, which is exactly what the NEPA document should examine. The increase in operations could not take place without the permit.

The Court may also note that the Council on Environmental Quality recently examined the appropriate interpretation of *Public Citizen,* and found the language from that case was limited by its unique context. The CEQ noted that "tort law and NEPA are governed by different principles that serve different policies," and "agencies are better guided by the longstanding principle of reasonable foreseeability and the rule of reason in implementing NEPA's directives." The CEQ determined that its regulations would require only that effects be "reasonably foreseeable," the same regulatory standard that applied when the Corps issued its decision here. 87 Fed. Reg. 23465-66 (2022).

Even applying tort standards the vessel traffic impacts from the Moda expansion are caused by the Corps' action. As the Court is aware, the long-established standard for proximate

cause is cause in fact plus foreseeability. *E.g. Travis v. City of Mesquite*, 830 S.W.2d 94, 98 (Tex. 1992). Here the Corps' decision is to allow vessel traffic on the exact site of the permitting, and nobody seriously contests that there is the potential for impacts from turbidity, the risk of oil spills, light pollution, noise pollution and air pollution. In a tort case this would be a directed verdict on proximate cause.

In the end the question whether the impacts are reasonably foreseeable and therefore must be placed before the public is basically a practical one. As one court put it, "[i]n all of the cases in which Corps jurisdictional disclaimers have been upheld, the activities involving waters of the United States, and therefore invoking Corps jurisdiction and NEPA, were physically, functionally, and logically separable from the activities held not subject to NEPA analysis." *Stewart v. Potts,* 966 F. Supp. 668, 682 (S.D. Tex. 1998). Here, the activities involving waters of the United States are physically, functionally and logically *inseparable* from the increased vessel traffic and other activities that produce the impacts. The dredge and fill here has no independent utility apart from oil tanker traffic. *Wetlands Action Network v. U.S. Army Corps of Eng'rs*, 222 F.3d 1105, 1116 (9th Cir. 2000) ("We have upheld an agency's decision to limit the scope of its NEPA review to the activities specifically authorized by the federal action where the private and federal portions of the project could exist independently of each other.").

The other cases cited by the Corps to claim it has no obligation to consider impacts of vessel traffic all involve situations with upland and remote impacts. *Save the Bay v. U.S. Army Corp of Engineers,* 610 F.2d 322 (5th Cir. 1980), involved a situation of "incidental federal involvement," in which the pipeline at issue was not even necessary for operation of a chemical plant. By contrast, here the federal involvement is necessary for the entire project, and without the federal permit there would be no operation of any vessel or other aspect of the terminal.

Center for Biological Diversity v. U.S. Army Corps of Eng'rs, 941 F.3d 1288, 1295 (11th Cir. 2019), involved a situation in which the Corps issued a permit for a phosphate ore mine but did not assess the effects of the storage of byproducts resulting from remote and future processing of the phosphate ore. The processing and the byproduct storage both took place outside waters of the United States. The court stated there that "Florida has authority over phosphate mining, and the Corps has authority only over U.S. waters." *Id.* at 1303. Here, expanded vessel traffic is the purpose of the Corps action and is taking place in the specific area over which the Corps has jurisdiction.

Kentuckians for the Commonwealth v. U.S. Army Corps of Eng'rs, 746 F.3d 698, 709 (6th Cir. 2014), and *Ohio Valley Environmental Coalition v. Aracoma Coal Co.,* 556 F.3d 177, 197 (4th Cir. 2009), both involved Corps of Engineers permitting related to coal mining, in which the Corps only "played a relatively minor role" and the mining was governed by a "centralized regulatory program" housed in another agency. Neither circumstance is present here, where the Corps is the deciding authority on whether the dredging and filling for the expanded tanker traffic occurs, and the expansion and its effects take place in waters of the United States.

In short, the Corps' assertion that its regulations or the case law exempt it from considering the direct, indirect and cumulative impacts of permitting the expanded marine terminal does not square with the facts of this case.

The Corps' assertion that any challenge to its failure to consider impacts of vessel traffic was waived is likewise a post-hoc argument that is clearly contrary to the record. Plaintiffs had no reason to address the Corps' scoping for two reasons: first, because as set out above the regulation actually requires the Corps to consider the impacts of vessel traffic, and second the

Corps actually addressed – albeit in a conclusory fashion that does not comply with its NEPA obligations – those impacts. The Corps did not even raise this defense in its answer in this Court.

In fact, Section 4.7 of the Moda Expansion EA actually addresses comments that concern "activities and/or effects outside the Corps's purview." AR 126. This section says nothing about the numerous and substantive comments on impacts from existing and expanded operations being "outside the Corps purview."

The impact on seagrasses of turbidity caused by tankers, light pollution, noise pollution and other issues were raised by the Plaintiffs, the U.S. Fish and Wildlife Service ("FWS"), and other parties. For example, the FWS sent the Corps satellite images showing the turbidity from operations and highlighted damages to seagrasses *from operations.* Dkt. No. 52 at 17-18. At this point in the process, if the Corps was going to state that the consideration of these issues was foreclosed by its regulations or a "scoping decision," it would have said so. Instead, it forwarded these comments to Moda for a response, and repeated Moda's consultant's statement that "[t]he existing seagrass beds have persisted for decades adjacent to the existing site which includes regular nearby vessel traffic, including that from within the adjacent Corpus Christi Ship Channel. It is the applicant's engineers' professional judgement (*sic)* that the slope stabilization measures provide adequate protection to avoided seagrass." AR 114, 390. At no point did the Corps tell any of the commenters that consideration of these issues was foreclosed by a "scoping decision." The scoping issue is being presented essentially as a post-hoc justification by the Corps, and it was not waived in any fashion.

B. THE CORPS FAILED TO CONSIDER POTENTIAL OIL SPILL IMPACTS.

"An increased risk of an oil spill caused by an increase in crude oil tanker traffic, for example, is a reasonably foreseeable indirect effect of a proposed dock extension." *Ctr. for*

Biological Diversity v. Bernhardt, 982 F.3d 723, 737 (9th Cir. 2020) (citing *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 867–70 (9th Cir. 2005)).

The Corps does not dispute that it did not consider oil spill risks from operations of the expanded Moda terminal. The Corps also does not dispute that:

- The Moda terminal is the single largest oil storage and export terminal by volume on the Gulf Coast, shipping to destinations including China and Europe.[1]
- The Moda terminal has drastically increased its throughput in recent years.
- The Moda Expansion EA does not contain any information about how the expansion of the Moda terminal will affect the volume of oil to be loaded and transported, the loading facilities for the tankers, or – beyond identifying the tankers as "Suezmax" - the number and types of barges, tankers or other craft that are expected to use the expanded terminal facilities on a daily, annual or other basis.

The only reference to oil spills in the Moda Expansion EA is that "[p]otential detrimental effects due to this project, such as oil spills, have been evaluated in our General Interest review and found to be of negligible, or less, concern (See Section 7.1)." AR 126. Section 7.1 of the Moda Expansion EA does not discuss oil spills or accidents. It does not even contain the words "oil spill" or "accident." AR 137-40.

The National Oceanic and Atmospheric Administration advises particular caution for the area at Aransas Pass and the Lydia Ann Channel, noting that "[s]ituations resulting in collisions, groundings, and close quarters passing have been reported by both shallow and deep-draft vessels." Exhibit 5, Excerpt of NOAA Chart 11307, Aransas Pass to Baffin Bay, p. 3. On March 15, 2021 an oil tanker lost power while moving through the Port and damaged a pier at

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[1] The Corps argues that the Court should not consider this fact, which Moda itself uses as part of its publicity campaign. https://www.enbridge.com/about-us/liquids-pipelines/export-terminals

the Moda terminal itself. Exhibit 6; Exhibit 4 ¶¶ 16-22.

The Corps' only response on oil spill risk is that the Court should ignore this entire issue as beyond the Corps' jurisdiction. With respect to the directly analogous *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 867–68 (9th Cir. 2005), all the Corps has to say is that it is from another circuit, and did not reference the regulations the Corps erroneously claims excuse it from considering vessel traffic impacts.

The Corps further tries to distinguish *Sierra Club v. Sigler*, 695 F.2d 957, 968–75 (5th Cir. 1983) on the basis that a part of that case referenced a since repealed requirement to analyze worst-case scenarios in NEPA documents. This misses the point. *Sierra Club v. Sigler* dealt with permits for a channel and oil terminal project, much like the present one. It is direct precedent that the Corps is required to consider the environmental impact – including oil spills – of the shipping activity its permitting is intended to allow. *Id.*

The Corps characterizes its discussion of oil spill risk as "brief." More accurately it is a single sentence referencing a section of the Moda Expansion EA that does not even contain the phrase "oil spill." The Court cannot defer to a conclusory statement with absolutely no data or other information supporting it. *Oregon Natural Desert Ass'n v. BLM*, 531 F.3d at 1142. The Corps' failure to give any information at all about the risk of oil spills and accidents was clearly arbitrary and capricious and requires reversal under both the National Environmental Policy Act and the Clean Water Act.

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

As with oil spill risk, the Corps does not contest that turbidity caused by tugs and tankers is killing sea grass beds adjacent to the Moda site or that increased vessel traffic will kill more

seagrass. Instead, the Corps again asserts it is not required to consider impacts from current vessel traffic and the increased vessel traffic its permitting is specifically designed to allow. Dkt. 53 at 18.

Despite its assertion that it need not consider effects of operations, the Corps spends considerable time asserting that it actually did so. For example, the Corps argues that it need only "consider the comments of other agencies" like the U.S. Environmental Protection Agency ("EPA"), which stated "it does not appear the applicant has evaluated potential indirect/secondary impacts to the seagrasses adjacent to the proposed facilities . . . ." AR 363. Per the Corps, it needs only to address the specific comments and explain why it found them unpersuasive.

The problem is the Corps cannot point to any place in the record that explains that or even if it found the expert agency comments unpersuasive. In fact, the Corps now states it did not adopt the un-named engineer's statement that "the slope stabilization measures provide adequate protection to avoided seagrass," because the engineer was responding to FWS's concern about vessel wakes, but the Corps did not consider vessel wakes. Dkt. No. 53, p. 21. (This is contrary to Enbridge's argument, which is that the Corps did adopt the statement from the engineer. Dkt No. 54, p. 34.)

The Corps' argument also misses the point: the Corps is required to actually document and present to the public the reasonably foreseeable impacts of its action. The EPA, FWS and public comments make it clear that there has been no evaluation of the reasonably foreseeable indirect and secondary impacts to seagrasses. *Davis v. Mineta*, 302 F.3d 1104 (10th Cir. 2002) ("a reviewing court 'may properly be skeptical as to whether an EIS's conclusions have a substantial basis in fact if the responsible agency has apparently ignored the conflicting views of

other agencies having pertinent expertise.'") *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 361 F.3d 1108 (9th Cir. 2004) ("[T]he Corps never explicitly adopted the claim [raised by FWS] that the project could result in an increase in tanker traffic, leaving [the court] to guess whether it took a hard look at, or even considered, this obvious potential impact.").

The Corps further argues that the Moda Expansion EA includes a section for "evaluation of Enbridge's response." However, the Corps does not contest that Section 4.6 of the Moda Expansion EA, titled "Corps' evaluation of the applicant's response," does not address seagrass loss, but states only "[i]n regard to impacts on the general environmental (*sic*), including fish and wildlife, the applicant's response has satisfied those concerns. See also Sections 5.4, 8.3, and 9.6 for further discussion." AR 125. Sections 5.4, 8.3, and 9.6 of the EA do not discuss the status of seagrasses or the impacts of the existing or expanded operations at the terminal on seagrasses. Rather, these sections discuss concepts of the least environmentally damaging practicable alternative (Section 5.4, AR 130), and compensatory mitigation (Section 8.3, AR 140-41 and Section 9.6, AR 145).

Although it denies that it considered impacts to seagrasses from current or expanded vessel operations, the Corps nonetheless asserts that the Court must presume it independently verified the statement from the unknown engineer. The problem is that nothing in the record demonstrates this. The Corps does not even argue that it identified the persons conducting the independent evaluation as required by 40 C.F.R. § 1506.5. The Corps' own procedures state that "[i]n all cases, the district engineer should document in the record the Corps independent evaluation of the information and its accuracy, as required by 40 C.F.R. § 1506.5(a)." 33 C.F.R. Pt. 325, App. B, § 8(f)(2); *see also Sierra Club v. Lynn,* 502 F.2d 43, 59 (5th Cir. 1974) ("NEPA's commands, however, do not permit the responsible federal agency to abdicate its

statutory duties by reflexively rubber stamping a statement prepared by others."). As the Fifth Circuit has stated, "bare assertion[s]" are "simply insufficient." *O'Reilly v. U.S. Army Corps of Eng'rs*, 477 F.3d 225, 235 (5th Cir. 2007); *Idaho Sporting Cong.*, 137 F.3d at 1150 ("[a]llowing the Forest Service to rely on expert opinion without hard data either vitiates a plaintiff's ability to challenge an agency action or results in the courts second guessing an agency's scientific conclusions. As both of these results are unacceptable, we conclude that NEPA requires that the public receive the underlying environmental data from which a Forest Service expert derived her opinion.").

The Corps also notes that Moda adopted a seagrass monitoring plan, a tacit admission that impacts from operations were addressed. However, adopting a monitoring plan does not satisfy the requirement to document and provide information regarding reasonably foreseeable impacts to the public. "[T]he very purpose of NEPA's requirement that an EIS be prepared for all actions that may significantly affect the environment is to obviate the need for speculation by insuring that available data is gathered and analyzed prior to the implementation of the proposed action." *LaFlamme v. FERC*, 852 F.2d 389, 400 (9th Cir. 1988) (internal citation and quotation marks omitted). The Corps makes no effort to distinguish *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067 (9th Cir. 2011), which establishes that even if "data will be collected sometime in the future, the data is not available during the EIS process and is not available to the public for comment. Significantly, in such a situation, the EIS process cannot serve its larger informational role, and the public is deprived of their opportunity to play a role in the decision-making process." *Id.* at 1084-85; *accord Nat'l Parks Conservation Ass'n v. Babbitt*, 241 F.3d 722, 733 (9th Cir. 2001) (impermissible under NEPA for the agency to "increase the risk of harm to the environment and then perform its studies. . . . This approach has the process exactly

backwards.”).

With respect to the Clean Water Act, the Corps cannot balance the benefits “which reasonably may be expected to accrue” from the action against the “reasonably foreseeable detriments” without considering indirect and “secondary” effects, defined as “effects on an aquatic ecosystem that are associated with a discharge of dredged or fill materials, but do not result from the actual placement of the dredged or fill material.” 40 C.F.R. § 230.11(h). *See also Center for Biological Diversity v. Dep’t of the Interior,* 623 F.3d 633, 647 (9th Cir. 2010) (“Without an accurate picture of the environmental consequences of the land exchange, the BLM cannot determine if the “public interest will be well served by making the exchange’ . . . .”).

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

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

Once again, the Corps disclaims any obligation to consider the noise, light and air pollution impacts of current and expanded vessel and loading operations. It could hardly do otherwise, since the Moda Expansion EA contains no data or information on light and noise from vessel operations, has no information on the increase in tankers and barges resulting from the proposed expansion, and Moda did not respond to comments on noise and light pollution. The Corps’ bare conclusion – in the face of extensive public comment and evidence to the contrary – that these impacts will be “negligible” is exactly the kind of “perfunctory or conclusory language [that] will not be deemed to constitute an adequate record” for NEPA purposes. *O’Reilly,* 477 F.3d at 235; *see also N. Carolina Wildlife Fed’n v. N. Carolina Dep’t of Transp.*, 677 F.3d 596,

602 (4th Cir. 2012) ("Conclusory statements that the indirect and cumulative effects will be minimal or that such effects are inevitable are insufficient under NEPA).

Oddly, the Corps then contends that it actually did consider vessel operations impacts, and found that they would be mitigated by preservation of a tract of land onshore. Dkt. No. 53, p. 23 (citing AR 124). There is, of course, no hard data to back up this assertion either, and tankers do not operate onshore. This assertion by the Corps does demonstrate that the Corps' claim that it confined its review to direct impacts of dredging is a post-hoc justification.

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

E. THE CORPS ONLY ANALYZED BENEFITS FROM EXPANDED TERMINAL OPERATIONS WITHOUT ANALYZING OR INFORMING THE PUBLIC OF THE COSTS OF OPERATIONS.

Sierra Club v. Sigler, 695 F.2d 957, 976 (5th Cir. 1983) is binding circuit precedent that requires – like the Corps' own regulations – that the discussion of costs and impacts must be coextensive with the purpose and purported benefits of the project. 695 F.2d at 978-79. *See also Van Abbema v. Fornell*, 807 F.2d 633, 640-42 (7th Cir. 1986) (economic analysis used inaccurate data, unexplained assumptions, and outdated reports).

Again, the Corps does not argue that it actually evaluated risks such as oil spills, impacts on adjacent property owners, and indirect impacts to seagrasses. The Corps also provides no actual data or analysis on the supposed benefits to the public.

Instead, the Corps again argues it does not have to consider impacts from current and expanded vessel traffic and operations at all. The Corps even argues that the Court should not follow the Fifth Circuit, and instead interpret *Kentuckians, supra,* to mean that the Corps can tout benefits from vessel traffic, but ignore the costs. This is plainly incorrect and contrary to

the basic purposes of NEPA.

The Corps then takes a different tack and argues that it did address vessel operation impacts by including the 70-acre onshore mitigation part of the project. For the reasons already discussed, this claim lacks any data or hard facts to back it up. Tankers operate on water, not on shore.

The Corps also does not address the fact that its failure to provide any reasoned analysis on the balancing of costs and benefits also violates the Clean Water Act, which prohibits impacts to wetlands unless the Corps finds that “the benefits of the proposed alteration outweigh the damage to the wetlands resource.” 33 C.F.R. § 320.4(b)(4). As the Corps did not reply to this argument it presumably confesses judgment on that point.

F. CLIMATE CHANGE IMPACTS FROM OPERATIONS ARE REASONABLY FORESEEABLE.

The Corps does not contest that climate change, caused in large part by the combustion of fossil fuels like the oil the Moda expansion will export, is a defining issue for the human environment. In their opening brief, the Plaintiffs cited the growing number of cases that require federal agencies like the Corps to consider these impacts in their National Environmental Policy Act documents. It is an odd interpretation of the law indeed that asserts there has been a “hard look” at the expansion of a globally significant oil export terminal without considering the climate change impacts of that expansion.

To reach this result the Corps makes broad brush attempts to distinguish the strong consensus of federal cases holding to the contrary. These generalized statements ignore the actual facts and analysis of those cases.

In all of these cases, the action agency asserted, as the Corps does here, that downstream emissions from fossil fuel infrastructure were too far removed from the agency’s jurisdiction to

warrant inclusion in a NEPA document. For example, the Corps asserts that *Columbia Riverkeeper v. U.S. Army Corps of Eng'rs,* 2020 WL 6874871 (W.D. Wash. Nov. 23, 2020), involved only a decision whether to consider greenhouse gas emissions on a localized or global scale. Dkt. No. 53 at 26. In fact, in that case – as in this case – the Corps asserted that the end emissions from methanol production from the project at issue were "too attenuated and far removed from the permitting applications . . . ." *Columbia Riverkeeper*, 2020 WL 6874871 at *4. The district court rejected this claim, finding that the "Corps assertion that these greenhouse gas emissions are outside their jurisdiction does not relieve it of its duty to take a 'hard look.'" *Id.* Under the NEPA regulations, greenhouse gas emissions were quantifiable and "reasonably foreseeable."

The Corps also attempts to distinguish the numerous other federal cases that find agencies must fully consider climate change impacts including the downstream greenhouse gas emissions of fossil fuel related projects. This argument is simply a variation on the Corps' claim that indirect and cumulative impacts are "beyond its jurisdiction."

The fact is that all of the decisions cited in the Plaintiffs' opening brief rely on the clear obligation to consider and inform the public about "reasonably foreseeable" indirect effects of the action. *Food & Water Watch v. FERC*, 28 F.4th 277, 289 (D.C. Cir. 2022) ("We have concluded that the end use of the transported gas is reasonably foreseeable, and the Commission, in response, invokes nothing more than a mere possibility of offsetting reductions."); *Sierra Club v. FERC*, 867 F.3d 1357, 1372 (D.C. Cir. 2017) (reasonably foreseeable that gas transported will be burned and contribute to climate change); *Center for Biological Diversity v. Bernhardt,* 982 F.3d 723, 735 (9th Cir. 2020) (NEPA requires consideration of reasonably foreseeable indirect effects, including overseas emissions from fossil fuels); *Utah Physicians for a Healthy*

Environment v. BLM, 528 F.Supp.3d 1222, 1234 (D. Utah 2021) ("In short, while the cumulative impacts section accomplished much of its NEPA-required mandate, on GHGs it failed to meaningfully describe and discuss relevant information regarding other present and reasonably foreseeable future GHG sources.").

The Corps attempts to distinguish *Inupiat v. BLM,* 555 F.Supp.3d 739 (D. Ak. 2021), *350 Mont. v. Haaland*, No. 20-35411, 2022 U.S. App. LEXIS 8918 (9th Cir. Apr. 4, 2022) and other cases by arguing that they involved federal lands, and characterizes its action here as "a permitting decision for limited aspects of a commercial facility on private land." Dkt. No. 53, p. 27. Again, this is a retread of the Corps' flawed "limited jurisdiction" argument. Without the dredging and construction in waters of the United States – the Corps' jurisdictional domain – there would be no expansion of the facility and no expansion of tanker and barge traffic.

Given the strong consensus and the impacts of climate change that are being felt even now, the Corps' refusal to do its legal duty is not just contrary to the law but a grave disservice to the public. The Corps' failure to consider the climate change impacts of oil exports is another example of its arbitrary and capricious failure to take a "hard look" at the consequences to the human environment of the Moda expansion.

G. THE CORPS PROVIDED NO DATA ON CUMULATIVE IMPACTS.

The Corps defends its cumulative impacts assessment, which looks back only five years, and contains no data about the reasonably foreseeable future actions in the watershed, by arguing that a less developed cumulative impacts analysis is required in an environmental assessment. Dkt. No. 53, p. 30. This claim rests on the assertion that there are no significant environmental impacts from the Corps' permitting the Moda expansion, which the record demonstrates is not correct.

The Corps asserts that its cumulative impacts analysis includes each of the five elements identified in *Taxpayers of Michigan Against Casinos v. Norton*, 433 F.3d 852 (D.C. Cir. 2006), but does not quote those five factors. That court listed the following factors:

> We have held that a "meaningful cumulative impact analysis must identify" five things: "(1) the area in which the effects of the proposed project will be felt; (2) the impacts that are expected in that area from the proposed project; (3) other actions — past, present, and proposed, and reasonably foreseeable — that have had or are expected to have impacts in the same area; (4) the impacts or expected impacts from these other actions; and (5) the overall impact that can be expected if the individual impacts are allowed to accumulate."

Id. at 864.

Here, the Corps has not assessed the full impacts from the proposed project, has arbitrarily limited its assessment to five years in the past and five years in the future, has not listed any impacts at all from the reasonably foreseeable future actions, and has not assessed the overall impacts if the individual impacts are allowed to accumulate. *See Northern Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1077-79 (9th Cir. 2011) (holding that agency arbitrarily and capriciously relied on 5-year timeframe in analyzing possible cumulative impacts from reasonably foreseeable projects).

The Corps asserts that the Plaintiffs have not pointed to any cumulative actions it failed to consider, but immediately concedes that the Plaintiffs identified at least two major projects in the area, directly within the Corps' jurisdiction. The Corps then claims it "identified" these actions, and "a brief discussion is all that is necessary." Dkt. No. 53, p. 30. The discussion of these major projects is so brief that it lacks any data at all.

This is not because the Corps does not have data: its own documents show that the Corpus Christi Channel Deepening Project is "to accommodate transit of fully laden very large crude carriers (VLCCs)," and would create approximately 46 million cubic yards of new work

dredged material from 1,778 acres and deepen that channel to some 80 feet. Dkt. No. 52, pp. 187-88 (Exhibit 11). "[C]umulative impact analyses [are] insufficient when they discuss[] only the direct effects of the project at issue on a small area and merely contemplate[] other projects but [have] no quantified assessment of their combined impacts." *Bark v. U.S. Forest Serv.,* 958 F.3d 865, 872 (9th Cir. 2020). In fact, the record shows the Corps' navigation branch alerted the project team of a "Federal Interest" in the vicinity of the project and requested additional information (AR 813) – the Corps plays a role in keeping the Corpus Christi Ship Channel and other shipping channels in the area open for navigation – but nowhere in the record does it appear that the project team provided additional information or sought information from the navigation branch as to whether the Federal Interest would be impacted by the Moda expansion.[2]

The Corps attempts to excuse its failure to provide any detail, arguing that the "hard data" requirement of *Neighbors of Cuddy Mountain v. U.S. Forest Serv.,* 137 F.3d 1372, 1379 (9th Cir. 1998), and other cases only applies to Environmental Impact Statements. This is clearly wrong. *E.g. Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1244 (9th Cir. 2005) (stating "[t]o 'consider' cumulative effects, some quantified or detailed information is required" in evaluating an Environmental Assessment); *Idaho Sporting Cong.*, 137 F.3d at 1150-52 (invalidating EA for failing to provide underlying environmental data).

In essence, the Corps is asking for deference to unsupported statements in the face of evidence that clearly shows major actions affecting the same area are contemplated, and these actions are of the kind that will affect identified problems of water quality and loss of special aquatic sites like seagrasses. The Corps also argues that it is justified in limiting its evaluation of

[2] The EA states the navigation branch responded to the Corps' inquiry regarding the project on January 22, 2020, indicating "no objection," AR 113, but there is nothing in the record that confirms this. To the contrary, the only correspondence from the navigation branch in the record is dated January 17, 2020, and it indicates a need for additional information. AR 813.

projects with potential cumulative impacts to a period of five years in the past and five years in the future. Dkt. No. 53, p. 31. The governing regulations make clear that a valid NEPA analysis must "[c]onsider the direct, indirect, and cumulative impacts of "past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." 40 C.F.R. § 1508.7. The Corps provides no data or reasoning why its limited time period would capture all of the relevant cumulative impacts. *See Northern Plains Res. Council,* 668 F.3d at 1077-79.

In short, the Corps is again asking the Court to defer to a void. That is contrary to law, and the Corps must prepare a valid cumulative impacts analysis.

H. AN EIS IS REQUIRED.

The Corps' argument that the Moda expansion will have no significant impacts to the human environment again relies on the assertion that it need only consider the narrow impacts of dredging in the footprint of the Moda expansion project, and that it properly considered that narrow class of impacts to be insignificant. Dkt. No. 53, pp. 32-34. These issues have been dealt with elsewhere in the briefing, and the Corps adds little new here.

To trigger the EIS requirement a "plaintiff need not show that significant effects *will in fact occur*;" raising "substantial questions whether a project may have a significant effect" is sufficient. *Idaho Sporting Cong.*, 137 F.3d at 1150. Here, there are many substantial questions.

With respect to whether the project is highly controversial, there is not only the strong public opposition, but also a "substantial dispute as to the size, nature or effect" of the expansion of the Moda terminal. *Coliseum Square Ass'n v. Jackson,* 465 F.3d 215, 234 (5th Cir. 2006). The Moda Expansion EA contains no information about the increase in throughput or vessel traffic the expansion is intended to accommodate. This also demonstrates the uncertainty of

impacts. Without this information, it is impossible to know the risk of oil spills, the increased impacts to special aquatic sites from vessel wake turbidity, the increase in noise and light pollution, and other issues. The Corps' only response to this fact is again the claim that it need not consider the expansion itself, only the dredging.

The Corps also appears to assert that impacts on wetlands can never be a "unique characteristic" for purposes of determining significance. Dkt. No. 53, p. 33, citing *Sierra Club v. Van Antwerp*, 661 F.3d 1147, 1154 (D.C. Cir. 2011). However, that case involved wetlands that the Corps characterized as "moderate quality as they were logged and some of them were ditched," and "not unique or rare in the landscape." *Id.*

By contrast, here many of the impacts are to seagrasses, which are designated as special aquatic sites. Section 9.4 of the EA states that "[k]ey issues of concern in this watershed are water quality and loss of special aquatic sites." AR 144. According to the Corpus Christi Bay National Estuary Program, Corpus Christi/Redfish/Nueces Bays contain nearly 9 percent of all Texas seagrass beds. Texas recognizes seagrass beds as a critical natural resource, and has an extensive state effort to protect them. Dkt. No. 52, pp. 101-2 (Exhibit 7, Declaration of Dr. Kirk Cammarata, at ¶ 5). There is no serious factual dispute that both the direct impacts of dredging and the impacts of operation of the Moda expansion will impact the unique characteristics of the bay.

In short, the Corps' insistence that there will be no significant impacts on the human environment from the Moda expansion is contrary to the facts and the law.

I. THE CORPS FAILURE TO DOCUMENT AND CONSIDER ALL OF THE RELEVANT IMPACTS VIOLATES THE CLEAN WATER ACT.

The Corps asserts that the Plaintiffs did not cite legal authority to show that the Corps decision violated the Clean Water Act. To the contrary, the Plaintiffs' briefing cited the

applicable regulations, and how the Corps' failures to assess the impacts of the Moda expansion violated the requirements of those regulations. The Corps' real complaint seems to be that the Plaintiffs incorporated the violations of the Clean Water Act in the same sections with violations of the National Environmental Policy Act. Dkt. No. 53, p. 35 ("Plaintiffs rely solely on NEPA cases"). The Corps regulations – which like NEPA require assessment of direct and indirect impacts – are the governing law, and that law is cited at the beginning and throughout the Plaintiffs' opening brief. Dkt. No. 52, p. 15 (citing Corps regulations); p. 25 (citing regulations); p. 30 (citing regulations); p. 37 (citing regulations).

It is certainly true that there is overlap between the requirements of the National Environmental Policy Act and the Corps Section 404 public interest analysis. The Corps is prohibited from approving a project "unless it can be demonstrated that such a discharge [from the project] will not have an unacceptable adverse impact either individually or in combination with known and/or probable impacts of other activities affecting the ecosystems of concern." 40 C.F.R. § 230.1(c). 33 C.F.R. § 320.4(a) requires the Corps to consider the probable impacts of the proposed action, its putative benefits, and weigh all "relevant" considerations. *Id*. The Corps must balance the benefits "which reasonably may be expected to accrue" from the action against the "reasonably foreseeable detriments." *Id*. Regulations explicitly require close consideration of "secondary" effects, defined as "effects on an aquatic ecosystem that are associated with a discharge of dredged or fill materials, but do not result from the actual placement of the dredged or fill material." 40 C.F.R. § 230.11(h).

These are functionally similar to the NEPA requirement that the Corps evaluate cumulative, direct and indirect impacts of its permitting decision. The Corps recognizes this by assessing the two requirements in a single document. The same lack of data and analysis that

violate the requirements of the National Environmental Policy Act are also violations of the substantive requirements of the Clean Water Act to consider reasonably foreseeable detriments, unacceptable adverse impacts, and secondary effects.

The substance of the Corps' defense of its Clean Water Act decision is a repetition of its NEPA argument. The Corps asserts that it need not consider any of the effects of the operation of the Moda expansion, and can limit its review to dredging in the footprint of the project. Dkt. No. 53, p. 36. The Corps' argument makes it abundantly clear that the Corps' position is that it can consider all of the claimed benefits of actual operation of the Moda expansion without considering any of its detriments, such as impacts on seagrasses. *Id.* at 36-37. The Corps states that effects from "construction activities" would be temporary and minimal, and then asserts that the benefits of the project to navigation, economic benefits to the applicant, and increased energy supply would be permanent. All of the claimed benefits accrue from operations. In addition, the claimed benefits are conclusory, without supporting data of any kind. The Corps' decision document does not even state the kind or amount of vessel traffic that will use the expanded Moda terminal.

In short, the Corps again makes it clear that it believes it is entitled to put a thumb on the scale by assessing benefits from operations, but not detriments. It further asserts that it may assign benefits without any underlying analysis or data. This is contrary to both the National Environmental Policy Act and the Clean Water Act.

J. THE EVIDENCE SUMITTED BY THE PLAINTIFFS' IS RELEVANT AND ALLOWED BY THE FIFTH CIRCUIT PRECEDENT.

For the most part the Corps refers to the earlier briefing (Dkt. Nos. 43-44) to argue that none of the evidence submitted by the Plaintiffs should be considered. The earlier briefing adequately covers the relevant law as it applies to Plaintiffs' Exhibits, including the Fifth

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

The Corps also objects to several references to energy industry articles indicating the size of the expansion of the Moda terminal, which is not indicated in the record and apparently not considered by the Corps in its decision. The Corps also objects to consideration of its own notice of dredging for the Corpus Christi Ship Channel Deepening Project. Neither the Corps nor Enbridge state that the information in these articles or the notice is inaccurate. Rather, the Corps argues that this information was not submitted to the Corps or the Court for its consideration in the earlier court ordered process. These items were not submitted to the Corps or in the earlier motion, but based on the Court's instruction that proposed extra-record evidence could be submitted and opposed in the dispositive motions, the Plaintiffs believed this important contextual information could be considered here. All of this information, like the information submitted in Dkt. No. 43, falls within the Fifth Circuit rule allowing evidence to show that information regarding environmental impacts was not considered in the NEPA process. The Plaintiffs, therefore, request that the Court consider this information, the accuracy of which is not contested.

IV. CONCLUSION

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

alternatives, and reconsideration of its permitting decision.

Respectfully submitted this 22nd day of August, 2022.

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CERTIFICATE OF COMPLIANCE

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

/s/ Robert B. Wiygul
ROBERT B. WIYGUL

CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing document was filed electronically (via CM/ECF) on August 22, 2022.

/s/ Robert B. Wiygul
ROBERT B. WIYGUL