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11 Attorneys for Plaintiff,  
12 FRIENDS OF NEWPORT HARBOR

13 **UNITED STATES DISTRICT COURT**  
14 **CENTRAL DISTRICT OF CALIFORNIA**

15 FRIENDS OF NEWPORT HARBOR, ) CASE NO.:  
16 Plaintiff, )  
17 v. ) **COMPLAINT FOR DECLARATORY AND**  
18 ) **INJUNCTIVE RELIEF**  
19 UNITED STATES ARMY CORPS OF ) National Environmental Policy Act, 42 U.S.C. §  
20 ENGINEERS, and SCOTT A. SPELLMON, in his ) 4321 *et seq.*; Administrative Procedure Act, 5  
21 official capacity as the Chief of Engineers and ) U.S.C. § 551 *et seq.*  
22 Commanding General of the United States Army )  
23 Corps of Engineers, )  
24 Defendants. )  
25 )  
26 )  
27 )  
28 )

**INTRODUCTION**

1  
2 1. This lawsuit seeks to vacate the UNITED STATES ARMY CORPS OF ENGINEERS  
3 (“Corps”)’s January 27, 2023 permit (No. SPL-2021-00425) (“Permit”), and enjoin all subsequent  
4 actions, for the construction and operation of a confined aquatic disposal facility (“CAD”) in the  
5 Newport Harbor, where sediment deemed unsuitable for open ocean disposal dredged by the Corps as  
6 part of its Newport Bay navigational channels maintenance will be deposited and contained.

7 2. Specifically, without conducting any environmental review on the impacts of the CAD,  
8 the Corps’ Permit authorizes the discharge of approximately 115,000 cubic yards of contaminated  
9 dredged materials from Newport Bay to be deposited and confined in the CAD.

10 3. In issuing the Permit absent any environmental review on the impacts of the CAD, the  
11 Corps violated the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321 *et seq.*, and the  
12 Administrative Procedure Act (“APA”), 5 U.S.C. §551 *et seq.*

**PARTIES**

13 4. Plaintiff FRIENDS OF NEWPORT HARBOR (“Friends”) is a limited liability company  
14 serving as a volunteer group of residents and local supporters in Orange County that want to ensure that  
15 contaminated materials that are unsuitable for open ocean disposal are not deposited in the Newport  
16 Harbor, one of the largest recreational harbors in the United States which is considered to be the crown  
17 jewel of the City of Newport Beach.

18 5. Defendant the CORPS is a state agency of the United States Government that, *inter alia*,  
19 implements various public works projects and exercises regulatory authority under the Clean Water Act  
20 (“CWA”) and other statutes. The Corps issued the Permit for the CAD.

21 6. Defendant SCOTT A. SPELLMON is the Chief of Engineers and Commanding General  
22 of the Corps and is sued in his official capacity with the Corps only.

**JURISDICTION AND VENUE**

23 7. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (civil action  
24 arising under the laws of the United States), 28 U.S.C. § 2201 (declaratory relief), 28  
25 U.S.C. § 2202 (injunctive relief), and 5 U.S.C. §§ 702, 706 (APA).

26 8. Venue in the United States District for the Central District of California is proper under  
27 28 U.S.C. § 1391 because the Corps is an officer or agency of the United States and Plaintiff resides in  
28 the district.

9. Plaintiff and its members are aggrieved by the Corps’ decision to issue the Permit  
without adequately assessing and mitigating the effects of the CAD on the environment and without

1 benefitting from the public’s input. Plaintiff and its members routinely visit the Newport Harbor and its  
2 adjacent beaches for, amongst other reasons, wildlife viewing; aesthetic enjoyment; and recreation,  
3 including boating, swimming, kayaking, surfing, diving, fishing, and photography. The Corps’ failures  
4 to comply with the law has harmed, impaired, and diminished Plaintiff and its members’ right to public  
5 input in governmental decisions, and will further harm, impair, and diminish Plaintiff and its members’  
6 use and enjoyment of these areas.

7 10. This Complaint is timely filed within any and all applicable statutes of limitation.

### 8 STATUTORY FRAMEWORK

#### 9 NEPA

10 11. NEPA is a procedural statute intended to ensure Federal agencies consider the  
11 environmental impacts of their actions in the decision-making process. 40 Code of Fed Reg. (“C.F.R.”)  
12 § 1500.1.

13 12. The Council on Environmental Quality (“CEQ”) promulgated uniform regulations to  
14 implement NEPA that are binding on all federal agencies. 40 C.F.R. §§ 1500-1508.

15 13. Although the Corps has its own set of NEPA regulations, such regulations merely  
16 supplement the CEQ regulations. 33 C.F.R. § 230.1.

17 14. NEPA requires federal agencies to prepare a “detailed statement” assessing the  
18 environmental impacts of all “major Federal actions significantly affecting the quality of the human  
19 environment.” 42 U.S.C. § 4332(c).<sup>1</sup> This statement is known as an Environmental Impact Statement  
20 (“EIS”).

21 15. If the proposed action is not likely to have significant effects, or if the agency is  
22 uncertain whether a full EIS is necessary, the agency must prepare an environmental  
23 assessment (“EA”) to determine whether the effects of the proposed action are significant enough to  
24 trigger an EIS. 40 C.F.R. §§ 1501.5(a), 1501.3(a).

25 16. When preparing an EA, an agency must take a “hard look” at the environmental effects,  
26 including “considering all foreseeable direct and indirect impacts.” *Idaho Sporting Cong. v.*  
27 *Rittenhouse*, 305 F.3d 957, 973 (9th Cir. 2002). When determining the degree of the effects, agencies  
28 should consider short and long-term effects, beneficial and adverse effects, effects on public health and  
safety, and effects that violate the laws protecting the environment. 40 C.F.R. § 1501.3(b)(2).

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<sup>1</sup> A major Federal action includes “[a]pproval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as Federal and federally assisted activities.” 40 C.F.R. § 1508.1(q)(3)(iv).

1 17. An EA must also “discuss each alternative considered in detail, including the proposed  
2 action, so that reviewers may evaluate their comparative merits” and “[i]nclude appropriate mitigation  
3 measures not already included in the proposed action or alternatives.” 40 C.F.R. § 1502.14(b);(e).

4 18. After conducting an EA, if an agency determines that the proposed action will not have  
5 significant impacts on the environment and that an EIS is not warranted, then the agency must prepare a  
6 Finding of No Significant Impact (“FONSI”) explaining the reasons why the action will not have  
7 significant impacts. 40 C.F.R. § 1501.6.

8 **APA**

9 19. APA section 702 provides a private cause of action to any person “suffering legal wrong  
10 because of agency action, or adversely affected or aggrieved by agency action within the meaning of a  
11 relevant statute...” 5 U.S.C. § 702.

12 20. Under the APA, a court must “hold unlawful and set aside agency actions, findings, and  
13 conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance  
14 with law . . . [or] in excess of statutory jurisdiction, authority, or limitations, or short of statutory right”.  
15 5 U.S.C. § 706(2).

16 **STATEMENT OF FACTS**

17 21. The Corps is mandated to maintain navigational channels within Newport Bay. The  
18 Corps typically dredges sediments for navigational channels and disposes of the sediment in the open  
19 ocean or along the shoreline.

20 22. Unfortunately, a large amount of sediments deemed unsafe for open ocean disposal due  
21 to, amongst other reasons, mercury levels exceeding the EPA threshold, has made its way into the  
22 Harbor and will be encountered during the dredging. Thus, the Corps plans to construct a CAD in the  
23 Harbor to dispose of these toxic sediments.

24 23. In March, 2022, the Corps published a Draft EA for the Lower Newport Bay  
25 Maintenance Dredging Project. However, as the name insinuates, the EA solely assessed impacts  
26 stemming from the Corps’ dredging of the federal navigational channels rather than considering  
27 impacts associated with both the construction and operation of the CAD.

28 24. On November 1, 2022, members of Friends sent a comment letter to the Corps raising  
concerns with the EA’s lack of environmental review concerning the construction and operation of the  
CAD.

25 25. On November 27, 2022, the Corps published a Final EA and FONSI for the Lower  
26 Newport Bay Maintenance Dredging Project. The Final EA describes the project as “consist[ing] of  
27  
28

1 maintenance dredging the portions of the federal navigation channels in Lower Newport Bay”. EA at 1.

2 26. Plaintiff is informed and believes that, without having prepared an EA or any other type  
3 of NEPA document for the CAD, the Corps signed a Permit for the construction and operation of the  
4 CAD on January 27, 2023.

5 **FIRST CAUSE OF ACTION**  
6 **(Violations of NEPA and APA)**

7 27. Plaintiff hereby realleges and incorporates all the above paragraphs as if fully set forth  
8 herein.

9 28. Plaintiff is informed and believes, and thereon alleges, that the Corps violated NEPA  
10 and the APA by issuing the Permit without preparing an EA or any other type of NEPA document  
11 reviewing analyzing the CAD’s environmental impacts, including but not limited to:

- 12 a. Failure to adequately establish an accurate existing condition to analyze impacts;
- 13 b. Failure to analyze a reasonable range of alternatives;
- 14 c. Failure to analyze, disclose, or mitigate hydrology and water quality impacts;
- 15 d. Failure to analyze, disclose, and mitigate hazardous and toxic waste impacts;
- 16 e. Failure to analyze, disclose, or mitigate air quality impacts;
- 17 f. Failure to analyze, disclose, or mitigate recreation impacts;
- 18 g. Failure to analyze, disclose, or mitigate aesthetic impacts;
- 19 h. Failure to analyze, disclose, or mitigate greenhouse gas impacts;
- 20 i. Failure to analyze, disclose, and mitigate marine and aquatic resource impacts;
- 21 j. Failure to analyze, disclose, and mitigate fish and wildlife habitat impacts;
- 22 k. Failure to analyze, disclose, and mitigate threatened/endangered species/critical  
23 habitat impacts;
- 24 l. Failure to analyze, disclose, and mitigate impacts to birds, including birds  
25 protected under the Migratory Bird Treaty Act;
- 26 m. Failure to analyze, disclose, and mitigate health and safety risks, including risks  
27 disproportionately affecting children;
- 28 n. Failure to analyze, disclose, and mitigate land use impacts; and
- o. Failure to analyze, disclose, and mitigate cumulative impacts.

29 29. As a result of the foregoing defects and others according to proof, the Corps’ issuance of  
30 the Permit was in violation of NEPA, was arbitrary and capricious, and in excess of its statutory  
31 authority. Accordingly, the Corps’ Permit must be set aside. 5 U.S.C. § 706(2).

**REQUEST FOR RELIEF**

WHEREFORE, Plaintiff requests relief and judgment as set forth below:

A. For a temporary stay, temporary restraining order, and preliminary and permanent injunctions enjoining the Corps, and its agents, employees, officers or representatives from taking any action to implement the CAD, unless and until the Corps fully complies with NEPA and the APA;

B. For a declaration of the rights and duties of the parties hereto, including but not limited to a declaratory judgment that the Corps violated its duties pursuant to NEPA and the APA and that the CAD Permit is null and void and without legal effect;

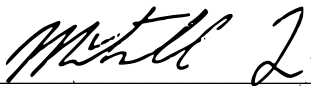
C. For an order that the Defendant(s) conduct and complete the required NEPA and APA environmental review by a reasonable date certain;

D. For an award of the Plaintiff's attorneys' fees and costs in this action pursuant to 28 U.S.C. § 2412;

E. For such other and further relief as this Court deems appropriate and just.

DATED: April 4, 2023

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By:   
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OF NEWPORT HARBOR