



St. James Parish Council

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Alvin St. Pierre, Jr.
Chairman

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Vice-Chairwoman

Linda Hubbell
Secretary

August 4, 2020

Honorable Members
St. James Parish Council

The St. James Parish Council will meet in regular session on Wednesday, August 5, 2020, at 6:30 p.m., via video/teleconference.

Please make every effort to attend.

Sincerely,

Linda Hubbell
Secretary

cc: Parish President Pete Dufresne & Staff
Assistant District Attorney Cody Martin
The News Examiner/Enterprise
The Morning Advocate
L'Observateur

Note: St. James Parish will provide, upon request, reasonable accommodation to any disabled individual wishing to attend the meeting. Anyone requiring reasonable accommodation is requested to contact 1-800-846-5277 (TDD), 1-800-947-5277 (Voice) or 562-2400 (Handicapped) to discuss the particular accommodation needed.

Alvin St. Pierre, Jr.	Jason Amato	Ryan Louque	Mason Bland	Clyde Cooper	Vondra Steib	Donald Nash
District 1	District 2	District 3	District 4	District 5	District 6	District 7

**AGENDA
ST. JAMES PARISH COUNCIL
VIDEO/TELECONFERENCE
WEDNESDAY, AUGUST 5, 2020**

Pursuant to La. R.S. 42:17.1, the St. James Parish Council (the "Council") will meet via video/teleconference at the date and time indicated to take up limited matters that (1) if delayed, would cause curtailment of vital public services; or (2) are critical to continuation of the business of the Council. If a member of the public would like to make a public comment on any agenda item, please do one of the following: 1) Send an email, prior to the meeting, to the Council Secretary (linda.hubbell@stjamesparishla.gov) stating the agenda item you want to submit a comment upon, along with your full name, address, and your written comments, which will be read into the record of the meeting; or 2) Dial into the teleconference line at (504) 326-1577 and enter Conference ID: 414 259 333#. You will be allowed to comment during the Public Comment item of the agenda on any matter requiring a vote of the Council.

6:30 P.M.– REGULAR MEETING

- I. CALL TO ORDER & ROLL CALL**
- II. PRAYER & PLEDGE**
- III. MINUTES**
 1. Approval of the July 22, 2020 regular minutes
- IV. FINANCE DEPARTMENT MONTHLY REPORT**
 1. Approval of the May 2020 Statement of Revenues and Expenditures.
- V. PRESIDENT’S REPORT**
- VI. PUBLIC COMMENT** on any agenda item requiring a Council vote in accordance with La. R.S. 42:14.
- VII. PRESENTATION - None**
- VIII. CORRESPONDENCE RECEIVED**
 1. Letter from Elizabeth Calderon - requesting postponement of the July 22, 2020 council meeting. Response from Cody Martin attached.
 2. Letter from Julie Teel Simmonds – Requesting to defer any further approvals for FG LA LLC and rescind their land use approval (St. Pierre)
- IX. APPOINTMENTS TO BOARDS AND COMMISSIONS - None**
- X. OLD BUSINESS - None**
- XI. NEW BUSINESS**
 1. Resolution to approve disbursement of payroll for the August 7, 2020 payroll (St. Pierre)
 2. Resolution to approve disbursement of funds to pay pending current invoices and payables (St. Pierre)
 3. Resolution authorizing the St. James Parish President to sign and execute a contract with Francis Horticultural Services for the construction of a splash park in District 4 and in District 5 (Dufresne)
 4. Resolution authorizing the St. James Parish President to sign an Intergovernmental Cooperative Endeavor Agreement with the Town of Lucher for the Marquette Drive Drainage Project (Dufresne)
 5. Resolution to terminate Special Counsel retained for the opioid litigation pursuant to St. James Resolution 18-74 adopted by the St. James Parish Council (St. Pierre)
 6. Resolution to obtain Special Counsel for opioid-related claims (St. Pierre)
 7. Consideration of appeal process options for CMT Liquids Terminal LLC land use appeal, Item No. 20-09, under St. James Parish Code of Ordinances Section 83-25(f) (St. Pierre)
- XI. MOTION TO ADJOURN**

To view backup documentation please visit www.stjamesla.com/agendacenter

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TULANE LAW SCHOOL

TULANE ENVIRONMENTAL LAW CLINIC

July 22, 2020

By Email to: council@stjamesparishla.gov and linda.hubbell@stjamesparishla.gov

Honorable Members, St. James Parish Council
Linda Hubbell, Secretary, St. James Parish Council
2631 Highway 20
Vacherie, LA 70090

Dear St. James Parish Council Members and Ms. Hubbell,

On behalf of the Louisiana Bucket Brigade, we request that you postpone the council meeting currently scheduled for today, July 22, 2020, at 6:30 PM to allow greater public participation and to meet the requirements of the Louisiana Open Meetings Law. Our client is particularly interested in postponing agenda item XI.4., the "Resolution authorizing the St. James Parish President to amend the servitude agreement for Utility Corridor with FG LA, LLC." The Open Meetings Law requires an agenda to be posted at least 24 hours in advance of a public meeting. (La. R.S. 42:19.) But we understand that the agenda for this meeting was not posted until sometime after 8:27 PM on July 21, 2020, *i.e.* less than 24 hours in advance. For your convenience, the attached screenshot of the Parish's webpage at 8:27 PM yesterday shows the absence of an agenda for today's 6:30 PM meeting.

Further, postponing today's 6:30 PM meeting will provide more time and so better support for public comment on the materials related to the meeting provided online yesterday after 8:27 PM.

Please do not hesitate to contact me with questions.

Best,

A handwritten signature in black ink, appearing to read 'Elizabeth Livingston de Calderon'.

Elizabeth Livingston de Calderon

c.c. Cody Martin, Esq., by email cmartin@cmmartinlaw.com
Vic Franckiewicz, Esq., by email Vic.Franckiewicz@butlersnow.com

Tulane Environmental Law Clinic

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<https://law.tulane.edu/clinics/environmental>

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▼ Parish Council

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7/22/20

Ms. Elizabeth Livingston de Calderon
Tulane Law School
Tulane Environmental Law Clinic

Via Electronic Mail: ecaldero@tulane.edu

Re: Response to Letter Received 7/22/20 concerning July 22, 2020 Agenda- St. James Parish Council

Dear Elizabeth:

Thank you for your letter sent earlier this afternoon. After reviewing same, I immediately made calls to the individuals responsible for posting notice of our agendas through the various methods set forth in La. R.S. 42:19. Please note that the agenda for tonight's meeting was finalized and emailed out to the Councilmen and others included on the distribution list at approximately 4:22 p.m. yesterday afternoon. Physical agendas were also posted at the buildings where such notices are customarily posted around that same time. The employee responsible for uploading said agenda to the Parish's website attempted on multiple occasions to upload the agenda through our third party service, CivicPlus, but due to internet connection issues, she was not able to verify that the agenda properly uploaded until this morning when she was able to obtain a stronger internet connection. I am working to get a contact number to our representative at CivicPlus to confirm what time the agenda was ultimately uploaded to their server and posted on our website. According to La. R.S. 42:19 (A)(2)(a), the failure to timely post notice via the Internet... due to any type of technological failure shall not be a violation of the provisions of this Chapter. There was no attempt made by the Parish of St. James to circumvent any of the requirements of the Louisiana Open Meetings Law in this instance.

As is always the case when virtual meetings of the St. James Parish Council are held pursuant to 84-JBE-2020, members of the public are welcome and encouraged to participate via teleconference. The information to join said teleconference is listed at the top of the agenda and I will also include same within this letter. Call-in Number: (504)326-1577, Conf. Id. No. 682 354 498#. The Administration and Council encourages public comment on any agenda item being considered by the Council.

Should you have any questions, please do not hesitate to contact our office using the information provided above.

Sincerely,

A handwritten signature in black ink, appearing to read 'CMM', with a long horizontal flourish extending to the right.

Cody M. Martin
Assistant District Attorney
Parish Attorney- St. James



July 22, 2020

VIA ELECTRONIC MAIL

Honorable Members, St. James Parish Council
Linda Hubbell, Secretary, St. James Parish Council
2631 Highway 20
Vacherie, LA 70090
Email: council@stjamesparishla.gov; linda.hubbell@stjamesparishla.gov

Re: FG LA LLA

Dear St. James Parish Council Members and Ms. Hubbell,

As you are aware, there remains active litigation in both state and federal court challenging permits issued to FG LA LLC in connection with its efforts to construct a petrochemical complex in St. James Parish. During the week of July 6 and on July 13, 2020, my clients in the federal lawsuit, *Center for Biological Diversity, RISE St. James, Louisiana Bucket Brigade, and Healthy Gulf v. U.S. Army Corps of Engineers*, Case No. 1:20-cv-00103-RDM (D.D.C.) observed construction trucks, crews, and materials stationed on the Formosa property along both highway 18 and 3127, including what appears to be a new parking lot, a large crane, two excavators, a horizontal drill, several bulldozers, and crews preparing to dig culverts as well as chipping trees from wetlands adjacent to highway 3127. On July 14, we submitted a motion for a preliminary injunction seeking an order that FG LA LLC stop construction until this case can be decided on the merits. On July 17, the American Civil Liberties Union of Louisiana filed an Amicus Curiae brief in support of the motion, declaring this project to be an environmental injustice. As they said in their conclusion, "Death is inevitable, but Black people in St. James Parish may die earlier and more painfully than many others because of racism." We are attaching both documents for your review and urge you to use your power and duty to protect and preserve the welfare, safety, environment and health of your Parish and its residents by deferring any further approvals for this project (including the item on today's agenda) and by rescinding FG LA LLC's land use approval.

Sincerely,

Julie Teel Simmonds, Senior Attorney
Center for Biological Diversity

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CENTER FOR BIOLOGICAL DIVERSITY,
et al.,

Plaintiffs,

v.

U.S. ARMY CORPS OF ENGINEERS,
et al.,

Defendants,

and

FG LA LLC,

Defendant-Intervenor.

Case No.: 1:20-cv-00103-RDM

**PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION
ORAL ARGUMENT REQUESTED**

Pursuant to Federal Rule of Civil Procedure 65(a) and Local Civil Rule 65.1, Plaintiffs Center for Biological Diversity, RISE St. James, Healthy Gulf, and Louisiana Bucket Brigade, respectfully move this Court to preliminarily enjoin the permit issued by the U.S. Army Corps of Engineers ("Corps") on September 5, 2019, to FG LA LLC ("Formosa Plastics") for the filling of wetlands and waters of the U.S. Plaintiffs also move this Court to enjoin construction activities for the proposed petrochemical complex ("Plastics Facility"). This motion is supported by the attached memorandum of points and authorities; declarations in support of standing and harm by Sharon Lavigne, Milton Cayette, Anne Rolfes, Andrea Alexander, Stephanie Cooper, Scott Eustis, Travis London, Cynthia Sarthou, and Miyoko Sakashita; declarations in support of harm of Dr. Gary P. Shaffer and Dr. Ivor van Heerden; declaration and exhibits of Julie Teel Simmonds to authenticate documents the Corps has agreed to add to the administrative record

and to demonstrate harm; and a declaration of Kieran Suckling on the issue of a bond. A proposed order is also attached.

If deemed necessary by the Court to resolve this motion, Plaintiffs request a hearing on this motion be held within the 21-day period provided by Local Civil Rule 65.1(d). Defendant-Intervenor Formosa Plastics has commenced site preparation and construction activities at the Plastics Facility. As explained in the accompanying memorandum, there is a high likelihood that historically significant burial sites will be damaged or destroyed in the absence of an injunction, and there are also threats of imminent, irreparable harm to wetlands, wildlife, aesthetics, levee stability, and air quality.

Plaintiffs sought to avoid the necessity of this motion on several occasions seeking a commitment from Formosa Plastics that it would extend its suspension of site preparation and construction activities until a decision on the merits from this Court. *See, e.g.* Teel Decl. Ex. D (March 30, 2020 request for a “stipulation for production of the administrative record and briefing schedule that includes an extension of the temporary suspension of work”); ECF No. 23 at 2 (noting Plaintiffs and Formosa Plastics were engaged in “discussions to determine whether they can reach an agreement on site preparation and construction activity at the site through the resolution of this case or some other agreed upon plan.”). However, Formosa has lifted its suspension of activity at the site and is moving ahead with significant activity that threatens imminent and irreparable harm to Plaintiffs’ interests. Teel Decl. Ex. E. (Formosa Plastics’ June 18, 2020 advertisement in the St. James News Examiner-Enterprise).

Undersigned counsel conferred with counsel for the Corps and Formosa Plastics pursuant to Local Rule of Civil Procedure 7(m), and both parties oppose this motion.

//
//
//

Dated: July 14, 2020

Respectfully submitted,

s/ Julie Teel Simmonds

Julie Teel Simmonds, CA Bar No. 208282*

Emily Jeffers, CA Bar No. 274222*

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*Admitted *Pro Hac Vice*

Attorneys for Plaintiffs

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CENTER FOR BIOLOGICAL DIVERSITY,
et al.,

Plaintiffs,

v.

U.S. ARMY CORPS OF ENGINEERS,
et al.,

Defendants,

and

FG LA LLC,

Defendant-Intervenor.

Case No.: 1:20-cv-00103-RDM

**MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION AND REQUEST FOR ORAL ARGUMENT**

TABLE OF CONTENTS

- INTRODUCTION 1
- STATUTORY BACKGROUND..... 2
 - I. The National Environmental Policy Act..... 2
 - II. The National Historic Preservation Act..... 3
 - III. The Clean Water Act and Rivers and Harbors Act..... 4
- FACTUAL BACKGROUND..... 5
 - I. The Formosa Plastics Petrochemical Complex..... 5
 - II. The Plastics Facility’s Impacts on the Human Environment and Historic Resources 6
 - III. The Corps’ Approval 11
 - IV. Formosa Plastics Begins Construction..... 11
- STANDARD FOR ISSUANCE OF A PRELIMINARY INJUNCTION 12
- ARGUMENT 13
 - I. Plaintiffs Are Likely to Succeed on the Merits..... 13
 - A. Plaintiffs Are Likely to Succeed on Their Claim That the Corps’ EA Violated NEPA 13
 - 1. The Corps’ cursory analysis of impacts to wetlands and flooding falls far short of the “hard look” NEPA requires..... 13
 - 2. The EA never gave a hard look at impacts to air or water quality..... 17
 - 3. The EA failed to take a hard look at environmental justice..... 20
 - 4. The EA failed to take a hard look at historic resources 21
 - 5. The Corps unlawfully failed to consider several connected actions..... 21
 - 6. The Corps omitted the required cumulative impacts analysis 23
 - B. Plaintiffs Are Likely to Prevail on Their Claims That the Corps Inadequately Evaluated the Project’s Impacts Under the NHPA 24
 - 1. The Corps did not properly define the area of potential effects 25
 - 2. The Corps’ lack of “identification efforts” violates the NHPA and puts historic cemeteries at risk 26

C.	Plaintiffs Are Likely to Prevail on Their Clean Water Act and Rivers and Harbors Act Claims.....	30
1.	The Corps failed to demonstrate that the proposed project will have the least damaging environmental impact.....	30
2.	The Corps' finding that the proposed project is in the public interest is arbitrary and capricious	33
II.	Plaintiffs Will Suffer Irreparable Harm Absent Injunctive Relief.....	38
III.	The Balance of Equities and the Public Interest Favor an Injunction.....	43
IV.	The Court Should Issue No Bond or Only a Minimal One.....	45
	CONCLUSION.....	45

TABLE OF AUTHORITIES

Cases

**All. to Save the Mattaponi v. U.S. Army Corps of Eng’rs*,
606 F. Supp. 2d 121 (D.D.C. 2009)..... 30, 33, 36

Alliance for the Wild Rockies v. Cottrell,
632 F.3d 1127 (9th Cir. 2011) 40

**Am. Rivers v. Fed. Energy Reg. Comm’n*,
895 F.3d 32 (D.C. Cir. 2018)..... 14, 15, 18

Animal Legal Def. Fund v. Purdue,
872 F.3d 602 (D.C. Cir. 2017)..... 34

Brady Campaign to Prevent Gun Violence v. Salazar,
612 F. Supp. 2d 1 (D.D.C. 2009)..... 39, 43

California v. U.S. Bureau of Land Mgmt.,
286 F. Supp. 3d 1054 (N.D. Cal. 2018)..... 41

Calvert Cliffs’ Coordinating Comm. v. Atomic Energy Comm’n,
449 F.2d 1109 (D.C. Cir. 1971)..... 19

City Club of N.Y. v. U.S. Army Corps of Eng’rs,
246 F. Supp. 3d 860 (S.D.N.Y. 2017)..... 32

Comanche Nation v. United States, No. CIV-08-849-D,
2008 WL 4426621 (W.D. Okla. Sept. 23, 2008)..... 27

Del. Riverkeeper Network v. Fed. Energy Reg. Comm’n,
753 F.3d 1304 (D.C. Cir. 2014)..... 22

Hammond v. Norton,
370 F. Supp. 2d 226 (D.D.C. 2005)..... 22

Found. for N. Am. Wild Sheep v. U.S. Dep’t of Agric.,
681 F.2d 1172 (9th Cir. 1982) 17

Found. on Econ. Trends v. Heckler,
756 F.2d 143 (D.C. Cir. 1985)..... 3

**Friends of Buckingham v. State Air Pollution Control Bd.*,
947 F.3d 68 (4th Cir. 2020) 20

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.,
528 U.S. 167 (2000)..... 12

Friends of the Earth, Inc. v. U.S. Army Corps of Eng’rs,
109 F. Supp. 2d 30 (D.D.C. 2000)..... 24

Friends of the Earth, Inc. v. U.S. Army Corps of Eng'rs,
109 F. Supp. 2d 30 (D.D.C. 2000)..... 14

Friends of the Wild Swan, Inc. v. U.S. EPA,
130 F. Supp. 2d 1207 (D. Mont. 2000)..... 44

Gerber v. Norton,
294 F.3d 173 (D.C. Cir. 2002)..... 15

Gov't of the Province of Manitoba v. Norton,
398 F. Supp. 2d 41 (D.D.C. 2005)..... 2, 16

Grand Canyon Trust v. Fed. Aviation Admin.,
290 F.3d 339 (D.C. Cir. 2002)..... 23, 24

Great Old Broads for Wilderness v. Kempthorne,
452 F. Supp. 2d 71 (D.D.C. 2006)..... 23, 24

Hough v. Marsh,
557 F. Supp. 74 (D. Mass. 1982)..... 35

Humane Soc'y of the United States v. Kempthorne,
481 F. Supp. 2d 53 (D.D.C. 2006)..... 39

Idaho Conserv. League v. Atlanta Gold Corp.,
879 F. Supp. 2d 1148 (D. Idaho 2012) 44

Idaho Rivers United v. Probert, No. 3:16-cv-00102-CWD,
2016 WL 2757690 (D. Idaho May 12, 2016) 39

**Idaho v. Interstate Commerce Comm'n.*,
35 F.3d 585 (D.C. Cir. 1994)..... 15, 19

Landwatch v. Connaughton,
905 F. Supp. 2d 1192 (D. Ore. 2012)..... 45

League of Wilderness Defs. v. Connaughton,
752 F.3d 755 (9th Cir. 2014) 45

League of Wilderness Defs./Blue Mts. Biodiversity Project v. Connaughton,
752 F.3d 755 (9th Cir. 2014) 40

League of Women Voters of the United States v. Newby,
838 F.3d 1 (D.C. Cir. 2016)..... 43

League of Women Voters v. Newby,
838 F.3d 1 (D.C. Cir. 2016)..... 12

Maher v. New Orleans,
516 F.2d 1051 (5th Cir. 1975) 4

Nat'l Parks Conserv'n Ass'n v. Semonite,
916 F.3d 1075 (D.C. Cir. 2019)..... 13

Nat'l Wildlife Fed'n v. Marsh,
721 F.2d 767 (11th Cir. 1983) 39

Nken v. Holder,
556 U.S. 418 (2009)..... 43

Ocean Advocates v. U.S. Army Corps of Eng'rs,
402 F.3d 846 (9th Cir. 2004) 19

**Pueblo of Sandia v. United States*,
50 F.3d 856 (10th Cir. 1995) 29

Pye v. United States,
269 F.3d 459 (4th Cir. 2001) 26

**Quechan Tribe of the Fort Yuma Indian Rsrv. v. U.S. Dep't of Interior*,
755 F. Supp. 2d 1104 (S.D. Cal. 2010)..... 43, 44

Red Wolf Coal. v. U.S. Fish & Wildlife Serv.,
210 F. Supp. 3d 796 (E.D.N.C. 2016)..... 45

Richland/Wilkin Joint Powers Auth. v. U.S. Army Corps of Eng'rs,
826 F.3d 1030 (8th Cir. 2016) 41

S. Fork Band of W. Shoshone v. U.S. Dep't of Interior,
588 F.3d 718 (9th Cir. 2009) 19

S. Utah Wilderness Alliance v. Norton,
237 F. Supp.2d 48 (D.D.C. 2002)..... 16

San Antonio Bay Estuarine Waterkeeper v. Formosa Plastics Corp.,
No. 17-0047, 2019 WL 2716544 (S.D. Tex. June 27, 2019)..... 2, 10, 34

San Luis & Delta-Mendota Water Auth. v. Jewell,
969 F. Supp. 2d 1211 (E.D. Cal. 2013)..... 38

Se. Alaska Conserv. Council v. U.S. Forest Serv.,
413 F. Supp. 3d 973 (D. Alaska 2019) 39

Sherley v. Sebelius,
644 F. 3d 388 (D.C. Cir. 2011)..... 12

Shoreline Assocs. v. Marsh, 555 F. Supp. 169 (D. Md. 1983),
aff'd, 725 F.2d 677 (4th Cir. 1984) 32

Sierra Club v. Fed. Energy Reg. Comm'n,
867 F.3d 1357 (D.C. Cir. 2017)..... 18

<i>Sierra Club v. Marsh</i> , 714 F. Supp. 539 (D. Me. 1989)	44
<i>Sierra Club v. Norton</i> , 207 F. Supp. 2d 1310 (S.D. Ala. 2002).....	44
<i>Sierra Club v. Peterson</i> , 717 F.2d 1409 (D.C. Cir. 1983).....	3
* <i>Sierra Club v. U.S. Army Corps of Eng'rs</i> , 645 F.3d 978 (8th Cir. 2011)	39, 44
<i>Sierra Club v. U.S. Dep't of Agric.</i> , 841 F. Supp. 2d 349 (D.C. Cir. 2012)	41
<i>Sierra Club v. Van Antwerp</i> , 709 F. Supp. 2d 1254 (S.D. Fla. 2009), <i>aff'd</i> , 362 Fed. Appx. 100 (11th Cir. 2010)	31
<i>Slockish v. U.S. Fed. Highway Admin.</i> , 664 F. Supp. 2d 1192 (D. Or. 2009)	24
<i>So. Utah Wilderness All. v. Burke</i> , 981 F. Supp. 2d 1099 (D. Utah 2013).....	28
<i>Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs</i> , 255 F. Supp. 3d 101 (D.D.C. 2017).....	20, 21
<i>Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs</i> , No. 16-1534-JEB, 2020 WL 1441923 (D.D.C. Mar. 25, 2020)	3
<i>Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs</i> , No. 16-1534-JEB, 2020 WL 3634426 (D.D.C. July 6, 2020)	45
* <i>Utahns v. Dep't of Transp.</i> , 305 F.3d 1152 (10th Cir. 2002)	30, 32
<i>W. Watersheds Proj. v. Schneider</i> , 417 F. Supp. 3d 1319 (D. Idaho 2019)	45
<i>White Tanks Concerned Citizens, Inc. v. Strock</i> , 563 F.3d 1033 (9th Cir. 2009)	19
<i>Winter v. Nat. Res. Def. Council</i> , 555 U.S. 7 (2008).....	12
<i>Wyo. Outdoor Council v. U.S. Army Corps of Eng'rs</i> , 351 F. Supp. 2d 1232 (D. Wyo. 2005).....	36
 Statutes	
33 U.S.C. § 403.....	5

33 U.S.C. § 1251(a) 4

33 U.S.C. § 1311(a) 4

33 U.S.C. § 1330 5

33 U.S.C. § 1344(a)–(e) 4

33 U.S.C. § 1344(e) 4

42 U.S.C. §§ 4321-4370m-12 2

42 U.S.C. § 4332(2)(C) 2

42 U.S.C. § 7412(b) 7

54 U.S.C. § 300320(3) 4

54 U.S.C. § 306108 4

Other Authorities

Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb 16, 1994) 3, 20

55 Fed. Reg. 36,641 (Sept. 6, 1990) 17

82 Fed. Reg. 16,668 (Apr. 5, 2017) 17, 37

83 Fed Reg. 25,776 (June 4, 2018) 33

Regulations

33 C.F.R. § 320.4 33

33 C.F.R. § 320.4(a)(1) 5, 33

36 C.F.R. § 60.4 4

36 C.F.R. § 800.16(d) 25

36 C.F.R. § 800.4 25

36 C.F.R. §§ 800.4-800.6 4

36 C.F.R. § 800.4(a)(2) 27

36 C.F.R. § 800.4(a)(3) 27, 28

36 C.F.R. § 800.4(b)(1) 27

36 C.F.R. § 800.5(a)(2) 25

40 C.F.R. § 230.10(a).....	4, 30
40 C.F.R. § 230.10(a)(3).....	4, 30
40 C.F.R. § 230.41	8
40 C.F.R. § 230.53	35
40 C.F.R. § 1500.1(a).....	2
40 C.F.R. § 1500.1(b)	2
40 C.F.R. § 1501.4.....	2, 14
40 C.F.R. § 1501.4(e).....	3
40 C.F.R. § 1508.7	3, 22
40 C.F.R. § 1508.8.....	2
40 C.F.R. § 1508.8(b)	3
40 C.F.R. § 1508.9(a).....	14
40 C.F.R. § 1508.13	3
40 C.F.R. § 1508.25(a)(1).....	22
40 C.F.R. § 1508.25(a)(1)–(2)	22
40 C.F.R. § 1508.27(b)(7).....	3
40 C.F.R. § 1508.27(b)(8).....	21

INTRODUCTION

Plaintiffs seek a preliminary injunction because the Army Corps of Engineers (“Corps”) unlawfully approved a permit under which FG LA LLC (“Formosa Plastics”), a subsidiary of Taiwan-based Formosa Petrochemical Company, has started to construct one of the world’s largest plastics facilities.¹ The facility will include 10 chemical plants; a heavy haul road and bridge; vessel and rail docks; power generation facilities; pipelines; a wastewater treatment plant; detention ponds; and other support facilities. Formosa Plastics is poised to transform sugarcane fields and wetlands along a stretch of the Mississippi River into a 1,500-acre plastics complex—10 times the size of D.C.’s National Mall—threatening imminent and permanent harm to wetlands, wildlife, historic grave sites, levee stability, air quality, and environmental justice absent an injunction.

Only immediate intervention can save these wetlands and grave sites and prevent other irreparable harm to Plaintiffs, who are likely to prevail on their legal claims. The record filed on May 29 (ECF No. 25)² demonstrates that the Corps failed to comply with the National Environmental Policy Act, National Historic Preservation Act, Clean Water Act, and Rivers and Harbors Act. Indeed, the Corps flouted its legal obligations under these bedrock environmental laws at every step of the way, including failing to take a hard look at the wetland destruction, air pollution, water pollution, and numerous other impacts from the facility; failing to properly identify the burial sites of enslaved people that experts believe are on site; and failing to properly

¹ Plaintiffs filed their Complaint on January 15, 2020. ECF No. 1. In March, Plaintiffs noticed activities commencing at the site and contacted counsel for Formosa Plastics with concerns. Teel Dec. Ex. D. On March 26, 2020, Formosa Plastics announced it was temporarily suspending activities. *Id.* Yet on June 28, it announced in the local newspaper that it was restarting construction at the site including wetlands clearing, dock and road building, a pile driving program and utility work. Teel Dec. Ex. E.

² Plaintiffs moved to admit extra-record evidence on July 13 (ECF No. 27) and have reached agreement with the Corps on documents to complete the record. ECF No. 27-1, Ex. A.

consider whether this massive plastics facility on one of the few undeveloped sites in the heart of an area known as Cancer Alley is in the public interest. Rather than conducting the careful analyses required by law, the Corps simply adopted the self-serving statements of Formosa Plastics—an entity a federal court found to be a “serial offender” with “enormous” violations of environmental laws, including spilling billions of plastic pellets into Texas creeks and bays and failing to report its violations. *San Antonio Bay Estuarine Waterkeeper v. Formosa Plastics Corp.*, No. 17-0047, 2019 WL 2716544, at *8-9 (S.D. Tex. June 27, 2019).

Such reckless decisionmaking cannot stand. *Gov’t of the Province of Manitoba v. Norton (“Manitoba”)*, 398 F. Supp. 2d 41, 53 (D.D.C. 2005) (“courts are responsible for ensuring that agencies comply with the statutory duty imposed on them by Congress” (citation omitted)). Given the stakes in this case, which include the very life, health, history, and future of this African American community, a preliminary injunction to preserve the status quo is necessary and in the public interest. The Court should grant Plaintiffs’ Motion for a Preliminary Injunction and maintain the status quo until the Court can resolve the case on the merits.

STATUTORY BACKGROUND

I. The National Environmental Policy Act

The National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321-4370m-12, “is our basic national charter for protection of the environment.” 40 C.F.R. § 1500.1(a). NEPA mandates that agencies take a “hard look” at the environmental impacts of their actions to ensure informed decision-making and public participation. *See Id.* § 1500.1(b). To accomplish these objectives, NEPA requires agencies to fully disclose all the potential environmental impacts of an action, 42 U.S.C. § 4332(2)(C), including “ecological . . . aesthetic, historic, cultural, economic, social, or health” effects. 40 C.F.R. § 1508.8.

The agency may prepare an Environmental Assessment (“EA”) to determine whether an Environmental Impact Statement (“EIS”) is warranted. *Id.* § 1501.4. Under the NEPA

regulations in effect when the decision was made, the EA must analyze the direct, indirect, and cumulative impacts of a proposed action. *Id.* §§ 1508.7, 1508.8. Direct effects “are caused by the action and occur at the same time and place.” *Id.* § 1508.8(a). Indirect effects are reasonably foreseeable effects “caused by the action and are later in time or farther removed in distance.” *Id.* § 1508.8(b). Cumulative effects are those resulting from the “incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency . . . or person undertakes” them. *Id.* § 1508.7; *see id.* § 1508.27(b)(7). Agencies must consider environmental justice during the NEPA process “by identifying and addressing . . . disproportionately high and adverse human health or environmental effects of [their] activities on minority populations and low-income populations.” Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb 16, 1994); *see also Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, No. 16-1534-JEB, 2020 WL 1441923, at *2 (D.D.C. Mar. 25, 2020).

If an agency action has effects that *may* be significant, an agency must prepare an EIS *before* the action is taken. 42 U.S.C. § 4332(2)(C); *see Sierra Club v. Peterson*, 717 F.2d 1409, 1415 (D.C. Cir. 1983). If the agency determines an EIS is not required after taking a “hard look” at the impacts, the agency must provide a convincing statement of reasons why the project’s impacts are insignificant and issue a Finding of No Significant Impact (“FONSI.” 40 C.F.R. §§ 1501.4(e), 1508.13. “Simple, conclusory statements of ‘no impact’ are not enough to fulfill an agency’s duty under NEPA.” *Founds. on Econ. Trends v. Heckler*, 756 F.2d 143, 154 (D.C. Cir. 1985).

II. The National Historic Preservation Act

In enacting the National Historic Preservation Act of 1966 (“NHPA”), Congress “acknowledged our debt to the past” with the express intent that “the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people.” *Maher v. New*

Orleans, 516 F.2d 1051 (5th Cir. 1975). Section 106 requires federal agencies to “take into account the effect” of projects requiring a federal permit on “any historic property.” 54 U.S.C. §§ 306108, 300320(3). Cemeteries and burial places associated with historic events are protected under the NHPA. 36 C.F.R. § 60.4. NHPA guidance recognizes the public can gain information “significant in American culture from burial places” and provides an example of West Africans “carried in the slave trade to the east coast of America, and their descendants” who “adapted traditional burial rites to plantation and community life.” Teel Decl. Ex. C, Attachment 1, at 14.

The NHPA is designed to ensure that federal decision-makers thoroughly investigate the potential impacts of their proposed actions on historic properties prior to taking final action. The NHPA “take into account” or “Section 106” process requires federal agencies to define an area of potential effects, carry out appropriate identification efforts, disclose historic properties within the area, evaluate the potential adverse effects of the federal undertaking to the historic properties, and seek ways to avoid, minimize, or mitigate any adverse effects before granting permits for a project. 36 C.F.R. §§ 800.4-800.6.

III. The Clean Water Act and Rivers and Harbors Act

Congress enacted the Clean Water Act to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). To accomplish this goal, the Act prohibits the discharge of any pollutant—including fill material—into waters of the United States unless authorized by a permit. *Id.* §§ 1311(a); 1344(a)–(e). The Corps may permit the discharge of fill under Section 404 if certain environmentally protective criteria have been met. *Id.* § 1344(e). The Corps must demonstrate there is no practicable alternative to the proposed discharge that would have “less adverse impact.” 40 C.F.R. § 230.10(a). If the discharge is proposed in a special aquatic site, such as a wetland, and is not water dependent, “practicable alternatives . . . are presumed to be available, unless clearly demonstrated otherwise.” *Id.* § 230.10(a)(3). The Corps may only issue the permit if it determines it is in the

public interest, taking into account aesthetic, historic, public welfare, and conservation impacts. 33 C.F.R. § 320.4(a)(1).

Section 10 of the Rivers and Harbors Act makes it unlawful “to excavate or fill” any navigable water without a Corps’ permit. 33 U.S.C. § 403. Before issuing a permit, the Corps must undertake an “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).

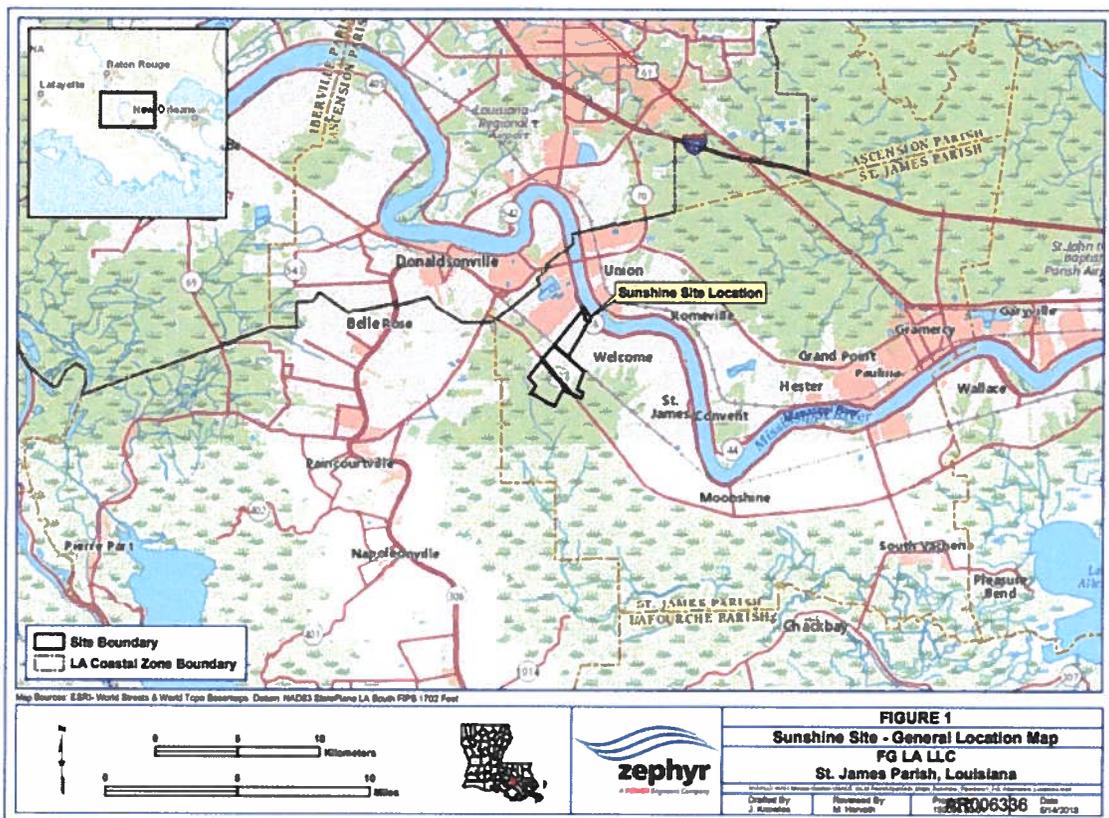
FACTUAL BACKGROUND

I. The Formosa Plastics Petrochemical Complex

Taiwan-based Formosa Plastics seeks to build one of the world’s largest plastic complexes, where it will turn fracked gas into the basic building blocks for plastic products (e.g. ethylene, propylene, polymer, and ethylene glycol). AR005391; Teel Decl. Ex. A, at 73. If built as planned, the complex will include 10 plastic petrochemical factories and numerous support facilities, including, a heavy haul road across a major levee for the Mississippi River; three barge and ship docks); a rail complex; power generation facilities; pipelines to and on the site; a wastewater treatment plant; and stormwater detention ponds among other infrastructure. AR000104; Teel Decl. Ex. A, at 74.

Formosa Plastics is building the petrochemical complex in St. James Parish, Louisiana, along the west bank of the Mississippi River. The property is currently an agricultural field, and the surrounding neighborhood consists of open farmland and homes alongside forested wetlands. *See* AR000151, AR004162. The site is the former location of two sugar cane plantations. AR000998. Almost half of the 2,319-acre property (965.4acres) consists of wetlands and waters that are part of the Barataria-Terrebonne National Estuary Program, which was designed to protect and restore estuaries of “national significance.” *See* 33 U.S.C. § 1330; AR000105; AR000148; AR000151 (“[h]igh quality forested wetland areas border two sides of the project site.”). About 850 acres of these forested wetlands are part of the Lac des Allemands swamp—a

large, shallow area that drains into the Gulf of Mexico, where bald-cypress and tupelo trees surround wetlands and other low-lying places, creating rich fishing grounds in and around the floodplains of the Mississippi River. Shaffer Decl. ¶ 4.



Source: AR006336

Formosa Plastics requires a permit from the Corps to carry out this project because it will destroy wetlands. It will dump 554,671 cubic yards of landfill into wetlands and low-lying areas, enough to fill more than 45,000 dump trucks. AR000535. Its stated project purpose is “to grade, place fill, aggregate material, and pilings to construct a plastics manufacturing facility to meet the public’s demand for plastic around the world.” AR000111.

II. The Plastics Facility’s Impacts on the Human Environment and Historic Resources

In August 2018, the Corps issued a public notice on Formosa Plastics’ request to fill and pave over wetlands and agricultural land for its petrochemical complex, AR004679, prompting hundreds of people to voice their opposition, AR001319–320, AR001987–2126, AR002227–

233, AR002313–345, AR003015–052. Plaintiffs submitted extensive comments describing the environmental impacts of the project and concerns about Formosa Plastics’ history of environmental violations. AR002313–345, AR003015–052, AR000952–996. The project will have numerous harmful environmental impacts, including air and water pollution, the destruction of wetlands, and harm to historic grave sites.

Air and water pollution: The Plastics Facility will emit more than 13.6 million tons of carbon pollution—equivalent to pollution from three coal-fired power plants—and over 800 tons per year of toxic air pollutants. AR003026; Teel Decl. Ex. A, at 81. The Plastics Facility will pollute the air with soot, smog, and other pollutants, including carbon monoxide, particulate matter, volatile organic compounds, and carcinogens such as benzene, 1,3-butadiene, and ethylene oxide. AR003024–026, AR003037, AR005392. EPA regulates 19 of these as hazardous air pollutants that may cause serious adverse health impacts such as neurological harm or birth defects. *See* 42 U.S.C. § 7412(b). These various air pollutants cause premature death, heart attacks, asthma, cancer, respiratory, neurological and reproductive damage. AR003024–025; Teel Decl. Ex. A, at 24–159.

The Plastics Facility will also discharge water pollution into the St. James Canal and Mississippi River, “the main source for municipal water down river for highly populated areas.” AR000148. The Corps did not disclose or analyze any wastewater or stormwater pollutants or impacts, and instead asserted that Formosa “is properly permitted with the LADEQ air and water permits.” AR000154.

Wetlands and floodplain impacts: Site-preparation, fill, and construction activities—some of which are now underway—will directly, permanently damage 61.7 acres of wetlands and up to 54.5 acres of other waters of the United States. AR000104. There are three types of direct wetlands impacts: (1) borrow pits containing herbaceous and forested wetlands will be permanently filled and covered with a utility plant and other infrastructure, AR000105;

AR000572; (2) 6.7 acres of batture wetlands will be damaged or destroyed to construct a water intake facility, three vessel docks, pipe rack, heavy haul road, and bridge, AR000105, AR005150–152, AR000590; and (3) detention ponds will be built in forested wetlands at the south end of the property, AR000104, AR000581. The batture wetlands—unique wetlands between the levee and river—on the west bank of the Mississippi River are classified as rare, imperiled, or difficult to replace (“RID”). See AR002254. Formosa Plastics only purchased compensatory mitigation credits for direct wetlands impacts. AR000106–107.

Wetlands provide wildlife and fish habitat; protect water quality; store floodwater; shield against erosion; and guard communities like St. James from flooding. 40 C.F.R. § 230.41; AR003031–32, AR004151; Teel Decl. Ex. B, at 1–174. The affected wetlands and waters also serve as important wildlife habitat. Dozens of migratory bird species use the wetlands in this area, including bald eagles. AR006423, AR006428. Additionally, imperiled species including manatees and endangered pallid sturgeons—a giant, ancient-looking fish—inhabit affected areas. AR006446. The project will expose these and other species to habitat destruction, vessel traffic, and noise, light, and water pollution.

Environmental justice: The petrochemical complex will be built in a low-income neighborhood that is 95 percent African American. AR000179. The corridor along the Mississippi River between New Orleans and Baton Rouge is known as “Cancer Alley” due to the many polluting petrochemical plants and refineries already located there. AR002047. The Formosa Plastics facility will further pollute the water this community drinks and the air it breathes.

Cultural and historic resources: Construction of the Formosa Plastics complex will occur on and adjacent to historic cemeteries that experts believe contain the remains of enslaved people who worked on the plantations. AR000107 (the Acadia Cemetery “contained the slaves who were associated with this plantation”); AR000386 (“The absence of verifiable

indications (headstones or through archival research) of who was buried in the cemetery leads us to believe it could have been a slave cemetery associated with the Buena Vista Plantation.”); Pls.’ Mot. to Admit, Spees Decl. Ex. E, at 10, ECF No. 27-2.

Formosa Plastics twice overlooked these historic resources in two 2018 reports (AR006120–329, AR005915–6010) that led to its conclusion that “there will be no impact on cultural resources.” AR005412. On August 10, 2018, the Louisiana State Historic Preservation Office (“SHPO”) notified the Corps it learned from a local archeologist with Coastal Environments, Inc. (“CEI”) that the reports overlooked one cemetery on an edge of the property (Buena Vista) and a second one (Acadia) where Formosa Plastics intends to build a utility plant. AR005353. The SHPO stated, “[a]s you can imagine, this prompted some consternation on the part of [Formosa Plastics]” and “would cause significant issues for the facility plan.” *Id.*; see also Spees Decl. Ex. D, ECF No. 27-2 (email from Formosa’s representative stating that protecting the Acadia Cemetery “would mean that portions of the planned Utilities Plant may have to be relocated, which makes this a very difficult option for [Formosa Plastics].”). The Corps’ August 27, 2018 notice for the project did not mention the cemeteries’ discovery. AR004679–680.

The Corps issued a finding of “No Historic Properties Affected for this undertaking” on January 28, 2019. AR000165. After that determination, the SHPO learned Formosa Plastics’ consultants were still looking in the wrong places for the cemeteries. AR000165 (the Corps’ Memorandum of Record notes only that a source contacted the State to communicate “that the cemeteries may be located in slightly different locations.”); Spees Decl. Ex. B, ECF 27-2 (email from CEI archeologist to State Division of Archaeology stating he is “greatly concerned that the contracting firm conducting this research did not examine the correct area” and explaining in detail why) & Ex. C (email from Louisiana Attorney General’s office to State Division of Archaeology, stating, “interments may still be intact,” there could be a “dedication problem for the whole Acadia area,” and “we may have to revisit whether to require them to examine the

borrowed area that was not yet examined.”). In June 2019, Formosa Plastics’ final archeological report redrew the boundaries for the Buena Vista Cemetery, which was not where fencing had originally been erected, and declared that there was no evidence of the Acadia Cemetery.

AR000328.

In February 2020, CEI produced a report that concluded (1) Formosa Plastics’ consultants searched in the wrong location each time they looked for cemeteries on the former Acadia Plantation; (2) four additional cemeteries may exist on the project site in addition to the two previously identified (Acadia and Buena Vista); and (3) further investigation is needed to avoid construction impacts to graveyards, including the Acadia Cemetery and four additional potential burial sites not mentioned in any of Formosa’s reports. Spees Decl. Ex. E, ECF No. 27-2. The Corps has not re-opened the NHPA consultation process or suspended Formosa Plastics’ permit pursuant to 33 C.F.R. § 325.7 (allowing the Corps to reevaluate and “modify, suspend, or revoke a permit”); AR000109.

Formosa Plastics’ history of non-compliance: In June 2019, a federal court held Formosa Plastics liable for polluting Texas waterways with billions of plastic pellets from its plant in Point Comfort, Texas. *See, e.g., San Antonio Bay Estuarine Waterkeeper*, 2019 WL 2716544, at *8-9. The court found the company had “enormous” permit violations and failed to report its non-compliance, further concluding Formosa is a “serial offender.” *Id.* According to the Environmental Protection Agency, six of seven Formosa Plastics’ facilities were in violation of federal environmental laws in 2018. AR003021; Teel AR Decl. Ex. A, at 1–7. Formosa Plastics’ other plant in Louisiana, a PVC plastic facility in Baton Rouge, also has a long history of federal violations, including “significant” violations of the Clean Air Act every quarter since 2009. AR003021, Teel Decl. Ex. A, at 8-23.

III. The Corps' Approval

Despite the numerous harms to the environment, public health, and important cultural resources from this massive plastics complex, the Corps issued a permit to Formosa Plastics on September 5, 2019. The permit authorizes permanent damage to 116.2 acres of wetlands and waters, AR000104, and is necessary for Formosa Plastics to proceed, AR000139. A Memorandum of Record accompanied the permit and includes the Corps' entire analysis and conclusions under NEPA, the NHPA, and the Clean Water Act. *See* AR000104–185.

The Corps declined to prepare an EIS and instead issued an EA with a one-paragraph FONSI concluding that the Plastics Facility will have no significant environmental impacts. AR000184. With respect to the NHPA, the Corps concluded there will be no impact to the Buena Vista Cemetery because it is “excluded from the project site” and “will be fenced outside of the facility because it is near the project boundary line and the public will have access to it.” AR000110, AR000129. As for the Acadia Cemetery, the Corps concluded that there will be no historic properties affected. AR000165. The Corps does not mention four other burial sites that may exist on the property. Under the Clean Water Act, the Corps deemed the project “the Least Environmentally Damaging Alternative [sic] Practicable Alternative,” AR000144; and it concluded that issuing the permit was not contrary to the public interest, AR000185.

IV. Formosa Plastics Begins Construction

On March 23, 2020, the same day Louisiana's COVID-19 stay-at-home order went into effect, several large trucks and a crew of workers broke ground on Formosa Plastics' site. Members of Plaintiff RISE St. James recorded a video of the activity as they passed by and alerted their members and the media. On March 27, Formosa ordered the utility work to stop, citing caution due to coronavirus and high-water levels of the Mississippi River. *Teel Decl. Ex. D.* On June 18, 2020, Formosa published an advertisement in the local paper about its plans to restart work, including soil testing, utility relocation, highway widening, a “test pile program,”

pipeline projects, and a contractor dock. Teel Decl. Ex. E. During the week of July 6 and on July 13, 2020, members of Plaintiffs RISE St. James and Healthy Gulf reported seeing construction trucks, crews, and materials stationed on the property along both highway 18 and 3127, including what appears to be a new parking lot, a large crane, two excavators, a horizontal drill, several bulldozers, and crews preparing to dig culverts and chipping trees from wetlands adjacent to highway 3127. Teel Decl. ¶ 8.

Formosa Plastics' construction activities will quickly transform the rural landscape around the site into a construction zone. Right now, the area consists of bucolic farms, homes, an elementary school, churches, swamps, and forested wetlands along a bend in the Mississippi River. It will soon be unrecognizable.

STANDARD FOR ISSUANCE OF A PRELIMINARY INJUNCTION

To obtain a preliminary injunction, Plaintiffs must show (1) a likelihood of success on the merits; (2) a likelihood of irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in their favor; and (4) an injunction is in the public interest. *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 19–20 (2008). The D.C. Circuit has historically used a “sliding scale” approach—allowing a “strong showing” on one factor to make up for a weaker showing on another. *Sherley v. Sebelius*, 644 F.3d 388, 392 (D.C. Cir. 2011) (citations omitted). The D.C. Circuit has not yet decided whether *Winter* explicitly precludes the continued use of a “sliding scale” approach. *League of Women Voters v. Newby*, 838 F.3d 1, 7 (D.C. Cir. 2016). In any event, Plaintiffs satisfy all four factors here.³

³ Plaintiffs have standing to bring this case. As described in the attached declarations, their members have concrete and particularized injuries that are fairly traceable to Defendants' actions, and those injuries will likely be redressed by a favorable decision. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 180–81 (2000). *See* declarations of Alexander, Cayette, Cooper, Eustis, Lavigne, London, Rolfes, Sakashita, and Sarthou.

ARGUMENT

I. Plaintiffs Are Likely to Succeed on the Merits⁴

A. Plaintiffs Are Likely to Succeed on Their Claim That the Corps' EA Violated NEPA

Plaintiffs are likely to succeed on their claim that the Corps failed to take a “hard look” at the environmental impacts of its action as NEPA requires. The Corps deficient EA fails to meaningfully evaluate the Plastics Facility’s controversial environmental impacts, ranging from wetlands destruction that intensifies flooding to air pollution that unfairly burdens an African American community. The EA largely echoes Formosa Plastics’ self-serving statements about the environmental effects, and without any independent analysis or verification the Corps decided that the project will have no significant impacts. Its one-paragraph FONSI (AR000184) fails to meet NEPA’s requirement that the Corps “make a convincing case for its finding.” *Nat’l Parks Conserv’n Ass’n v. Semonite*, 916 F.3d 1075, 1082 (D.C. Cir. 2019). Because this massive petrochemical complex will indeed have significant environmental impacts, the Corps’ failure to prepare an EIS was also arbitrary. Here, Plaintiffs will focus on the Corps’ failure to take a hard look at the direct and indirect impacts to (1) wetlands, flooding, and wildlife; (2) air and water pollution; (3) environmental justice; (4) historic resources; (5) connected actions; and (6) cumulative impacts.

1. The Corps’ cursory analysis of impacts to wetlands and flooding falls far short of the “hard look” NEPA requires

The Plastics Facility will permanently damage 116.2 acres of wetlands and other waters (about 88 football fields) and cover 1,500 acres (nearly 2.5 square miles), yet the Corps never took a “hard look” at resulting impacts to hydrology, drainage, flooding, adjacent wetlands, wetlands, or wildlife. The Corps’ EA fails to consider the risk of flooding and related impacts

⁴ For purposes of preliminary relief, Plaintiffs focus here on a subset of their claims concerning the Corps’ violations of law.

even though the Plastics Facility will be built on coastal wetlands in low-lying areas along the Mississippi River—where half the property is barely above sea level and will soon be underwater. AR002231, AR002330, AR005893–909.

The Corps' EA was simply too flawed to assist in determining whether the action may significantly impact the environment and require preparation of a full EIS. *Am. Rivers v. Fed. Energy Reg. Comm'n*, 895 F.3d 32, 49-55 (D.C. Cir. 2018) [hereinafter, *Am. Rivers v. FERC*]; 40 C.F.R. § 1501.4; 1508.9(a). As in *American Rivers v. FERC*, the Army Corps relied on Formosa's—the applicants'—statements without independently verifying or collecting information to conclude there would be no significant impacts. *Am. Rivers v. FERC*, 895 F.3d at 50. In that case, the D.C. Circuit found the EA “rife with flaws” for failing to explain the effects of or take hard look at impacts to fish, finding it “woefully light on reliable data and reasoned analysis [while] heavy on unsubstantiated inferences and *non sequiturs*.” *Id.* at 50–51. The Corps' EA here is a close analogy: it sparingly notes the Plastics Facility's impacts, contains a “breezy dismissal” of serious impacts, and accepts Formosa Plastics' self-serving positions as “adequate” evidence of no significant impacts. *Id.*

To start, the Corps failed to consider that construction of the Plastics Facility will severely alter the hydrology and drainage of the site, increasing the likelihood that flooding will harm contiguous wetlands and other property. The permit allows 554,671 cubic yards of material, enough to fill over 45,000 dump trucks, to be dumped as fill in wetlands and low-lying areas. AR000535. This will dramatically alter the hydrology of the site, which increases “flashiness”—meaning that water volume from the site will rapidly increase during storms, damaging contiguous wetlands and valuable, storm-protecting habitat types. AR003031, Teel Decl. Ex. B, at 149–69. The EA failed to *mention* the effects of this fill on hydrology, flooding, runoff, or contiguous wetlands. This violates NEPA's “hard look” mandate. *See Friends of the Earth, Inc. v. U.S. Army Corps of Eng'rs*, 109 F. Supp. 2d 30, 37-38 (D.D.C. 2000) (Corps' EA

on a Section 404 permit for construction of floating casinos on the Mississippi River was insufficient because it failed to evaluate impacts to hydrology and wetlands from “runoff, sedimentation and placement of impervious surfaces”).

The EA’s discussion of flooding comes only in response to public comments, and its finding of no flood risk relies on a “no-risk analysis” that *has not yet been completed* but that Formosa Plastics claims “will demonstrate that the fill placed within the floodplain will cause no rise in the base flood water surface elevation.” AR000127. The Corps must analyze all impacts from its decision; it cannot abdicate its analytic responsibility to Formosa Plastics for some future, unknown date. To do so is arbitrary and capricious. *Am. Rivers v. FERC*, 895 F.3d at 54 (an agency cannot rely on “sight-unseen acceptance” of an applicant’s “anticipated-but-unidentified mitigation measures” which the agency was content “to leave as ‘TBD’”); *Gerber v. Norton*, 294 F.3d 173, 185-186 (D.C. Cir. 2002) (an agency may not “delegate its responsibility to the regulated party” (citations omitted)); *see also Idaho v. Interstate Commerce Comm’n.*, 35 F.3d 585, 596 (D.C. Cir. 1994) (similar).

Next, the EA fails to adequately analyze the risk of flooding. Major storms with the capacity to flood the site—such as Category 3 or higher hurricanes and intense rainfall events—are increasingly likely and common due to climate change. AR002984, AR003027–32; AR003030; Teel Decl. Ex. B, at 94–129. The Plastics Facility will be between the Mississippi River and Lac Des Allemands, swamp an area endangered by the “killer storm surges” from the Gulf of Mexico. AR0006336; AR003030; Teel Decl. Ex. B, at 124–134. Yet the Corps did not consider the risk of flooding due to hurricanes or storm surges, relying instead on Formosa’s hydrology report, which assumes unrealistic low water levels in the St. James Canal but fails to model a range of other, likely scenarios—like hurricane and storm surge events. AR003058, AR003060. Similarly, the Corps failed to model a 500-year rain event and only evaluated flooding impacts within the 100-year floodplain, AR000126–127, even though floodplain maps

are outdated and do not represent the true risk of flooding in Louisiana, AR003031–032, Teel Decl. Ex. B, at 170–203. In other words, the Corps’ EA dismisses flooding concerns solely based on Formosa Plastics’ studies of drainage and hydrology issues, then summarily states the facility will have “no impact on the effort to flood proof the area.” AR000114–15. This conclusory assertion, based solely on the applicant’s statements, mirrors the “hurried analysis” in *S. Utah Wilderness Alliance v. Norton*, 237 F. Supp.2d 48, 52-55 (D.D.C. 2002), where an agency’s EA did not reflect the “hard look” NEPA requires.

Finally, the Corps failed to take a “hard look” at direct and indirect impacts of destroying 116.2 acres of wetlands and other waters on wetlands and wildlife. This includes damage to 6.7 acres of sensitive batture wetlands that are habitat for bald eagles and other wildlife. AR000105, AR006432. Eight and a half acres of forested wetlands will be destroyed on site that are habitat for 25 species of migratory birds of concern. AR000104, AR005505. The EA fails to mention any adverse impacts to thousands of additional acres of forested wetland that will be affected—including the contiguous Lac des Allemands swamp, which includes baldcypress-water tupelo forested wetlands that play an invaluable role protecting communities against storms. AR003030, Teel Decl. Ex. B, at 135–47. Formosa Plastics purchased mitigation credits for *direct* wetlands impacts, AR000106–107, but this does not substitute for a NEPA analysis of the project’s concomitant impacts. *Manitoba*, 398 F. Supp. 2d 41, 65 n.24 (even with mitigation, an EA must completely account for any possible adverse impacts).

The EA also fails to take a hard look, or even adequately describe, the Plastics Facility’s impacts on migratory birds that use the Mississippi flyway migration corridor. Coupled with deforestation of 8.5 acres; construction, noise, traffic, and lighting from the Plastics Facility will displace birds from preferred habitat and inhibit their feeding and nesting. *See* AR005507. However, rather than quantifying or qualitatively describing impacts to migratory birds, the EA focuses on the absence of bald eagle nests in 2017 to conclude that all bird impacts have been

minimized or eliminated. AR000125. Additionally, manatees that are threatened by vessel traffic and endangered pallid sturgeon that are threatened by industrial pollutants live in this part of the Mississippi River. AR006446; 82 Fed. Reg. 16,668, 16,701 (Apr. 5, 2017); 55 Fed. Reg. 36,641 (Sept. 6, 1990). Construction will expose these animals to habitat destruction, traffic, and noise, light, and water pollution, but the Corps considered none of these impacts in the EA, in violation of NEPA. *See Found. for N. Am. Wild Sheep v. U.S. Dep't of Agric.*, 681 F.2d 1172, 1178 (9th Cir. 1982) (holding invalid an EA's "omission of any meaningful consideration" of a road's traffic impacts on wildlife).

2. The EA never gave a hard look at impacts to air or water quality

The Corps acknowledges the Plastics Facility will cause harmful air and water pollution, AR000154, but never analyzed these impacts either quantitatively or qualitatively. The Corps' failure to even consider impacts on air quality, water quality, or climate change—much less take a "hard look" at the direct, indirect, and cumulative impacts—violates NEPA and is arbitrary and capricious.

As an initial matter, the Corps failed to quantify air and water pollution from construction anywhere in the record. The EA also does not evaluate the impacts of the facility's release of vast quantities of (1) common air pollutants that harm public health like soot and those that cause smog, AR003024–025; Teel Decl. Ex. A, at 24–57; (2) toxic and carcinogenic pollutants, AR003025–026, Teel Decl. Ex. A, at 58–159; (3) 13.6 million tons of greenhouse gases each year, AR000126, AR003028, AR003037; or (4) wastewater and stormwater discharges, AR000156, AR00166 (merely noting that the state Department of Environmental Quality ("LADEQ") issued a water quality certification for the project's placement of fill material). Instead of taking a "hard look," the Corps summarily concludes that "the plant will not impact water quality or air quality in a manner that is not accepted by the [LADEQ]," AR000171–172, and that air quality issues are "subject to local and state regulatory authorities and are thus are

[sic] anticipated to be local in extent, minor in intensity, and/or short-term in duration.”

AR000152, *see also* AR000154 (Formosa “is properly permitted with the LADEQ air and water permits.”), AR000128, AR000130. Further, the EA fails to discuss the wastewater and stormwater pollution that Formosa Plastics will discharge into the Mississippi River, St. James Canal, and other water on and adjacent to the site. As just one example, plastic pellets and powders the facility will produce are a major source of water pollution from facilities just like this. These tiny plastic beads escape during storage, loading, and transportation by rail, truck, or vessel. *See, e.g.*, AR003033; Teel Decl. Ex. B, at 204–09. One dock that will be built will be large enough to hold material to load four container barges, on which plastic pellets will be loaded and shipped on the Mississippi River. AR005151. Despite the Corps’ contention otherwise, AR000154, Formosa Plastics has not yet received its stormwater or wastewater discharge permits.

NEPA requires more than passive acceptance of an applicant’s promise not to violate state or local pollution standards, as the Court of Appeals held in *Am. Rivers v. FERC*, 895 F. 3d at 54. In that case, the agency relied on a state water quality certification to find no significant water quality impacts of a river project. However, the court found this an unacceptable stand-in for the required NEPA analysis, especially given the applicant’s record of water quality violations. *Id.* at 54. The EA here suffers from the same flaw.

The Corps’ wholesale reliance on state permits therefore renders the EA inadequate under binding Circuit precedent, which establishes that a state agency’s regulation of Formosa does not relieve the Corps of its own duties under NEPA to analyze and disclose to the public all of the direct, indirect, and cumulative impacts of pollution. It is well-settled that “the existence of permit requirements overseen by another federal agency or state permitting authority cannot substitute for a proper NEPA analysis.” *Sierra Club v. Fed. Energy Reg. Comm’n*, 867 F.3d 1357, 1375 (D.C. Cir. 2017) (citing *Calvert Cliffs’ Coordinating Comm. v. Atomic Energy*

Comm'n, 449 F.2d 1109, 1122-23 (D.C. Cir. 1971). The Corps cannot rely on “[c]ertification by another agency that its own environmental standards are satisfied” in lieu of performing its own NEPA analysis. *Idaho*, 35 F.3d at 596 (quoting *Calvert Cliffs*, 449 F.2d at 1123 (additional citation omitted); see also *S. Fork Band of W. Shoshone v. U.S. Dep’t of Interior*, 588 F.3d 718, 726 (9th Cir. 2009) (rejecting agency’s failure to analyze air impacts based on the fact the facility operates under a state permit because “[a] non-NEPA document—let alone one prepared and adopted by a state government—cannot satisfy a federal agency’s obligations under NEPA” (citation omitted)). Disclosure of these impacts is even more important when an applicant has a history of related violations at its other facilities. See *infra* at 34.

NEPA required the Corps to analyze the impacts of the facility’s air and water pollution. The Plastics Facility and its infrastructure are a cohesive whole that cannot proceed “independent of the wetlands project.” *White Tanks Concerned Citizens, Inc. v. Strock*, 563 F.3d 1033, 1036 (9th Cir. 2009) (Corps had to analyze environmental impacts of the entirety of a housing project even though impacted wetlands represented only one percent of the development’s footprint). Just like in *White Tanks*, “this project’s viability is founded on the Corps’ issuance of a Section 404 permit, [thus] the entire project is within the Corps’ purview.” *Id.* at 1042. Indeed, the Corps’ admitted the “entire project lies within Corps jurisdiction,” asserting the broad scope of its EA analysis:

The scope of analysis extends beyond the project footprint/regulated activity to examine area wetlands and drainage to ensure that excavation and fill activities do not cause further adverse effects or local water quality issues *and that plant operations do not cause further adverse effects to the surrounding communities.*

AR000108 (emphasis added). The Corps was obligated to consider effects beyond the discharge of fill, but never did so. See, e.g. *Ocean Advocates v. U.S. Army Corps of Eng’rs*, 402 F.3d 846, 867-68 (9th Cir. 2004) (requiring the Corps to consider effects of a Section 404 permit for an oil refinery dock on increased oil tanker traffic and oil spills risks).

3. The EA failed to take a hard look at environmental justice

Formosa Plastics' petrochemical complex will burden a low-income, African American community with toxic air pollution. However, the EA arbitrarily concluded there are no adverse effects on environmental justice. AR000173–174. The Corps failed to properly address the project's disproportionately high adverse health and environmental effects on minority and low-income populations. Exec. Order No. 12,898. Instead, the Corps rubber-stamped Formosa Plastics' flawed rationale, violating NEPA in several respects.

First, the Corps concludes that the project will have of “no adverse effect” because the “facility will meet all NAAQS for criteria pollutants and ambient air standards for toxic air pollutants.” AR00173–174. The Fourth Circuit has rejected the same kind of “flawed” environmental justice analysis. *Friends of Buckingham v. State Air Pollution Control Bd.*, 947 F.3d 68, 90–92 (4th Cir. 2020). It concluded that “even if all pollutants within the county remain below state and national air quality standards, the Board failed to grapple with the likelihood that those living closest to the [project]—an overwhelmingly minority population . . . —will be affected more than those living in other parts of the same county.” *Id.* at 91–92. Here, as in *Friends of Buckingham*, the Corps' analysis fails because it did not assess the disproportionate harm of air pollution on St. James' African American population.

Second, the EA parroted Formosa Plastics' irrelevant excuse that the site is “remote.” AR000174. Regardless of the area's population density,⁵ however, the Corps has a duty to determine “whether there may be a disproportionately high and adverse human health or environmental effects on minority populations.” Teel Decl. Ex. B, at 224, at 9; *see, e.g., Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 255 F. Supp. 3d 101, 137-40 (D.D.C. 2017)

⁵ The EA biased the population density by cherry-picking the center of the 3.75 square mile property, which unsurprisingly has zero inhabitants within a mile. The record shows the true one-mile radius from the property boundary has 122 residents. AR002236. Finally, the density analysis ignores hundreds of children attending school one mile away. AR006905.

(rejecting the Corps' environmental justice analysis in an EA). The Plastics Facility will be just a half-mile from the residential community of Union, one mile upriver from St. Louis Academy (previously called Fifth Ward Elementary School), and near the residential community of St. James. AR006336, AR006905. These communities are predominantly low income and African American, and it is critical that the Corps evaluate the impacts of the project on these communities' air quality, water quality, and public health.

Finally, the Corps ignored the legacy of petrochemical plants along this stretch of the Mississippi River, which is called "Cancer Alley" due to its disproportionate pollution burden and health problems. AR000116, AR002047. Community members have watched family and friends die early deaths due to cancer or they themselves have fought cancer and other illnesses. AR002020, AR002022–2023, AR002025, AR002083, AR002103–104, AR002111, AR002233. NEPA mandates that agencies consider "the potential for multiple or cumulative exposure to human health or environmental hazards in the affected population and historical patterns of exposure to environmental hazards." Teel Decl. Ex. B, at 224; *Standing Rock Sioux Tribe*, 255 F. Supp. 3d at 137–40. Yet the Corps failed to do so, rendering its EA unlawful.

4. The EA failed to take a hard look at historic resources

An EA must consider whether the action "may cause loss or destruction of significant scientific, cultural, or historical resources." 40 C.F.R. § 1508.27(b)(8). As discussed below regarding the Corps' compliance with the NHPA, *see infra* at 24–30, the Corps failed to meaningfully address the project's impacts on various historic burial sets, let alone provide the requisite convincing case of no significant impacts.

5. The Corps unlawfully failed to consider several connected actions

The Corps' EA failed to evaluate connected actions of new pipelines and transmission lines for the Plastics Facility that will have significant environmental impacts—including up to 567 acres of additional wetlands harm. Under NEPA, an agency acts unlawfully when it "divides

connected, cumulative, or similar federal actions into separate projects and thereby fails to address the true scope and impact of the activities that should be under consideration.” *Del. Riverkeeper Network v. Fed. Energy Reg. Comm’n*, 753 F.3d 1304, 1314 (D.C. Cir. 2014) (the agency impermissibly analyzed one segment of a four-part pipeline upgrade project instead of the entire project); *see also* 40 C.F.R. §§ 1508.7, 1508.25(a)(1)–(2).

Actions are connected if they, *inter alia*, “[c]annot or will not proceed unless other actions are taken previously or simultaneously,” or are “interdependent parts of a larger action and depend on the larger action for their justification.” *id.* at § 1508.25(a)(1). Courts also consider the whether the project has “logical termini” and the “substantial independent utility” of a project. *Del. Riverkeeper*, 753 F.3d at 1315–16; *Hammond v. Norton*, 370 F. Supp. 2d 226, 247 (D.D.C. 2005).

Here, the Corps impermissibly failed to analyze in its EA the impacts to environmental and cultural resources from connected federal actions: the approval of Section 404 permits for transmission lines and pipelines built solely to serve the Plastics Facility. AR004171–172. The Plastics Facility will require two segments of an electrical transmission line, three natural gas pipelines, and five liquid feedstock pipelines. AR006334–344. Only one of these requisite pieces of infrastructure—a propane pipeline—exists currently; the remaining nine projects will be entirely new construction. AR006334. These new infrastructure projects have no independent significance and utility outside of serving the Plastics Facility. AR002248. The project “will require the use of several [new] pipelines” as well as “two new transmission lines,” AR002249, and the pipelines will be “servicing only this facility,” AR004675; *see also* AR006334.

Because these directly connected infrastructure projects will fill wetlands and will therefore have adverse impacts as a result of the Plastics Facility, these impacts were required to be analyzed in the EA to provide a full picture of the harms associated with the Facility. Yet they were never mentioned as a cumulative impact. Worse, the Corps knew early in the process that

the project would necessitate these wetlands-destroying infrastructure projects. AR006330–335; *see also* AR006357 (“The final plans for new transmission lines will be provided as an application update . . . when they become available.”). A new utility switchyard is included in the impacts analysis, but inexplicably, new transmission lines that connect to it are not. AR006334. Similarly, none of the impacts from the pipelines that will transport gas and natural gas liquids directly to the Plastics Facility are mentioned (let alone analyzed) in the EA, even though the Corps was aware of these projects, which, in total, could fill and otherwise harm more than 535 acres of wetlands and nearly 32 acres of open waters. *Id.* These omissions were neither explained nor substantiated; and the Corps’ EA is therefore arbitrary and capricious.

6. The Corps omitted the required cumulative impacts analysis

The Corps neglected to conduct any cumulative impacts analysis on the impacts to wildlife, wetlands, flooding, drainage, hydrology, air quality, water quality, public health, historic resources, or environmental justice, which violates NEPA. “As the D.C. Circuit has emphasized, ‘a meaningful cumulative impact analysis must identify (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.’” *Great Old Broads for Wilderness v. Kempthorne*, 452 F. Supp. 2d 71, 84 (D.D.C. 2006) (quoting *Grand Canyon Trust v. Fed. Aviation Admin.*, 290 F.3d 339, 342 (D.C. Cir. 2002) (striking down EAs for failing to meet NEPA’s mandates).

The Corps’ EA does not satisfy these requirements. While it contains a definition of “cumulative impacts,” AR000161–162, and explains the geographic scope for an analysis, AR000162; it then omits any such analysis for wildlife, wetlands, flooding, drainage, hydrology, air quality, water quality, public health, historic resources, or environmental justice. The EA fails

to mention any other past, present, or reasonably foreseeable projects in the area, including other industrial developments mentioned in public comments. AR003043 (noting permits issued to Yuhuang Chemical, Inc., Americas Styrenics LLC, Mosaic Phosphate Company, Nustar Logistics, and Marathon Pipeline among others in St. James). Instead, the EA's unsupported conclusion is that "the incremental contribution of the proposed activity to cumulative impacts . . . [is] not considered to be significant." AR000163; *see also* AR000151 (Table 7 deeming cumulative effects for aquatic ecosystem as "Minor Effect (Long Term)").

The EA further concludes, with no analysis, that "[o]ther secondary effects that may be realized include reduced air quality, increased traffic, and construction equipment noise," which "are subject to local and state regulatory authorities and are thus are [sic] anticipated to be local in extent, minor in intensity, and/or short-term in duration." AR000151–152. This is not even a sideways glance, let alone the requisite hard look required by NEPA. As in *Great Old Broads*, because the agency's "EA fails to include the requisite cumulative impacts analysis, it cannot be sustained." *Great Old Broads*, 425 F. Supp. 2d at 85; *see also Grand Canyon Trust*, 290 F.3d at 342 ("the agency's EA must give a realistic evaluation of the total impacts and cannot isolate a proposed project, viewing it in a vacuum"); *Friends of the Earth, Inc. v. U.S. Army Corps of Eng'rs*, 109 F. Supp. 2d 30, 42 (D.D.C. 2000) (rejecting EAs prepared by the Corps that contained "no actual analysis," just a "conclusory statement" that cumulative impacts were minimal).

B. Plaintiffs Are Likely to Prevail on Their Claims That the Corps Inadequately Evaluated the Project's Impacts Under the NHPA

Formosa Plastics' complex will cover 1,500 acres, and in its path of destruction there are historic sites—including cemeteries of enslaved people—which were not properly identified, disclosed, or safeguarded. Like NEPA, the NHPA is a "stop, look and listen" statute. While procedural, each is a "powerful legal mechanism" that "cannot casually be set aside." *Slockish v. U.S. Fed. Highway Admin.*, 664 F. Supp. 2d 1192, 1208 (D. Or. 2009). Here, the Corps did not

faithfully execute its NHPA mandates and prematurely issued a permit to Formosa Plastics before conducting reasonable identification efforts for historic properties on site. Plaintiffs are likely to succeed in showing the Corps violated the NHPA.

1. The Corps did not properly define the area of potential effects

As an initial matter, the Corps did not properly define the “area of potential effects”—the locations where direct or indirect impacts to historic resources may occur—for the project, as the NHPA requires. 36 C.F.R. § 800.4; *see also id.* § 800.16(d) (“[a]rea of potential effects means the . . . areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties.”). As discussed *supra* at Section A.1.b.iv., at 21–23, the Corps omitted several portions of this project from its analysis, namely the construction of transmission lines and pipelines built solely to service the Plastics Facility that will impact 535.2 acres of wetlands and 31.8 acres of open waters. AR004171–72, AR006330, AR006334. The Corps failed to include these areas within the area of potential effects of the Plastics Facility or to engage in the NHPA identification process for these areas. The record contains no discussion of the potential adverse effects of these infrastructure routes on historic resources.

Furthermore, the Corps erroneously determined the “Buena Vista Cemetery area is outside of the project [area of potential effects] and no project impacts would occur within 300ft.” AR000999. The agency also asserted “the cemetery will be fenced outside of the facility because it is near the project boundary line and the public will have access to it.” AR000110. To begin with, Formosa Plastics initially fenced off an inaccurate location for the cemetery, which the Corps did not acknowledge, question, or explain in its NHPA determination. AR000999. Similarly, in its Memorandum of Record, the Corps does not explain how this now-relocated fencing protects the cemetery from all direct or indirect adverse effects of the Plastics Facility. AR000165; *see* 36 C.F.R. § 800.5(a)(2) (defining adverse effects to include, for example, “[r]emoval of the property from its historic location,” which Formosa Plastics has said it is

considering (AR001120), and “introduction of visual, atmospheric or audible elements that diminish the integrity of the property’s significant historic features.”); *see also Pye v. United States*, 269 F.3d 459, 469 (4th Cir. 2001) (in discussing impacts to an African American cemetery, the court noted, “[e]ven if no backhoes will touch either historic area, damage to historic areas can occur in less direct ways. . . . [T]he smallest of endeavors can have enormous consequences if taken improvidently”).

Further, contrary to the Corps’ assertion, Formosa Plastics has never committed to protecting the Buena Vista Cemetery (or providing public access to it).⁶ On the contrary, Formosa Plastics appears to tacitly acknowledge the facility will likely impact the cemetery, because there are potential plans to relocate the human remains. AR001120 (Formosa’s Supplemental Environmental Assessment Statement referencing the Buena Vista Cemetery’s “relocation, if necessary.”); Spees Decl. Ex. H, ECF No. 27-2 (June 15, 2020 letter from Formosa to Pam Spees) (Formosa Plastics plans “to have the remains re-interred”). The Buena Vista Cemetery and the ancillary transmission lines and pipelines should have been included in the area of potential effects for the NHPA analysis for this project but were not. As a result, the Corp failed to comply with its duties under NHPA.

2. The Corps’ lack of “identification efforts” violates the NHPA and puts historic cemeteries at risk

The Corps failed to make a reasonable and good faith effort to identify and delineate historically important cemeteries the Plastics Facility will endanger, even after presented with evidence of their existence and locations. Instead, the record and its own Memorandum shows the Corps rubber-stamped Formosa Plastics’ conclusions that historic sites will not be impacted with almost no involvement in the process. AR000165.

⁶ Formosa has repeatedly denied public access to the cemetery (including for a one-hour Juneteenth commemoration this year, *see infra* at 43).

Under the NHPA, the agency must make “a reasonable and good faith effort to carry out appropriate identification efforts, which may include background research, consultation, oral history interviews, sample field investigation, and field survey.” 36 C.F.R. § 800.4(b)(1). As a starting point, the Corps is required to review “existing information on historic properties within the area of potential effects, including any data concerning possible historic properties not yet identified,” *id.* § 800.4(a)(2), and to “[s]eek information, as appropriate, from . . . other individuals and organizations likely to have knowledge of, or concerns with, historic properties in the area.” *Id.* § 800.4(a)(3).

There is no evidence in the record the Corps conducted any “oral history interviews, sample field investigations, . . . field survey,” or anything remotely resembling adequate identification efforts, *id.* § 800.4(b)(1), and this remained true even after the Corps was presented with evidence of historic cemeteries on site. The NHPA does not tolerate this level of passivity. *See, e.g., Comanche Nation v. United States*, No. CIV-08-849-D, 2008 WL 4426621 (W.D. Okla. Sept. 23, 2008) (Defendants failed to “stop, look and listen” and instead “merely paused, glanced, and turned a deaf ear to warnings of adverse impact.” (citation omitted)).

Before the Corps issued its NHPA determination, Formosa’s consultants twice overlooked or ignored two known historic cemeteries on site believed to contain the remains of enslaved people. AR000864–915, AR005970–995. Even after a “source,” later identified as an archeologist with the Louisiana firm Coastal Environments, Inc. (“CEI”), notified the State Historic Preservation Office (“SHPO”) of Formosa’s oversight, the Corps never got involved. AR000165.

CEI later alerted the reviewing agencies again, this time explaining that the cemeteries are, in the Corps’ understated words, “in slightly different locations” than surveyed. AR000165. CEI said it remained “greatly concerned that the contracting firm . . . did not examine the correct area” and “plotted the southeastern limits of the cemetery approximately 86 meters northeast of

the northern limits of the graveyard location indicated by the map overlays,” concluding, “I only hope that this effort will prevent the indiscriminant [sic] destruction of the cemetery.” Spees Decl. Ex. B, ECF No. 27-2. Even after the revelations of the cemeteries’ existence and Formosa’s mistaken survey locations, there is no evidence the Corps ever contacted CEI for additional information, although CEI certainly qualifies as an organization “likely to have knowledge of, or concerns with, historic properties in the area.” 36 C.F.R. § 800.4(a)(3).

While the Corps’ NHPA determination includes a section titled “Identification and Evaluation,” it is void of any evidence of identification and evaluation efforts. In fact, the only indication of Corps activity regarding the burial sites is in its three-page NHPA determination, which mentions “[b]ackground research and literature review . . . conducted by Corps staff in November and December of 2018,” AR000997, but there is no evidence of this “review” in the record. Rather, the record demonstrates the only basis for the Corps’ conclusions was information Formosa provided, with sign-off from the SHPO, even though CEI repeatedly pointed out to the agencies that this information was incorrect and incomplete. AR005353; AR000165; Spees Decl. Ex. B, ECF No. 27-2. The Corps’ adoption of Formosa Plastics’ findings and reports without any further inquiry violates the NHPA. While the Corps may use contractors, including those of applicants, to prepare “information, analyses, and recommendations,” the agency “remains legally responsible for all required findings and determinations . . . [and] is responsible for ensuring that its content meets applicable standards and guidelines.” 36 C.F.R. § 800.2(a)(3). Similarly, consultation with and concurrence from the SHPO does not absolve the Corps of its NHPA duties. *See So. Utah Wilderness All. v. Burke*, 981 F. Supp. 2d 1099, 1109 (D. Utah 2013) (noting that consultation with the SHPO is but one requirement, and “[t]here is nothing in the NHPA or Section 106 that excuses the [agency’s] failure to comply with the other procedures based on a concurrence from the SHPO.”).

Courts have found an agency's identification efforts unreasonable where there is evidence of historical properties in the area of potential impacts that have not been fully surveyed. For example, the Tenth Circuit held an agency did not "reasonably pursue the information necessary to evaluat[e]" whether a canyon contained cultural resources when information indicated "a sufficient likelihood" of historic properties to "warrant further investigation." *Pueblo of Sandia v. United States*, 50 F.3d 856, 860-62 (10th Cir. 1995). The same is true here. The Corps was presented with evidence showing historic properties might be present but did nothing with it. Such failure is the essence of arbitrary decisionmaking.

A post-hoc archaeological report—which Formosa's consultants submitted in June 2019, five months *after* the Corps' NHPA determination—does nothing to remedy the Corps' failures. That report indicates that Formosa's consultants (1) subsequently discovered additional human remains at the Buena Vista Cemetery site, requiring the boundaries and fencing plan to be changed, and (2) again failed to find the Acadia Cemetery. AR000324–387. There is no evidence the Corps had any involvement in determining how or where Formosa's consultants undertook this additional site work or evaluated the consultants' conjecture that the Acadia Cemetery had previously been destroyed. The Corps instead summarily accepted that Formosa's contractors did not find any remains in the area where it plans to build the facility's utility plant. AR000165. A February 2020 report provided to the Corps (and disregarded) illuminates its lack of reasonable efforts, explaining in detail the errors and oversights that still have not been addressed with respect to the Acadia and Buena Vista cemeteries. Importantly, the report also concludes four additional cemeteries may exist on the project site that have yet to be investigated. Spees Decl. Ex. E, ECF No. 27-2.⁷ The Corps' treatment of these cemeteries and other possible burial sites

⁷ The Corps' Memorandum of Record contains other omissions, errors, and procedural irregularities that further undermine the credibility of its conclusions. For example, it shows the SHPO's concurrence came *before* the Corps' requested it. AR000165. It also shows the Buena

does not meet the “take into account” standard of the NHPA. Its lack of process, independent inquiry, and transparency reflects a fundamental flaw in the Corps’ permit analyses with respect to historic and cultural resources, and Plaintiffs are likely to succeed on their claim the Corp violated the NHPA.

C. Plaintiffs Are Likely to Prevail on Their Clean Water Act and Rivers and Harbors Act Claims.

Plaintiffs are likely to succeed on their claims that the Corps violated the Clean Water Act and Rivers and Harbors Act. The Corps (1) failed to “adequately explain why there is no less-damaging practicable alternative” and (2) arbitrarily found the project in the public interest. *All. to Save the Mattaponi v. U.S. Army Corps of Eng’rs*, 606 F. Supp. 2d 121, 130, 136 (D.D.C. 2009) [hereinafter “*Mattaponi*”].

1. The Corps failed to demonstrate that the proposed project will have the least damaging environmental impact

The Corps failed to ensure it selected the least environmentally damaging practicable alternative. The Clean Water Act prohibits the Corps from issuing a permit “if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem.” 40 C.F.R. § 230.10(a). Here, it is undisputed that the project is *not* “water dependent” (AR000111; Defs’ Answer ¶ 118, ECF No. 19), and therefore it must be *presumed* less environmentally damaging alternatives are available “unless clearly demonstrated otherwise.” 40 C.F.R. § 230.10(a)(3); *see Utahns v. Dep’t of Transp.*, 305 F.3d 1152, 1186-87 (10th Cir. 2002) (“The test is whether the alternative with less wetlands impact is

Vista Cemetery “contains the individuals who were part of the family associated with the plantation,” (AR000107; error repeated at AR000165), which has no support in the record and is in fact contradicted by Formosa Plastics’ own consultants. AR000349 (“According to a search on Find-A-Grave, none of the previous owners are buried at the plantation. They are buried in various locations in St. James, Assumption, and Orleans Parishes. It is possible that slaves who once lived on the property might be buried at this location.”).

‘impracticable,’ and the burden is on the Applicant . . . , with independent verification by the [Corps], to provide detailed, clear and convincing information *proving* impracticability.”).

Plaintiffs are likely to prevail because the Corps failed to demonstrate the lack of less environmentally damaging alternatives. Its selected alternative had the most wetlands (40 percent of the property) and most significant damage to wetlands (61.7 acres) of all alternatives, AR000106, AR000278 (alternatives 1 & 2 combined are the preferred alternative), yet the Corps eliminated all others as impracticable *before* ever comparing the potential harm to wetlands. Instead of providing clear and convincing information proving impracticability, and without any independent analysis, the Corps parroted Formosa Plastics’ analysis and criteria that precluded otherwise practicable alternatives. This is insufficient. *Sierra Club v. Van Antwerp*, 709 F. Supp. 2d 1254, 1264–68 (S.D. Fla. 2009) (the Corps violated the Clean Water Act with an uncritical acceptance of applicant’s alternatives report), *aff’d*, 362 Fed. Appx. 100 (11th Cir. 2010).

As one example, the Corps never considered permitting a smaller facility. Had the Corps done so, it could have considered other properties—with fewer wetlands and lesser environmental harm—that were eliminated primarily because of their size. AR 000139. Notably, the facility’s construction is planned in two phases. Construction of Phase I alone would yield 74 percent of the total product Formosa plans to produce, thus generally meeting project objectives of producing plastic for the global market. Yet the Corps failed to consider an alternative that would reduce the facility footprint by not building the Phase II expansion, which consists of a second ethane cracker and utility plant. AR004162, AR006052 (Figure 1). Here, neither the Corps nor Formosa Plastics ever explained why it must build one of the world’s largest plastic plants for the project to be practicable, let alone provide clear and convincing information *proving* the impracticability of a smaller facility. The Corps is under no obligation to accommodate all components of a proposed project. *Shoreline Assocs. v. Marsh*, 555 F. Supp.

169, 179 (D. Md. 1983), *aff'd*, 725 F.2d 677 (4th Cir. 1984) (upholding the Corps alternative that avoided wetlands by not accommodating boat storage and launch desired by developer).

The Corps' failure to evaluate a smaller facility option is like the evaluation that the Tenth Circuit found deficient in *Utahns*, 305 F.3d at 1189. The Tenth Circuit held that the Corps violated the law when it eliminated practicable alternatives for a proposed freeway, such as a narrower median or right-of-way, because both met the basic project purpose even if they did not allow for all of the amenities or utilities desired by the applicant. *Id.* Here, the Corps never assessed a smaller option, silently acquiescing to Formosa Plastics' unsupported rejection of "smaller plant options . . . [because] the social and economic benefits created by a [f]acility of this size would not be realized." AR005418. The Corps and Formosa Plastics needed to prove—and they failed to prove—that a smaller, less damaging facility is impracticable because of costs, technology and logistics. *Utahns*, 305 F.3d at 1166 (alternatives analysis inadequate with "no cost methodology contained in the record").

The Corps also failed to consider alternatives to building a marine facility, including three docks and a heavy haul road, which would permanently destroy precious batture wetlands. The Corps itself found that the basic purpose of the project is not water dependent, AR000111, but it never demonstrated that it is impracticable for the facility to use the site's existing roads and rail for transportation of equipment, supplies, and products. The Corps irrationally eliminated alternatives that lacked an option to build docks. AR000137–144. The fact that an applicant would like to build a dock does not compel the Corps to include it in considering alternatives if the basic purpose is not water dependent. *See, e.g., City Club of N.Y. v. U.S. Army Corps of Eng'rs*, 246 F. Supp. 3d 860, 872 (S.D.N.Y. 2017) (holding that the Corps' alternatives analysis was faulty because the basic purpose could be met without building a pier).

The Corps' also arbitrarily and capriciously rubber-stamped Formosa Plastics' elimination of sites in Ascension Parish, an area that is *not* predominately African American. The

conclusory statement that “by this time, six sites located in Ascension Parish had been eliminated,” AR000139, fails to demonstrate that alternatives were not practicable. Formosa eliminated promising sites in Ascension Parish, claiming that the region would not attain air pollution standards in the future, but Ascension Parish in fact kept its attainment status on April 30, 2018, long before the Corps’ final decision. 83 Fed Reg. 25,776 (June 4, 2018). Practicable alternatives must be analyzed, even if they only become available during the approval process. *Mattaponi*, 606 F. Supp. 2d, at 129-30. In *Mattaponi*, water needs changed and previously rejected alternatives became practicable during the pendency of the permit application. The court held the Corps failed to “explain fully, based on an analysis adequate to the task, why other alternatives are either impracticable or more damaging.” *Id.* at 130. Here, as in *Mattaponi*, the Corps had to provide more analysis on the Ascension Parish alternatives to demonstrate their unavailability.

For these reasons, Plaintiffs are likely to succeed in establishing that the Corps violated the Clean Water Act by failing to prove that it selected the least environmentally damaging alternative.

2. The Corps’ finding that the proposed project is in the public interest is arbitrary and capricious

Plaintiffs are also likely to prevail because the Corps’ public interest review—which requires it to consider the cumulative effects on aesthetic, historic, environmental, wildlife, floodplain, water, and community welfare values, *see* 33 C.F.R. § 320.4(a)(1)—fails to comply with the Clean Water Act and Rivers and Harbors Act. The Corps’ public interest review was a table with checkboxes indicating if the effects are “detrimental,” “neutral,” “negligible,” or “beneficial.” AR000152–158. This cursory review assigned a “neutral” or “negligible” value to nearly every public interest factor, falling well short of the careful, reasoned analysis the law requires. 33 C.F.R. § 320.4(a)(1). The Corps must balance the detriments against the benefits and deny the permit if it would be against “the public interest.” *Id.* § 320.4. Here, the Corps

improperly tipped the scale by disregarding the detriments. Plaintiffs are likely to show that the Corps' decision for at least one of many public interest factors was arbitrary.

First, the Corps' failure to properly weigh Formosa Plastics' long history of environmental violations was arbitrary. *Cf. Animal Legal Def. Fund v. Purdue*, 872 F.3d 602, 619-20 (D.C. Cir. 2017) (holding that an agency's licensing decision was arbitrary and capricious where the agency relied on a certification of compliance while ignoring the facility's history of non-compliance with regulatory requirements). The Corps' erroneously relied on Formosa Plastics' environmental compliance, dismissing concerns because the project will be "properly permitted with the LADEQ air and water permits." AR000154. The Corps' acceding to Formosa Plastics' rationale that its history of violations did not show a bad track record—but rather that it has cooperated with regulators, self-reported violations, and agreed to ensure compliance—is belied by the evidence. AR000119.

The Corps never even acknowledged Formosa Plastics was deemed a "serial offender" with "enormous" violations of environmental laws. *See San Antonio Bay Estuarine Waterkeeper*, 2019 WL 2716544, at *8-9. Before the Corps granted this permit, a federal court held Formosa Plastics liable for violating the Clean Water Act for discharging billions of plastic pellets into a bay from its facility in Point Comfort, Texas. *Id.* The court detailed the severity of the violations stating, "[t]he evidence demonstrates that Formosa Plastics has been in violation of its Permit concerning the discharge of floating solids . . . since January 31, 2016 and that the violations are enormous. . . . Formosa has also failed to report violations of the Clean Water Act to State and/or federal authorities." *Id.* at 25–26. EPA records also show that Formosa Plastics' other plastics plant in Baton Rouge, Louisiana, has been in violation of the Clean Air Act every quarter since 2009 and in violation of the Resource Conservation and Recovery Act every quarter since 2004. AR003021; Teel Decl. Ex. A, at 8–23. The Corps' failure to properly consider Formosa Plastics' long track record of violating permit requirements and failing to report violations is arbitrary,

and undermines its findings on environmental concerns, fish and wildlife values, and water quality factors.

Second, the Corps' impermissibly discounted all adverse effects and only looked at beneficial economic effects. The law does not allow an "unjustifiably greater weight" to be assigned to the benefits of a project. *Hough v. Marsh*, 557 F. Supp. 74, 86 (D. Mass. 1982) (striking down public interest review that looked one-sidedly at economic benefits but ignored adverse impacts). The Corps unlawfully glossed over the environmental and health concerns of the Formosa Plastics' project. Public testimony, media, and comments about the project show that the Corps' failed to consider important aspects of the problem and overly weighted the claimed benefits.

For example, the Corps has not squared its negligible impact findings on aesthetic and historic values with the serious concerns that the project deepens environmental racism, desecrates graves of enslaved persons, and mars the landscape—as described in the NEPA and NHPA sections above. The Corps' tries to paint a rosy picture by claiming that landscaping, with a "tree screen," will make the aesthetic impacts negligible, AR000153, but this ignores that the agricultural character of the land will change into a gargantuan industrial facility belching air and noise pollution into an African American neighborhood. When paying respects or engaging in quiet contemplation at the graves on the property, if ever allowed access, future visitors will experience a backdrop of one of the world's largest petrochemical complexes—with smokestacks, chemical tanks, utility plants, foul smells, and pipelines. This entails nearly complete loss of aesthetic values, which will certainly "mar the beauty," "deny access to or visibility of the resource, or result in changes in odor, air quality or noise levels." 40 C.F.R. § 230.53. Additionally, the adverse impact on historic values is *not* "neutral because it has been mitigated," AR000155, because the Corps failed to ensure access to and adequate protection of the Acadia and Buena Vista cemeteries, and failed to conduct any analysis of four additional

potential burial sites on the property. *See supra* at 24-30. There is no support for the Corps' conclusions that community welfare, historic, and aesthetic values tip the scales in favor of the public interest. *See, e.g., Wyo. Outdoor Council v. U.S. Army Corps of Eng'rs*, 351 F. Supp. 2d 1232, 1256 (D. Wyo. 2005) (public interest review ignored cumulative impacts).

The Corps also downplayed the pollution from the Plastic Facility. The Corps' scant description noted the facility's impacts on plastic, air, and water pollution, including:

the addition of more disposable plastics to the environment, output of chemicals through the smoke stack, possible contaminants entering the Mississippi River, potential contaminants in the area drainage entering the river and lake systems nearby, potential impacts to fish and wildlife, evacuation hazards, impacts to wetlands, and chemical spill concerns.

AR000154. However, it determined that these concerns are “neutral because the issues have been mitigated,” *id.*, even though the record reveals nothing that “mitigated” plastic, air, or water pollution—or related impacts on wildlife and public health. The Corps only required Formosa Plastics to provide compensatory mitigation for some wetland loss by purchasing wetlands credits, AR000107; but this will not mitigate the pollution. For example, though not analyzed by the Corps, the facility will double the air pollution in St. James Parish, including carcinogenic pollutants. Teel Decl. Ex. A, at 81. There is no mention of how Formosa Plastics' chronic air pollution will be mitigated. *Mattaponi*, 606 F. Supp. 2d at 136 (the Corps unlawfully failed to consider the impacts of chronic exposure to water pollution). Plastic pollution is likewise unmitigated—both the direct effects of plastic pellet discharges and indirect plastic pollution from the annual production of 2.4 million tons of ethylene (an amount that could make about a trillion plastic water bottles)—much of which will inevitably end up in landfills and oceans.⁸

⁸ The Corps' token statement that “[r]ecycling programs in many areas help to mitigate the disposable plastic issues,” AR000154, runs contrary to the fact that plastic continues to overwhelm municipal waste management systems—and only 9 percent of plastic is recycled nationally. AR003033; Teel Decl. Ex. B, at 204-09

Finally, the Corps' neutral finding on the project's harm to wildlife was arbitrary. For example, the Corps' found that fish and wildlife values are neutral because they "will relocate," AR000155, and claimed the project would have "no effect" on endangered pallid sturgeon or threatened manatee, AR000146, AR006012; but this runs counter to evidence in the record. The record does not support a "no effect" determination for pallid sturgeon. Rather, it reflects a "concern for the endangered Pallid Sturgeon," AR000108; in particular, the Louisiana Department of Fish and Wildlife expressed concerns about sturgeon becoming entrained or impinged in the facility's intake structure. AR000108–109. Formosa Plastics' own consultant also noted that pallid sturgeon are likely to occur in the affected area and advised against construction during the breeding season, AR006432; however, no such mitigation was adopted. Further, in its "Species Effects Determination Key" the Corps wrongly indicated project is not in St. James Parish, which lead to an incorrect "no effect" determination for manatees. AR006012. The numerous vessels serving the facility will worsen a predominant threat to manatee survival—vessel collisions. *See* 82 Fed. Reg. at 16,701; *see also* AR006446, AR004166 (discussing increased traffic servicing the facility). In addition, the property is important migratory bird and bald eagle habitat. The forested area and borrow pits that will be filled serve as a migratory bird flyway and feeding grounds, and bald eagles have been sighted and may nest in the forested wetlands.⁹ AR006432–433. The Corps' brief statement that impacts to wildlife will be mitigated is insufficient to support the Corps' public interest finding. AR000155.

Plaintiffs are likely to succeed in showing that the Corps' analysis was arbitrary in one or more of these many aspects to warrant the preliminary relief sought.

⁹ The Corps cannot rely on a single survey Formosa Plastics conducted in 2017 outside the nesting season to justify that no nests were found, and nests on adjacent properties could also be disturbed. AR006433.

II. Plaintiffs Will Suffer Irreparable Harm Absent Injunctive Relief

Unless the Court grants this motion, Plaintiffs will suffer irreparable harm from Formosa Plastics' imminent and permanent destruction of critical environmental and historic resources—the very resources this lawsuit seeks to protect. This injunction is necessary to temporarily maintain the status quo and prevent irreparable harm until the Court can rule on the merits.¹⁰

Some members of the plaintiff groups have lived in St. James their whole lives. Lavigne Decl. ¶ 2. A lifelong resident, Ms. Lavigne lives on the same road and the same stretch of the Mississippi River where the Plastics Facility will be built. Lavigne Decl. ¶ 3. Mr. Cayette lives on land his great-grandfather acquired in the 1800s after the abolition of slavery. Cayette Decl. ¶ 2. For these plaintiffs, Formosa Plastics is not only an unwanted neighbor; but construction will also destroy the precious remaining fields, forest, swamps and drive away the birds, frogs, grasshoppers, butterflies, and dragonflies they grew up with and adore. Lavigne Decl. ¶ 22, Cayette Decl. ¶ 11. Construction of the Plastics Facility will pollute the air they breathe, it will increase traffic, cause odors and noise. Lavigne Decl. ¶ 18, Cayette Decl. ¶¶ 8–10. Heartbreakingly, the project limits their ability to visit the cemeteries of the enslaved people who worked on the plantations so that they may “pray, sing, bring flowers” to honor their ancestors. Lavigne Decl. ¶ 30, Cayette Decl. ¶ 6. In Mr. Cayette's own words, “It would be a painful loss of my culture and heritage if those sacred sites are disturbed, and I would be emotionally and spiritually devastated if it happens.” Cayette Decl. ¶7.

Formosa Plastics has already begun and plans to ramp up construction over the next six months. Teel Decl. Ex. E. If it proceeds as planned, Formosa Plastics will damage 6.7 acres of critical batture wetlands; build a dock, heavy haul road, and bridge from the levee over Highway 18; relocate utilities; widen Highway 3127 from two to four lanes; and initiate a pile-driving

¹⁰ Courts need not defer “to federal agencies' positions concerning irreparable harm.” *San Luis & Delta-Mendota Water Auth. v. Jewell*, 969 F. Supp. 2d 1211, 1215 (E.D. Cal. 2013).

program and pipeline projects. *Id.* An injunction is necessary to prevent these activities that will cause irreparable harm. *See, e.g., Se. Alaska Conserv. Council v. U.S. Forest Serv.*, 413 F. Supp. 3d 973, 980-81 (D. Alaska 2019) (finding initial steps of ground-disturbing activities, including building a road, would cause irreparable harm).

The harms from these activities both independently and collectively warrant injunctive relief. “Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable.” *Humane Soc’y of the United States v. Kempthorne*, 481 F. Supp. 2d 53, 69 (D.D.C. 2006) (citation omitted); *see also Nat’l Wildlife Fed’n v. Burford*, 835 F.2d 305, 323–26 (D.C. Cir. 1987) (affirming preliminary injunction based on environmental injury). “When a procedural violation of NEPA is combined with a showing of environmental or aesthetic injury, courts have not hesitated to find a likelihood of irreparable injury.” *Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 24 (D.D.C. 2009) (citations omitted). Irreparable harm from the imminent construction activities fall into three categories: (1) environmental and aesthetic injuries; (2) levee instability; and (3) injuries to historic and cultural resources.

First, the injunction is necessary to prevent irreparable harm to Plaintiffs’ concrete environmental interests in wetlands, wildlife, aesthetics, and clean air. Formosa Plastics’ initial construction activities include imminent tree clearing and filling of forested batture wetlands on the Mississippi River to build a dock, road, and bridge; and that harm alone is sufficient to warrant an injunction. *See, e.g., Sierra Club v. U.S. Army Corps of Eng’rs*, 645 F.3d 978, 995 (8th Cir. 2011) (finding irreparable harm from filling wetlands); *Nat’l Wildlife Fed’n v. Marsh*, 721 F.2d 767, 786 (11th Cir. 1983) (same); *Idaho Rivers United v. Probert*, No. 3:16-cv-00102-CWD, 2016 WL 2757690, at *17 (D. Idaho May 12, 2016) (finding irreparable harm from cutting trees). Destroying wetlands or clearing trees is the definition of irreparable. *See League of Wilderness Defs./Blue Mts. Biodiversity Project v. Connaughton*, 752 F.3d 755, 764–65 (9th Cir.

2014) (clearing trees cannot be remedied with money or by planting seedlings, irrespective of whether the trees are small and were previously logged). Building on the batture will damage up to 6.7 acres of wetlands—including clearing trees—and require 27,611 cubic yards of fill. AR000105, AR002243. As construction proceeds, even more wetlands throughout the property will be permanently destroyed, and contiguous wetlands will be harmed as well. Shaffer Decl. ¶¶ 12-13, van Heerden Decl. ¶ 17.

Destruction of these wetlands will directly harm Plaintiffs' aesthetic interests. For example, this will impair Mr. Eustis' ability to observe and photograph wildlife and wetlands surrounding the property. Eustis Decl. ¶¶ 8, 11. It will also harm Plaintiffs' interests in migratory birds and other wetland wildlife. AR003023–024, AR004313–315, AR006434; Eustis Decl. ¶¶ 10, 13; Alexander Decl. ¶¶ 6-7 (“I am an avid birdwatcher . . . [and t]he destruction of wetlands will further threaten these birds, affecting my ability to continue seeing and enjoying them”); Shaffer Decl. ¶ 13 (construction will displace migratory birds).

Plaintiffs will also be irreparably harmed by Formosa Plastics' transformation of the agricultural landscape to a massive construction site for the petrochemical complex, forever damaging the look, feel, and value of this serene spot on the river. *See Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) (finding activity that harms a plaintiff's “ability to ‘view, experience, and utilize’” an area in an “undisturbed state” is “actual and irreparable injury” that “satisfies the ‘likelihood of irreparable injury’ requirement articulated in *Winter*”). Plaintiffs' members value and have benefitted from this area for many years, and Formosa Plastics' construction will harm them in immediate and concrete ways. *See, e.g.,* Lavigne Decl. ¶ 21 (describing how she values “green and beautiful agricultural land and rich wetlands” and filling those wetlands and bulldozing the trees will cause her “great sorrow and anger” every time she goes by); Cayette Decl. ¶ 8 (describing how the open space and wildlife improve his quality of life and how construction will destroy “the natural beauty of the site”).

The irreparable harm also includes an immediate increase in air pollution from construction, road traffic, and vessel traffic, Lavigne Decl. ¶ 19, Cayette Decl. ¶ 10; and in due course the petrochemical complex will *double* the air pollution in the Parish. Air pollution not only increases the risk of dying from COVID-19; but the plant’s emissions also include harmful pollutants that endanger human health and the environment. Cayette Dec. ¶¶ 8-9; Lavigne Decl. ¶ 16. “[S]everal courts, including the Supreme Court, have found that increased air pollution can constitute irreparable harm.” *California v. U.S. Bureau of Land Mgmt.*, 286 F. Supp. 3d 1054, 1073-74 (N.D. Cal. 2018) (citing *Beame v. Friends of the Earth*, 434 U.S. 1310, 1314 (1977) (recognizing “irreparable injury that air pollution may cause during [a two month] period, particularly for those with respiratory ailments”); *Sierra Club v. U.S. Dep’t of Agric.*, 841 F. Supp. 2d 349, 358 (D.C. Cir. 2012) (irreparable harm from air pollution due to coal plant expansion). Absent an injunction, Plaintiffs’ members will be forced to breathe air polluted with soot, smog, carcinogens and other pollutants. Cayette Decl. ¶ 9; Lavigne Decl. ¶¶ 16, 27; Cooper Decl. ¶ 7. This puts them at risk of developing asthma, respiratory problems, cancer, and other health problems. AR003024–026. This harm is especially pronounced because some of Plaintiffs’ members already suffer from ailments that make them more vulnerable to air pollution. Cayette Decl. ¶ 9, Lavigne Decl. ¶ 18, Cooper Decl. ¶¶ 5-7.

Further, the imminent construction on the levee for the heavy haul road and bridge, and the trucks carrying heavy loads, will immediately and irreparably risk levee instability and flooding. Van Heerden Decl. ¶¶ 24, 27, 29-30; *see also Richland/Wilkin Joint Powers Auth. v. U.S. Army Corps of Eng’rs*, 826 F.3d 1030, 1038 (8th Cir. 2016) (affirming irreparable harm for levee work, an initial step in a larger project with flooding harm). As detailed in Dr. van Heerden’s declaration, construction and trucks on the west bank of the Mississippi River threaten to destabilize the levee. Van Heerden Decl. ¶¶ 24, 27, 29-30. The Mississippi River Flood Protection Levee protects St. James residents, homes, farms, transportation routes, and other

resources from inevitable hurricanes and floods. AR000548; van Heerden Decl. ¶ 30; Lavigne Decl. ¶ 24. In addition to levee instability, Plaintiffs' members face harm from flooding because construction and landfill will increase flood risk even as soon as this hurricane season—between June and November. *See* Shaffer Decl. ¶¶ 8-11; van Heerden Decl. ¶¶ 10, 16, 21, 23, 25 (noting there is a high probability that the property will flood during major storms or intense rainfall). This increased flooding hazard puts locals at risk. Lavigne Decl. ¶ 28.

Finally, the imminent plans for boring and pile driving (as well as ensuing landfill and construction) on the site will irreparably harm historic properties, some of which have never been surveyed. Spees Decl. Ex. E, ECF No. 27-2. The CEI Report concluded, (1) Formosa Plastics' consultants overlooked the Acadia and Buena Vista cemeteries in its archeological reports, and other omissions made it "impossible to evaluate the conclusions presented" (*id.* at 11); (2) when sent back to do further investigation after CEI reported their error to the SHPO, Formosa Plastics' consultants searched in the wrong location for the Acadia Cemetery (*id.* at 20); (3) four unmarked cemeteries (sites B, D, H, and L) may exist on the project site in addition to the two previously identified (*id.* at 120-21); (4) further investigations are required to avoid construction impacts to the Acadia Cemetery and the four additional potential burial sites (*id.* at 34, 121-122). Because of the Corps' inadequate identification of historic resources, Formosa Plastics' activities risk irreversibly damaging historic grave sites of enslaved people. Construction will also harm the aesthetics of the historic cemeteries and impede access for those paying their respects to the deceased. Plaintiffs will suffer irreparable injury to their interests in these historic grave sites. *See, e.g.*, Lavigne Decl. ¶¶ 30-33; Cooper Decl. ¶ 13; Cayette Decl. ¶¶ 6-7; London Decl. ¶ 8.

This harm is significant and imminent, as Formosa Plastics has already sought to block Plaintiffs' access to access the Buena Vista Cemetery. In denying Ms. Lavigne of RISE St. James' most recent request for access (Spees Decl. Ex. G & H, ECF No. 27-2), Formosa Plastics

argued the “property is an active construction site,” rendering it unsafe for her to visit the cemetery. *Id.* Ex. H. On Juneteenth this year (June 19, 2020), Ms. Lavigne visited the Buena Vista Cemetery to pay respects to her community’s ancestors and honor the resting place of enslaved people who had no say in where they worked or died. Lavigne ¶ 30. To do so, she had to obtain a Temporary Restraining Order in state court. *RISE St. James and Sharon Lavigne v. FG LA LLC, a/k/a Formosa Plastics*, Civ. Action 39963, 23rd Judicial District Court (June 18, 2020). This affirms the immediacy of the harm and need for injunctive relief.

An injunction is necessary given Formosa Plastics’ refusal to delay construction; imminent, significant, and irreparable injuries; and the provisions of NEPA, the NHPA, and Clean Water Act that require analysis *before* any project construction occurs.

III. The Balance of Equities and the Public Interest Favor an Injunction

Granting Plaintiffs’ requested relief—which would maintain the status quo pending a decision of these issues on the merits—serves the public’s interest in preventing harm that our environmental laws were meant to protect. The preliminary injunction factors of balancing the equities and finding an injunction in the public interest “merge when the Government is the opposing party.” *Nken v. Holder*, 556 U.S. 418, 435 (2009). Additionally, “there is a substantial public interest in having governmental agencies abide by the federal laws that govern their existence and operations.” *League of Women Voters of the United States v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016) (citation and internal quotations omitted).

The Court “looks to the statutes enacted by Congress” for the public interest test. *Quechan Tribe of the Fort Yuma Indian Rsrv. v. U.S. Dep’t of Interior*, 755 F. Supp. 2d 1104, 1122 (S.D. Cal. 2010) (citation omitted). In enacting NEPA, the NHPA, and the Clean Water Act, Congress established that protecting environmental and historic resources is in the public interest. *Brady Campaign*, 612 F. Supp. 2d at 26 (“the public has an interest in having Congress’ mandates in NEPA carried out accurately and completely” (citation omitted)); *Sierra Club v.*

Marsh, 714 F. Supp. 539, 592-93 (D. Me. 1989) (similar); *Quechan Tribe*, 755 F. Supp. 2d at 1122 (public interest served, because with the NHPA, Congress “determin[ed] that preservation of historical properties takes priority”); *Friends of the Wild Swan, Inc. v. U.S. EPA*, 130 F. Supp. 2d 1207, 1213 (D. Mont. 2000) (“The public interest is best served by prompt action” by the government “to comply with the [Clean Water Act’s] charge”). The public has an overriding interest in ensuring the Corps complies with these statutes *before* taking actions that irreversibly impact the environment.

As discussed above, if an injunction is not granted Plaintiffs will be irreparably harmed by the destruction of wetlands, environmental damage, and the desecration of grave sites of enslaved persons, which bear witness to both our country’s shameful past and the faith, resilience, and perseverance of the present-day St. James community. If irreparable injury is probable, “the balance of harms will usually favor the issuance of an injunction to protect the environment.” *Idaho Conserv. League v. Atlanta Gold Corp.*, 879 F. Supp. 2d 1148, 1158 (D. Idaho 2012) (citation omitted) (granting a preliminary injunction after weighing environmental harm of water pollution over the economic injury).

Conversely, there is no harm at all to the Corps from temporarily suspending its permit. *Sierra Club v. Norton*, 207 F. Supp. 2d 1310, 1341 (S.D. Ala. 2002) (“proposed injunction threatens little tangible harm to the governmental entities”). And the harm to Formosa Plastics, if any, is likely minimal. Formosa is at the front end of a multi-year project, and a few months delay for a project that will not be completed for 10 years is unlikely to make or break the proposal. *See, e.g., Sierra Club v. Army Corps*, 645 F.3d at 97–98 (environmental harms outweighed temporary loss of jobs and delays in opening the plant). Delaying the project should not tip the balance of equities; Formosa Plastics made the risky decision to begin construction while the Corps’ permitting decisions were in litigation, and after it became aware that its historic resources surveys were deficient. *See League of Wilderness Defs. v. Connaughton*, 752

F.3d 755, 766 (9th Cir. 2014) (“irreparable environmental injuries outweigh the temporary delay intervenors face in receiving a part of the economic benefits of the project”). It is better to pause construction now to preserve the status quo rather than risk having to reverse course as the court ordered in *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, No. 16-1534-JEB, 2020 WL 3634426, at *8-9 (D.D.C. July 6, 2020).

IV. The Court Should Issue No Bond or Only a Minimal One

If the Court issues an injunction, Plaintiffs—all nonprofit organizations—respectfully request that the Court require no bond or, at most, a nominal bond. *See, e.g.*, Suckling Decl. ¶ 8-9. Courts routinely require no bond or only a minimal bond (i.e., \$500 or less) in public interest environmental cases of this kind.¹¹

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request the Court grant their Motion for Preliminary Injunction.

Dated: July 14, 2020

Respectfully submitted,

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¹¹ *See, e.g., W. Watersheds Proj. v. Schneider*, 417 F. Supp. 3d 1319, 1335 (D. Idaho 2019) (ordering no bond); *Red Wolf Coal. v. U.S. Fish & Wildlife Serv.*, 210 F. Supp. 3d 796, 807 (E.D.N.C. 2016) (ordering a \$100 bond); *Landwatch v. Connaughton*, 905 F. Supp. 2d 1192, 1198 (D. Ore. 2012) (ordering no bond).

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EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR BIOLOGICAL DIVERSITY,
et al.,

Plaintiffs,

v.

U.S. ARMY CORPS OF ENGINEERS,
et al.,

Defendants,

and

FG LA LLC,

Defendant-Intervenor.

Case No.: 1:20-cv-00103-RDM

**AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION OF LOUISIANA
FOUNDATION IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION
AND REQUEST FOR ORAL ARGUMENT**

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CORPORATE DISCLOSURE STATEMENT

In accordance with LCvR 7(o)(5) and Rules 26.1 and 29(a)(4) of the Federal Rules of Appellate Procedure, Amicus Curiae American Civil Liberties Union Foundation of Louisiana represents that it is a non-profit organization with no parent corporation and no outstanding stock shares or other securities in the hands of the public. No publicly held corporation owns any stock in amicus curiae.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

IDENTITY AND THE INTERESTS OF THE AMICUS 1

STATEMENT OF COUNSEL..... 1

INTRODUCTION..... 2

ARGUMENT..... 2

I. THE CORPS VIOLATED THE NEPA BY FAILING TO CONSIDER ENVIRONMENTAL RACISM. 2

A. Black people are disproportionately affected by environmental hazards. 3

B. Cancer Alley, and St. James Parish, are already plagued by environmental hazards. 6

C. The Corps abdicated its duty to investigate allegations of racism. 8

1. The Corps applied an incorrect standard to evaluate discrimination. 9

2. Formosa’s focus on its site-selection was outcome-oriented and narrow. 10

3. The Corps failed to consider other relevant factors. 11

4. Formosa’s site-selection process demonstrates obvious discriminatory impact. 13

II. THE CORPS VIOLATED THE NHPA BY IGNORING AT LEAST TWO SLAVE CEMETERIES.	14
A. The Corps relied on faulty Formosa reports to justify its “no effects” finding.	15
B. Slave cemeteries are historic properties.	19
C. Cemeteries on the proposed site show Louisiana’s brutal history of slavery.	20
D. Halting construction supports Louisiana’s interest in protecting slave cemeteries.	23
E. The only way to protect cemeteries on the proposed site is to withdraw the permits.	24
CONCLUSION	25
CERTIFICATE OF COMPLIANCE	26
CERTIFICATE OF SERVICE	26

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IDENTITY AND THE INTEREST OF THE AMICUS

The American Civil Liberties Union (“ACLU”) is a nationwide, non-profit, non-partisan organization with approximately 1.5 million members dedicated to the principles of liberty and equality embodied in the Constitution and the nation’s civil rights laws. The ACLU has long been committed to racial justice, and it has participated in a panoply of critical cases concerning racial justice that have reached the Supreme Court. The ACLU Foundation of Louisiana is a statewide affiliate of the national ACLU. For more than 60 years, the ACLU Foundation of Louisiana has fought to defend all people, particularly Black Louisianans, from government abuse and overreach through litigation, policy, and advocacy. Furthermore, the construction of the proposed Formosa complex would directly harm the interests, values, and quality of life of the members of the ACLU Foundation of Louisiana who live in St. James Parish.

Amicus supports Plaintiffs’ requested remedy for declaratory and injunctive relief because the U.S. Army Corps of Engineers’ (the “Corps”) failed to prepare an Environmental Impact Statement and its woefully inadequate Environmental Assessment seriously undermine the core purposes of the National Environmental Policy Act (“NEPA”), including rigorous evaluation of environmental impacts, public disclosure, and fully-informed agency decision-making. Furthermore, the Corps’ failure to take account of site surveys indicating where enslaved people were buried not only violates the National Historic Preservation Act (“NHPA”), but also further harms the Black residents of St. James Parish, a community that has already experienced neglect and abuse.

STATEMENT OF COUNSEL

This brief was not authored in whole or part by counsel for a party to this litigation. No person other than Amicus Curiae or their counsel contributed money to fund preparing or

submitting this brief.

INTRODUCTION

This core of this case concerns environmental racism and injustice. The proposed FG LA LLC Plastics petrochemical complex (“Formosa complex”) is sited on former plantations in the heart of Cancer Alley, an area infamous for its dense clusters of industrial factories among primarily low-income and Black communities. Construction is already under way on land comprising as many as six unmarked cemeteries that likely contain the remains of enslaved people. Over the insistent objections of nearby residents, and without properly investigating the property’s historical significance or assessing the Formosa complex’s environmental impact, the Corps issued federal permits and authorizations for it to proceed.

As alleged in the Complaint, ECF No. 1, the Corps failed to prepare an Environmental Impact Statement (“EIS”), in violation of the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321, *et seq.*, and its finding that the complex would have no significant environmental effect was based on a gravely flawed, woefully inadequate Environmental Assessment. The Corps also violated the National Historic Preservation Act (“NHPA”) by failing to conduct an adequate historic properties identification and assessment process, specifically by overlooking historic cemeteries and failing to take account of records indicating where additional enslaved people may be buried.

ARGUMENT

I. The Corps violated the NEPA by failing to consider environmental racism.

Federal agencies such as the Corps are required to evaluate and address environmental racism during the NEPA review process:

Each federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and

adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States ...

Exec. Order 12,898, 59 Fed. Reg. 7629 (Feb. 16, 1994). This executive order (“EO”) obligates the Corps to analyze the environmental effects, including not only human health but the economic and social effects of proposed actions on minority and low-income communities when required by NEPA. NEPA requires the Corps to prepare an Environmental Impact Statement (“EIS”) for actions “significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). Determining the significance of an action requires analysis of several contextual factors such as “society as a whole (human, national), the affected region, the affected interests, and the locality,” including short- and long-term effects. 40 C.F.R. § 1508.27. The severity of an action’s impact also requires evaluation of its “intensity,” including factors such as unique geographic characteristics (e.g., proximity to historic or cultural resources); the degree to which the action’s human environmental effects are “likely to be highly controversial”; whether it is related to other actions with “cumulatively significant impacts,” and the degree to which an action may cause loss of significant cultural or historical resources. 40 C.F.R. § 1508.27(b). As demonstrated by its environmental assessment (“EA”) and Statement of Findings (“findings” or “Corps findings”), the Corps failed to adequately consider the human impact of the Formosa complex on Black and poor communities in St. James Parish.

A. Black people are disproportionately affected by environmental hazards.

A baseline consideration for the Corps and any federal agency charged with addressing environmental justice in predominantly Black communities is the extensive history of environmental racism in the United States. Prominent examples such as the water contamination in Flint, Michigan, where 56 percent of the population are Black and 41.5 percent live below the

poverty line—underscore the longstanding nature of this problem. Loosely defined, environmental racism refers to institutional regulations, policies, or government and/or corporate decisions that target specific communities for locally undesirable land uses and lax enforcement of zoning and/or environmental laws, causing communities of color to be disproportionately affected by hazards such as toxic emissions and hazardous waste.¹ Areas such as Cancer Alley (*see* § I(B), *supra*) are best understood as the decades-long, cumulative effect of this phenomenon. The deleterious effects of inequitable land-use policies and practices are now, sadly, well-documented and empirically verifiable.

For example, communities of color have higher exposure rates to air pollution than white residents: a Yale University study published in the scientific journal *Environmental Health Perspectives* found that white people had the lowest exposure rates for 11 of 14 pollutants monitored in the study, while Black people had the highest for 13 of the 14.² Communities of color are most often where industrial facilities, hazardous waste sites, and landfills are located;³ people of color are almost twice as likely as white people to live within a fence-line zone of a hazardous chemical facility, according to a Center for Effective Government report.⁴

Low-income communities of color often have limited access to clean drinking water,⁵ and water contamination predominantly affects children of color who live in rural areas.⁶ For

¹ Environmental Justice & Environmental Racism, Green Action for Health & Environmental Justice, <http://greenaction.org/what-is-environmental-justice/> (last visited July 17, 2020).

² See Cheryl Katz, *People in Poor Neighborhoods Breathe More Hazardous Particles*, ENVIRONMENTAL HEALTH NEWS, November 1, 2012, available at: <https://www.scientificamerican.com/article/people-poor-neighborhoods-breathe-more-hazardous-particles/>

³ See *Toxic Wastes and Race at Twenty (1987-2007)*, March 2007, available at <https://www.nrdc.org/sites/default/files/toxic-wastes-and-race-at-twenty-1987-2007.pdf>

⁴ See *Living In The Shadow of Danger: Poverty, Race, and Unequal Chemical Facility Hazards* (January 2016), available at: <https://www.foreffectivegov.org/sites/default/files/shadow-of-danger-highrespdf.pdf>.

⁵ James VanDerslice, *Drinking Water Infrastructure and Environmental Disparities: Evidence and Methodological Considerations*, *American J. of Public Health* (December 2011), available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3222486/?tool=pmcentrez>

⁶ Andrew Postman, *The Truth About Tap*, NRDC.org (Jan. 5, 2016), <https://www.nrdc.org/stories/truth-about-tap#note68>.

example, residents of isolated St. Joseph, Louisiana, have long complained of muddy, brown water flowing from their taps—a state health officer blamed the small town’s 95-year-old municipal system;⁷ nearly 40 percent of the town’s 1,176 people are living below the poverty line, and 55 percent are Black.⁸

Even the effects of climate change are disproportionately absorbed by low-income, communities of color; for example, Black people accounted for 73 percent of New Orleans residents displaced by Hurricane Katrina, and more than a third of them were estimated to have been impoverished, according to a Congressional Research Service report.⁹ In the current coronavirus pandemic, longstanding health and social inequities have put people of color at greater risk of contracting COVID-19 or experiencing illness, according to the CDC.¹⁰ As of June 12, 2020, age-adjusted hospitalization rates are five times higher for non-Hispanic Black people compared with white people.¹¹ Dr. Anthony Fauci, director of the National Institute of Allergy and Infectious Diseases, recently acknowledged that institutional racism contributes to the virus’ disproportionate impact on Black people.¹²

As the above reports, statistics, and data illustrate, environmental racism is an entrenched phenomenon, no less problematic than more overt forms of structural racism. Because racial minorities bear a disproportionate burden of morbidity and mortality, the Corps had an even

⁷ Mark Ballard, *State says St. Joseph’s brown drinking water is safe*, THE ADVOCATE, Dec. 22, 2016, available at: https://www.theadvocate.com/baton_rouge/news/politics/article_5123e7df-73c8-593b-b2ce-4d04751a3734.html

⁸ U.S. Census Bureau, *Quick Facts: Tensas Parish, Louisiana* (2019), available at <https://www.census.gov/quickfacts/tensasparishlouisiana>

⁹ Abby Phillip, *White people in New Orleans say they’re better off after Katrina. Black people don’t.*, THE WASHINGTON POST, August 24, 2015, available at: <https://www.washingtonpost.com/news/post-nation/wp/2015/08/24/white-people-in-new-orleans-say-theyre-better-off-after-katrina-black-people-dont/>

¹⁰ COVID-19 in Racial and Ethnic Minority Groups, CDC (update June 25, 2020), available at <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/racial-ethnic-minorities.html>.

¹¹ *Id.*

¹² Jacqueline Howard, *Institutional racism contributes to COVID-19’s “double whammy” impact on the Black community*, Fauci says, CNN.COM, June 23, 2020, available at <https://www.cnn.com/2020/06/23/health/coronavirus-pandemic-racism-fauci-bn/index.html>

greater obligation to identify, assess, and address the environmental and health effects of the proposed Formosa complex on the neighboring Black and low-income communities in St. James Parish who will bear the brunt of its impact.

B. Cancer Alley, and St. James Parish, are already plagued by environmental hazards.

The 171-mile stretch of the Mississippi River between Baton Rouge and New Orleans has long been considered “ground zero in the national debate over environmental justice.”¹³ One third of the state’s Black residents, many of them descendants of formerly enslaved Americans, live in a corridor that comprises 3.6 percent of Louisiana’s land.¹⁴ Although Black people make up about 21 percent of the state’s population, they make up about 44 percent of the Mississippi River Corridor’s population.¹⁵ This area is densely packed with oil refineries, petrochemical plants, and waste dumps; it is considered one of the most heavily polluted areas in the United States.¹⁶ Known locally as “Cancer Alley,” the area accounts for approximately one-fourth of the country’s petrochemical pollution, according to a study by the U.S. Commission on Civil Rights.¹⁷

Although more white people than Black people live in this corridor, it is 21 percent more likely that a Black person will live within two miles of a polluter.¹⁸ An Environmental Protection Agency study found Black residents bear a 61 percent greater pollution burden than would be expected from a random dispersal of the state’s plants.¹⁹ The problem is so longstanding that the

¹³ John McQuaid, *Chemical corridor: Black residents shoulder the heaviest burden of pollution along the Mississippi River*, THE TIMES-PICAYUNE, May 21, 2000, available at: https://www.nola.com/news/politics/article_04acb695-fd93-5c08-9479-b7b34d700b15.html

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Not in My Backyard: Executive Order 12,898 and Title VI as Tools for Achieving Environmental Justice, at pp. 23, 124, available at <https://www.usccr.gov/pubs/envjust/ej0104.pdf>.

¹⁸ *Id.*

¹⁹ *Id.*

U.S. Commission on Civil Rights found in a 1993 study that Black communities in the corridor “are disproportionately impacted by the ... government system for permitting and expansion of hazardous waste and chemical facilities.”²⁰ The federal advisory panel noted that these communities “are most often located in rural and unincorporated areas, and residents are of low socioeconomic status with limited political influence.”²¹

In 2000, when the New Orleans *Times-Picayune* published a four-part series examining environmental racism, it identified the “top ten polluters” in the corridor, and the third-highest polluter was IMC-Agrico, which produced phosphate fertilizer in St. James Parish.²² It alone produced 12,592,973 pounds of pollutants into the air, land, and water.²³ Two of the other “top polluters” were in neighboring Donaldsonville: Triad Nitrogen, Inc. and CF Industries, Inc., which together produced 9,110,505 pounds.²⁴ Today, Mosaic Fertilizer, LLC owns the former IMC-Agrico plant, and the company maintains a 960-acre lake that contains “hundreds of millions of gallons of toxic, radioactive water that sits on top of a 200-foot pile of waste product, an enormous, chalky white wall” of phosphogypsum, a mound known locally as the big “gypstack.”²⁵ The storage site is an “eyesore” that has been under a federal consent decree since 2015 for releasing excessive amounts of sulfur dioxide and sulfuric acid mist into the air.²⁶

²⁰ John McQuaid, *Burdens on the Horizon* (part of the “Unwelcome Neighbors” series), THE TIMES-PICAYUNE, May 21, 2000, available at: https://www.nola.com/news/politics/article_4cdf0771-78f3-5f4f-a980-4ac317086a04.html

²¹ *Id.*

²² The series, which received the John B. Oakes Award for Distinguished Environmental Reporting, is available here: https://www.nola.com/news/article_65ec2bb8-fbf6-11e9-8b0b-9ffb21c4a287.html. See also the accompanying infographic, “Chemical Corridor,” available at <https://bloximages.newyork1.vip.townnews.com/nola.com/content/tncms/assets/v3/editorial/d/10/d1010e68-fc1f-11e9-b5f7-bbb70cf481b8/5dbb491c0c0d1.pdf.pdf>

²³ *Id.*

²⁴ *Id.*

²⁵ Lauren Zanolli, ‘*If there’s a spill, it’s a disaster*’: living next to a giant lake of radioactive waste, THE GUARDIAN, Nov. 6, 2019, available at <https://www.theguardian.com/us-news/2019/nov/06/louisiana-st-james-parish-lake-radioactive-industrial-waste-cancer-town-pollution-mosaic>

²⁶ *Id.*; see also EPA announcement of settlement, available at: <https://www.epa.gov/enforcement/reference-news-release-major-fertilizer-producer-mosaic-fertilizer-llc-ensure-proper>

Mosaic is one of 10 industrial plants in the parish, including Air Products, DuPont, Louisiana Sugar Refining, Nucor, NuStar, OxyChem, Plains Pipeline, Rain CII, and Shell.²⁷

The above-cited facts and circumstances are the context in which the Corps was required to evaluate the Formosa complex, but it failed in its evaluation, as demonstrated by its findings. It failed to consider, for example, the “cumulatively significant impacts” of the Formosa complex, the other local and regional refineries, petrochemical plants, and waste sites, as required by 40 C.F.R. § 1508.27(b). It failed to consider the context of the region (the above-described “Cancer Alley”) and the locality of St. James Parish, as evidenced by its failure to deem the project significant enough to issue an EIS. 40 C.F.R. § 1508.27. Finally, and perhaps most significantly, it gave at best only cursory consideration to the underlying issue of environmental racism.

C. The Corps abdicated its duty to investigate allegations of racism.

Not only did the Corps fail to prepare an EIS, it failed utterly in undertaking its obligation to assess and investigate allegations of environmental racism. Indeed, the Corps’ environmental assessment and findings uses the word “racism” only once, in reference to community comments about Formosa’s project. AR000134.

In reference to EO 12898, the Corps determined that the Formosa complex “would not use methods or practices that discriminate on the basis of race ... nor would it have a disproportionate effect on minority or low-income communities.” AR000171. The Corps’ methodology in reaching this conclusion relied entirely on Formosa’s own representations and reasoning, apparently without any independent investigation or objective assessment. AR000171-AR000177. Formosa’s own defense of racism allegations likewise misapprehends or deliberately skews the question of disproportionate impact, focusing almost entirely on its own

²⁷ St. James Parish’s web site listing of industrial plants, <https://www.stjamesla.com/QuickLinks.aspx?CID=37>

site-selection process.

1. The Corps applied an incorrect standard to evaluate discrimination.

As a threshold matter, the Corps mistakenly adopted Formosa's incorrect methodology in reviewing allegations of discrimination. Formosa claimed there is no evidence of discriminatory intent in its site-selection process; the Corps noted Formosa provided data "showing that this project has not been planned to intentionally impact Environmental Justice Communities in the area." AR000171-AR000172. But this perfunctory review failed in two ways: the Corps failed to properly evaluate the project's effect, as required by EO 12898; the Corps also failed to evaluate the issue of intent, which required it to look beyond Formosa's narrow focus on its site-selection process. The inquiry is not whether Formosa "planned to intentionally" impact certain communities, but whether its project *will* impact those communities, and whether discriminatory intent can be inferred from circumstantial and direct evidence.

Although Formosa correctly asserted that Section 601 of Title VI prohibits only intentional discrimination, it incorrectly dismissed as inapplicable Section 602, which invites consideration of disparate impact. For example, the Environmental Protection Agency promulgated regulations that prohibit "criteria or methods of administering [a] program or activity which have the *effect* of subjecting individuals to discrimination because of their race, color, national origin, or sex." 40 CFR § 7.35(b) (emphasis added). Formosa asserted that, because Section 602 does not create a private right of action, claims of disparate impact or effect under these regulations "have been limited to the administrative complaint process." AR001045. But that is irrelevant in this context, and EO 12898 explicitly requires consideration of discriminatory effect. The Corps was required to consider the Formosa complex's effect on minority and low-income communities; in its blind acceptance of Formosa's self-assessment, the Corps failed to properly evaluate claims of

discrimination. Asking only whether Formosa's final site-selection process contained evidence of discriminatory intent ignores the broader context that such an inquiry demands.

2. Formosa's focus on its site-selection was outcome-oriented and narrow.

Formosa found no evidence of discriminatory intent in its own site-selection process, but its analysis was narrowly focused on the outcome, and failed to fully examine underlying assumptions and decisions that predated and pervaded its identification of sites within "Cancer Alley." AR001046. For example, Formosa framed its analysis by discussing its evaluation of 14 sites, all of which are located in St. James Parish and two neighboring parishes, Ascension Parish (to the northwest) and St. John the Baptist Parish (to the southeast). Thus, its analysis began with an assumption that all the sites it considered were neutrally selected, and it did not examine whether discriminatory intent undergirded the process and criteria used to identify those sites.

The sites allegedly were selected in concert with the Louisiana Department of Economic Development ("LED") and a consultant, using certain evaluation criteria including "proximity to ethylene, ethane, and natural gas pipelines" and "proximity of nearby residents." AR001076-1081. However, it abandoned the site it initially selected (in St. James Parish) because the river pilots association objected to the construction of a dock there. Absent from this review was any discussion of Formosa's decision to locate its complex within the South or, more specifically, Louisiana itself—consideration of other states was apparently omitted. Significantly, neither the Corps nor Formosa analyzed what factors other agencies (such as LED) and individuals (such as the unidentified consultant) considered. More importantly, neither the Corps nor Formosa considered the historical land-use policies and decisions that caused specific sites to fulfill its purported criteria (*see* §1(B) *infra*). In that specific context, facially neutral criteria such as "proximity to residents" can and did serve as a proxy for race. As previously noted, the region in

question has a disproportionately high Black population, and Black communities there are most often located in rural, unincorporated areas, with low socioeconomic status and limited political influence.

Ultimately, Formosa restarted the site-selection process with LED and a consultant, “along with the economic development committees of various parishes and service providers.” AR001077. It again re-used similar criteria (such as “proximity to residents”) and did not discuss or examine the other parties’ influence or underlying considerations and assumptions. For example, Formosa required access to the Mississippi River for water intake, discharge, and transportation; it put a premium on remoteness and distance from residents, as well as industrial use conformity. *Id.* But it (and the Corps) failed to consider the historical context that resulted in a dense concentration of Black farmers and laborers, descended from formerly enslaved people, living and working on remote property near the banks of the Mississippi River in the area where Formosa sought to establish its complex. The Corps also failed to consider the fact that decades of local (parish) and state land-use decisions caused the circumstances that made large, remote tracts of industrially zoned property available and attractive to Formosa.

3. The Corps failed to consider other relevant factors.

As Formosa correctly acknowledged, investigating discrimination “demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.” *Id.* (citing *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1976)). The impact of the official action, whether it bears more heavily on one race than another, may provide an important starting point. *Village of Arlington Heights*, 429 U.S. at 266. “Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of state action[.]” *Id.* But disproportionate impact is not determinative, and the Court must look to other

evidence, including the “historical background of the decision ... particularly if it reveals a series of official actions taken for invidious purposes.” *Id.* at 267. The legislative or administrative history, especially statements made by members of the decision-making body, may be relevant. *Id.* at 268. These factors are not an exhaustive list of the “subjects of proper inquiry in determining whether racially discriminatory intent existed.” *Id.*

As discussed above, the U.S. Commission on Civil Rights found more than 25 years ago that Black communities in the Mississippi corridor are disproportionately impacted by the “government system for permitting and expansion of hazardous waste and chemical facilities.”²⁸ In this case, this clear pattern emerged from local, state, and federal action that collectively targeted those communities for locally undesirable land uses. This disproportionate impact is obvious and well-documented, but it was either ignored or dismissed by the Corps’ review of the Formosa complex. It failed to consider the historical background, including the legislative and administrative history of land-use decisions in “Cancer Alley” broadly and St. James Parish specifically.

For example, the Corps did not consider the example of Shintech, Inc., which relocated from a minority community in St. James Parish after environmental justice challenges were raised.²⁹ In 1996, Shintech proposed a plastics plant near Convent, Louisiana, a heavily industrial and predominantly African-American community with high unemployment.³⁰ Because of health concerns, the community protested, and Shintech eventually located its plant elsewhere.³¹ And now, because of the Formosa project, the St. James landscape is “Shintech on steroids.”³²

²⁸ See fn. 22, *supra*.

²⁹ Not in My Backyard: Executive Order 12,898 and Title VI as Tools for Achieving Environmental Justice, at p. 4, available at <https://www.usccr.gov/pubs/envjust/ej0104.pdf>.

³⁰ *Id.* at 23.

³¹ *Id.*; see also Alexander Cockburn, *Environmental Justice Is Put to the Test*, LOS ANGELES TIMES, August 28, 1997, available at <https://www.latimes.com/archives/la-xpm-1997-aug-28-me-26685-story.html>

³² Oliver Houck, *Shintech: Environmental Justice at Ground Zero*, 31 GEO. ENVTL. L. REV. 455, 503 (2019).

Other than cursory references to St. James Parish authorities' approval of a Drainage Impact Study for the Formosa complex and an evacuation route, and the parish president's statement that local residents were "job ready," the Corps did not review or probe statements and decisions by local authorities. AR000115; AR000132-AR000133. It failed to acknowledge that more than 100 residents opposed the project at a public hearing, and the only supportive vote came from a company representative.³³ The Corps noted that St. James Parish Planning Commission approved Formosa's application, and that the land of the proposed site was set aside and designated for industrial use. AR000135-136; AR000175. The Corps did not review the legislative or administrative history of those decisions, nor did it examine statements or decision-making by Louisiana State authorities regarding the proposed site and permits. In short, the Corps failed to consider relevant factors to determine whether racially discriminatory intent existed in the site-selection and permit-approval process.

4. Formosa's site-selection process demonstrates obvious discriminatory impact.

In disclaiming any discriminatory intent, Formosa concluded, "it is clear that the site was not intentionally placed in a predominantly African-American community." AR0001059. Even though an Black community "is also located in the general vicinity, 'this fact alone does not constitute environmental racism.'" *Id.* (citing *North Baton Rouge Environmental Ass'n v. LDEQ*, 00-1878 (La. App. 1st Cir. 11/13/01), 805 So. 2d 255). These statements obfuscate the appropriate inquiry, which is not whether Formosa set out with the specific intent to locate its complex in or near a Black community. The question is whether discriminatory intent can be inferred from the evidence and circumstances that resulted in that outcome. Even if Formosa never considered racial demographics, if it intentionally relied on other facially race-neutral

³³ *Id.* at 504. Parish officials "basically changed a black district into the petrochemical district." *Id.* at 505.

criteria that have a discriminatory impact, then it may have had discriminatory intent. Even if Formosa only considered properties in a specific geographic area that had several other indicia of poverty—and all those sites coincidentally were in or near Black communities—it could not absolve itself of discriminatory intent, even if it purportedly ignored racial demographics.

Moreover, Formosa’s site-selection process shows an obviously discriminatory impact. After discussing demographics and population densities within a 1, 2, and 5-mile radius of the project, Formosa showed that it narrowed 14 sites to 8 “based on ability to operate with emissions,” and all of the 8 remaining sites had at least 50 percent or more Black population; the least densely populated site was chosen. AR0001079. The 6 disregarded sites in neighboring parishes, all eliminated “based on the inability to produce emissions,” were majority-white communities. *Id.*

Even if Formosa’s reason for disregarding the sites in majority-white communities was racially neutral, it is significant that it disregarded them, regardless of its purported reasons. Additionally, it is extremely significant that the 8 remaining sites were all majority-Black communities. Even if the criteria that Formosa purportedly used to arrive at that stage of selection were racially neutral, the end result was an obviously discriminatory impact. As one environmental law professor has noted, “None of this is by accident.”³⁴

By failing to examine the systemic patterns underlying the process that made the 14 sites available in the first place, or the reasons why all 8 of the sites that met Formosa’s criteria had a majority Black population, and why all 6 of the rejected sites it rejected had a majority white population, Formosa completely ignored its own complicity in, and ratification of, environmental racism.

II. The Corps violated the NHPA by ignoring at least two slave cemeteries.

³⁴ *Id.* at 503 (“Coincidence or no,” the “future industrial” zones are “almost exclusively” St. James’ minorities).

The National Historic Preservation Act (NHPA), 16 U.S.C. § 470 *et seq.* requires that any federally funded undertaking “take into account the effect of the undertaking on any district, site, building, structure or object that is included in *or eligible for* inclusion in the National Register” of Historic Places (emphasis added). 16 U.S.C. § 470f. The criteria for a historic property are: “the quality of significance in American history, architecture, archeology, engineering, and culture is present in districts, sites, buildings, structures [or, alternatively,] objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association.” 36 C.F.R. § 60.4. The property must “have yielded, or may be likely to yield, information important in prehistory or history.” 36 C.F.R. § 60.4.

The National Park Service’s National Register Bulletin 41, Guidelines for Evaluating and Registering Cemeteries and Burial Places, recognizes that the public “can gain information significant in American culture from burial places” that may be eligible for inclusion on the National Register. The Bulletin provides the example of “West Africans carried in the slave trade to the east coast of America, and their descendants, who adapted traditional burial rites to plantation and community life.”

A. The Corps relied on faulty Formosa reports to justify its “no effects” finding.

The reports issued by Formosa’s consultants, which were used by the Corps to justify its “no adverse effects” finding, did not thoroughly research the slave cemeteries, relied on the wrong maps, were incomprehensive, and did not offer supporting evidence for its conclusions.

The Corps relied on a report that concluded that the slave cemetery located on the former Acadia Plantation could not be located. AR000165. However, this first report by Formosa’s consultant surveyed the wrong area, *id.*, and made no mention of the Acadia Plantation despite the fact that it is located on Formosa’s building site. Spees Decl., ECF No. 27-2 at 33.

After receiving a more detailed map from an independent researcher, Formosa's consultant explored the site again, reporting to the Corps that they "found nothing," a finding that the Corps accepted. AR000165. However, this second report did not follow technique and reporting guidelines established by the U.S. Department of the Interior³⁵ and Louisiana's Divisions of Archaeology and Historic Preservation³⁶ and did not provide supporting evidence for this claim.

While the Department of the Interior and Divisions encourage the use of remote sensing techniques, Formosa's consultant only used mechanical trenching during the second site exploration. ECF No. 27-2 at 91.

The Ninth Circuit has previously ruled on this issue, holding that the Bureau of Land Management "failed to make a reasonable and good faith effort to identify historical and cultural resources, as required under National Historic Preservation Act (NHPA) because the agency relied on existing information ... *which had been based on a combination of minimal site information and inconsistent survey methods* (emphasis added)." *Montana Wilderness Ass'n v. Connell*, 725 F.3d 988, 1009 (9th Cir. 2013).

Here, a report prepared by Coastal Environments, an outside firm, recommended that multiple types of testing should have been used to explore the site such as "metal detector scans, probing, and cadaver dogs" since it is "difficult to visually detect possible grave shafts." ECF No. 27-2 at 91. This recommendation is in line with guidelines encouraged by the U.S. Department of the Interior.³⁷

³⁵ Nat'l Park Serv., *Archeology and Historic Preservation: Secretary of the Interior's Standards and Guidelines* (1983), available at https://www.nps.gov/history/local-law/arch_stnds_2.htm#report. The Secretary's guidelines indicate that "Remote sensing techniques may be the most effective way to gather background environmental data [and] *plan more detailed field investigations* (emphasis added)."

³⁶ Louisiana's Divisions of Archaeology and Historic Preservation, *Fieldwork Guidelines for Cultural Resource Investigations* 17 (2018), <https://www.crt.state.la.us/Assets/OCD/archaeology/Section106/Field%20Standards%202018.pdf>.

³⁷ Nat'l Park Serv., *supra* note 35.

Additionally, the report used by the Corps to justify its finding contained no photos or justification of strategy, although Louisiana's Divisions of Archaeology and Historic Preservation requires this additional evidence.³⁸ As the 2020 Coastal Environment report states, "No photographs or sketches of any features were provided in [Formosa's consultant's report], nor were the locations of the features depicted on the site map, [all of which are] omissions that make it impossible to evaluate the conclusions presented in that report." ECF No. 27-2 at 33.

After Formosa's second report, the State of Louisiana was notified again that Formosa's consultants investigated the wrong site. *Id.* In the third report, consultants claimed that there was "no evidence of the [Acadia] cemetery." ECF No. 27-2 at 38. Furthermore, while sixteen trenches were initially planned, only eight were dug because "it was determined additional trench excavation was unnecessary." *Id.* However, the consultant's report has no evidence to support that conclusion. *Id.* Like the previous report, the methodology used to investigate this area consisted only of mechanical trenching and did not use other techniques. *Id.* The report also claimed that soil changes found on the site, which typically are evidence of buried remains and objects,³⁹ were not "cultural or man-made features." *Id.* However, no photographs or plans of these "soil changes" were presented in the report, in contravention of state guidelines.⁴⁰

Moreover, after Formosa was alerted to the possibility of the cemeteries in July 2018, the company acquired two more tracts of land near the Acadia Plantation in October and December

³⁸ Louisiana's Divisions of Archaeology and Historic Preservation, *supra* note 36, at 17 and 6.

³⁹ See generally Torri B. Thomas, Sheree J. Finley, Jeremy E. Wilkinson, Daniel J. Wescott, Azriel Gorski, & Gulnaz T. Javan, *Postmortem Microbial Communities in Burial Soil Layers of Skeletonized Humans*, 49 J. FORENSIC AND LEG MED. 43 (2017).

⁴⁰ Louisiana's Divisions of Archaeology and Historic Preservation, *supra* note 36, at 17.

of 2018.⁴¹ There is no indication in the record that these tracts of land were examined for additional burial grounds.⁴²

Coastal Environments also found five additional “anomalies” on the proposed building site that were not included in Formosa’s first report or mentioned in the Corps’ findings. ECF No. 27-2 at 38. “Research has ruled out the possibility of these five anomalies being related to 1) oil or natural gas wells, 2) structures shown on U.S. Geological Survey quadrangles, or 3) sugarhouse complexes depicted on historic maps.” *Id.* According to Coastal Environments, “it is possible that some of these anomalies represent additional unmarked burial sites, which must be verified archaeologically.” *Id.*

Furthermore, subsequent investigation by Coastal Environments reveal that another former plantation operated on the proposed building site: Elina. However, while the Corps’ assessment mentioned Elina’s potential as an alternative building site five times, the Corps took none of those opportunities to speak of Elina’s historical significance. AR000139; AR000140; AR000141; AR000143; AR000176. Archaeological investigations have verified the presence of graves at the Elina plantation, which enslaved 38 people. ECF No. 27-2 at 59. “Because the surrounding roads and ditch lines have not changed...since then,” it is likely that any human burials at that location have not been impacted and could remain relatively intact. ECF No. 27-2 at 75.

By issuing a “no effect” determination, the Corps chose to rely on studies “[that] apparently did not use historic or aerial images to pinpoint probable site locations,” were incomprehensive,

⁴¹ Letter from Pam Spees, Senior Staff Attorney, Ctr. for Const. Rts. to Linda Hubbell, Secretary, St. James Parish Council (Dec. 23, 2019), <https://ccrjustice.org/sites/default/files/attach/2019/12/RISE%20Letter%20to%20St.%20James%20Parish%20Council%20Burial%20Sites%2012.23.2019.pdf>.

⁴² *Id.*

did not offer supporting evidence for its conclusions, and only included two historic maps--one of which was assigned the wrong date. ECF No. 27-2 at 32. In doing so, they not only set aside federal and state guidelines, but also ignored the conditions, effects, and history of slavery, an institution that was formally in place for almost 250 years.

B. Slave cemeteries are historic properties.

Although the Corps believes that the cemeteries found on the Formosa property are not historic properties, slave cemeteries, graveyards, and memorials help remedy a profound absence in our collective memory.⁴³

The Corps' finding speaks to a widespread disregard of African-American history. Only 2% of the 95,000 entries on the National Register of Historic Places—"the list of sites deemed worthy of preservation by the federal government"—focus on the experiences of African Americans.⁴⁴ This absence is due to bias, deliberate destruction, and a lack of documentation.

Bias was written into the criteria that determine how sites are selected for the National Register. One of the criteria for preservation is architectural significance, meaning that unadorned buildings like slave cabins and tenement houses were excluded from consideration.⁴⁵ Additionally, some historically Black neighborhoods were deliberately targeted by arson in the years after Reconstruction⁴⁶ or displaced in later decades by highway construction,

⁴³ See generally James Oliver Horton, *On-Site Learning: The Power of Historic Places*, 23 *Cultural Resources Management*, No. 8, 2000, at 5. Professor Horton was the Benjamin Banneker Professor of American Studies and History at George Washington University and Historian Emeritus of the Smithsonian Institution's National Museum of American History.

⁴⁴ Casey Cep, *The Fight to Preserve African-American History*, *The New Yorker* (Jan. 27, 2020), <https://www.newyorker.com/magazine/2020/02/03/the-fight-to-preserve-african-american-history>.

⁴⁵ Brent Leggs, Keri Rubman, and Byrd Wood, *Preserving African American Historic Places* 4 (2013), <https://forum.savingplaces.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=8a25da05-bc46-3141-bf02-ec8e6cb72e0b&forceDialog=0>

⁴⁶ Laura Ewen Blokker, *The African-American Experience in Louisiana*, 70 (2012), https://www.crt.state.la.us/Assets/OCD/hp/nationalregister/historic_contexts/The_African_American_Experience_in_Louisiana.pdf

gentrification, and urban renewal.⁴⁷ Lastly, “standard measures for tracing family histories and life in the United States do not account for the lived experience of Black Americans. Unlike the poorest whites, enslaved Americans were not guaranteed marriage licenses or even birth or death certificates by the state.”⁴⁸

Since emancipation, our collective memory of slavery has become abstract. Therefore, gravesites are material testaments to the millions of people who lived, worked tirelessly, and died in bondage. The widespread failure to preserve African-American history speaks to the grave need of halting construction on the proposed building site, where at least two slave cemeteries have been found.

C. Cemeteries on the proposed site show Louisiana’s brutal history of slavery.

Even though glass and metal items from as far back as 1803 were found on the proposed building site, the Army Corps of Engineers still concluded that none of the Formosa property was eligible for listing on the National Register of Historic Places. AR000110. However, proper evaluation would have revealed the historical significance of the proposed building site, which includes slave cemeteries. AR000107.

People enslaved in Louisiana produced much of the country’s cotton and sugar. In 1860, Louisiana produced about 800,000 bales of cotton, one-sixth of all cotton grown in the United States.⁴⁹ Almost one-third of all cotton exported from the United States, most of which went to

⁴⁷ Wendell E. Pritchett, *The “Public Menace” of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL’Y REV. 1, 6 (2003). (“Blight was a facially neutral term infused with racial and ethnic prejudice.”); see also Citizen King: Three Perspectives, PBS Transcript, available at http://www.pbs.org/wgbh/amex/mlk/sfeature/sf_video_pop_04_tr_qry.html. In this interview, James Baldwin famously stated that “urban renewal...means moving the Negroes out. It means Negro removal, this is what it means.”

⁴⁸ Periwinkle Institute, *Memory and Landmarks: Report of the Burial Database Project of Enslaved Americans 18-19* (2017).

⁴⁹ Online Exhibit, Louisiana State Museum, *Two Centuries of Louisiana History – Antebellum Louisiana II: Agrarian Life*, <https://www.crt.state.la.us/louisiana-state-museum/online-exhibits/the-cabildo/antebellum-louisiana-agrarian-life/>.

Britain and France, came from Louisiana.⁵⁰ In the 1830 U.S. Census, the owner of the Acadia plantation, which forms part of the proposed building site, was recorded as “owning” 23 slaves while his son “owned” six. Archaeologists suggest that “the number of slaves owned indicates that [the owners] were likely involved in...cotton.” ECF No. 27-2 at 31. As the Louisiana State Museum notes, “Cotton picking was hard, back-breaking, finger-splitting work.”⁵¹ Slaves harvesting the crop averaged about 150 pounds per day, “working from sunup to beyond sundown.”⁵² Free people of color “often commented that slaves who did not meet an established quota were commonly whipped.”⁵³ Even the Corps’ finding and Formosa’s reports concede that “The Acadia cemetery ... is believed to include the slaves of the plantation.” AR000107.

Much of the sugar grown in the United States during the Antebellum period came from Louisiana.⁵⁴ Louisiana produced from one-quarter to one-half of all sugar consumed in the United States.⁵⁵ In any given year, the combined crop of other sugar-producing states in the South was less than five percent of Louisiana’s production rate.⁵⁶ This production translated to an inhumane environment.

Researcher and author Daniel Rasmussen writes,

“More than any other place in North America, Louisiana was becoming known for its brutal conditions. When slaves across the United States spoke with dread of being “sold south” or “sold down the river,” they were speaking of the slave plantations around New Orleans. Nowhere in America was slavery as exploitative, or profits as high, as in the cane fields of Louisiana. Slaves worked longer hours, faced more brutal punishments, and lived shorter lives than any other slave society in North America.”⁵⁷

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Daniel Rasmussen, *American Uprising: The Untold Story of America’s Largest Slave Revolt* 48-49 (2011).

In late November 2019, Plaintiff RISE St. James learned through a public records request to the Louisiana Division of Archaeology that a cemetery had been discovered by archaeological consultants employed by Formosa on a portion of the property owned by Formosa where the Buena Vista Plantation once operated.⁵⁸ A report prepared by Defendant's archaeologists found that despite significant disturbances at the site, "numerous intact burials and grave shafts indicate much of the cemetery remains intact."⁵⁹

Formosa's archaeologists' report also confirmed that the owner of the plantation, Benjamin Winchester, owned "dozens of slaves." U.S. Census data from 1830 through 1860, some with "slave schedules" attached, show that Winchester "owned" over 200 people by 1860. ECF No. 27-2 at 86. According to the 1860 census, they ranged in age from as young as 10 months to as old as 60 years.⁶⁰

Because Louisiana's sugarcane plantations were known for their harsh work environments, it is likely that the people enslaved on these various plantations died from disease or injuries suffered in the fields or in the sugarhouses during grinding season.⁶¹ People enslaved had no choice in where they lived or where they were buried. Because slaveowners prohibited burials on valuable land, slave burial grounds were often confined to remote areas or marginal property.⁶² Such burial grounds were rarely documented and infrequently appear on historical maps.

Because people enslaved had no control over their burial, there is scant evidence of other groups of people working the land, and there are records of the owners being buried

⁵⁸ Letter from Pam Spees, Senior Staff Attorney, Ctr. for Const. Rts. to Neil Gauthier, Project Manager, U.S. Army Corps of Engineers (Dec. 18, 2019).

⁵⁹ Letter from Pam Pam Spees, Senior Staff Attorney, Ctr. for Const. Rts. to Louisiana Department of Environmental Quality Public Participation Group (Dec. 18, 2019), <https://ccrjustice.org/sites/default/files/attach/2019/12/RISE%20St.%20James%20DEQ%20Comments%20Dec.%2018%20%20w%20attachments.pdf>.

⁶⁰ *Id.*

⁶¹ Rasmussen *supra* note 57; *See also* Louisiana State Museum, *supra* note 49.

⁶² *See generally* Allan Amanik, *Till Death Do Us Part: American Ethnic Cemeteries as Borders Uncrossed* (2020).

elsewhere, the people who were buried at these cemeteries are thought to be the people who were enslaved on the plantations.

D. Halting construction supports Louisiana's interest in protecting slave cemeteries.

In one Louisiana parish alone, volunteers have uncovered over 3,500 burials.⁶³ In 2013, unmarked graves of as many as 1,000 slaves were found by an archaeologist in south Louisiana working for a Shell refinery.⁶⁴ In that same year, the National Burial Database of Enslaved Americans received evidence of 340 burial sites of people enslaved in Louisiana.⁶⁵

Vincent deForest, a civil rights activist who helped preserve two slave cemeteries in Washington, D.C., says, "The wholeness of the living is diminished when the ancestors are not honored."⁶⁶ This epitaph conforms to Louisiana's interest in abandoned cemeteries and unmarked burial sites.⁶⁷

Louisiana's Slavery Ancestral Burial Grounds Preservation Commission was established in 2018 to "study and develop measures to preserve and protect unmarked and historic burial grounds, graves, and cemeteries of the formerly enslaved in Louisiana."⁶⁸

Louisiana's interest extends to both preserved burial sites and those that are abandoned. Louisiana law clearly states that abandoned cemetery spaces may not be demolished. La. R.S. §

⁶³ Graham Ulkins, *Showcasing Louisiana: Group uncovers forgotten plantation cemeteries*, WAFB (May 30, 2019), <https://www.wafb.com/2019/05/30/showcasing-louisiana-group-uncovers-forgotten-plantation-cemeteries/>. Louisiana has parishes, not counties.

⁶⁴ Kevin McGill, *Forgotten no more: Shell Oil preserves slave cemeteries*, AP News (June 14, 2018), <https://apnews.com/31e381032d534016bf9680d808c20022/Forgotten-no-more:-Shell-Oil-preserves-slave-cemeteries>.

⁶⁵ Periwinkle Institute, *supra*, note 48, at 34.

⁶⁶ McGill, *supra*, note 64.

⁶⁷ See also Online Exhibit, Louisiana State Museum, Two Centuries of Louisiana History – Antebellum Louisiana I: Disease, Death, and Mourning, <https://www.crt.state.la.us/louisiana-state-museum/online-exhibits/the-cabildo/antebellum-louisiana-disease-death-and-mourning/>. This exhibit also goes into detail about African-Americans' influence on Louisiana's mourning traditions, specifically stating, "Many [mourning] customs incorporated...African elements, a cultural heritage from Louisiana's colonial era."

⁶⁸ H.R. No. 51., 2018 Leg., 2018 Reg. Sess. (La. 2018); see also African American Burial Grounds Network Act, H.R. 1179, 116th Cong. (2019). The bill explains that the "documentation and protection of African-American burial grounds have been shamefully neglected."

8:308(B). In 1991, Louisiana passed the Louisiana Unmarked Human Burial Sites Preservation Act, noting that “there is a real and growing threat to the safety and sanctity of unmarked burial sites,” specifically citing “economic development of the land.” La. R.S. § 8:672.

This position was reaffirmed by the Louisiana Attorney General, who recognized in an advisory opinion, “Cemeteries are considered by most cultures to be sacred spaces” and that we have “moral duties to the wishes of the dead.”⁶⁹

E. The only way to protect cemeteries on the proposed site is to withdraw the permits.

Federal agencies must “develop in consultation with identified consulting parties alternatives and proposed measures that might avoid, minimize or mitigate any adverse effects of the undertaking on historic properties and describe them in the EA or DEIS.” 36 C.F.R. § 800.8. An adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association.” 36 C.F.R. § 800.5. Adverse effects on historic properties include, but are not limited to: physical destruction, alteration, removal, change of the character of the property's use, or introduction of visual, atmospheric or audible elements that diminish the integrity of the property's significant historic features. 36 C.F.R. § 800.5.

Here, the Corps only undertook a cursory review of the proposed building site, finding “no adverse effects” even though Formosa’s building plan includes building a complex on top of the human remains of enslaved people.

Plaintiff RISE St. James believes its members are the descendants of the people enslaved and buried at the Buena Vista Plantation.⁷⁰ Yet, despite this connection, Formosa has unsuccessfully

⁶⁹ La. Atty .Gen. Op. No. 07-0183.

⁷⁰ Sara Sneath, *St. James residents seek permission to hold Juneteenth ceremony at possible slave*

tried to block Plaintiff RISE St. James' access to one of the slave cemeteries, in contravention of state law.⁷¹ Additionally, emails released in response to a public records request to the Louisiana Division of Archaeology reveal that Formosa's representatives have discussed the removal of any remains should they be found at the Acadia cemetery.⁷² It was their assessment that protecting the burial ground at the Acadia site would be "a difficult option for FG," proving that the only way to protect this historic property is through legal intervention.⁷³

By issuing a "no adverse effects" determination, the Corps has not only dismissed Plaintiff's connections to their history, but also threatens to rob our community of reminders of our past.

CONCLUSION

150 years after the Emancipation Proclamation, Black people in St. James Parish are still fighting for recognition.

Death is inevitable, but Black people in St. James Parish may die earlier and more painfully than many others because of racism. Tragically, their enslaved ancestors are still fighting for dignity, even in death. The loss of historic resources, which are irreplaceable, represents a significant loss to culture. "Although an unmarked grave may seem bleak, the soil is saturated with humanity that can educate and heal."⁷⁴

cemetery, The New Orleans Advocate/The Times Picayune (June 15, 2020), https://www.nola.com/news/environment/article_268b6c56-af18-11ea-9aa7-337a832274d0.html.

⁷¹ Associated Press, *Court: Allow Juneteenth service at cemetery*, WBRZ, (June 19, 2020), <https://www.wbrz.com/news/court-allow-juneteenth-service-at-cemetery/>. Cemetery dedication law in Louisiana prohibits landowners from unreasonably and categorically denying access to cemeteries on their property by descendants and friends. See *In re St. James Methodist Church of Hahnville*, 95-410 (La. App. 5 Cir. 12/27/95) 666 So. 2d 1206 (citing *Vidrine v. Vidrine*, 225 So.2d 691, 697-698 (La. App. 3rd Cir. 1969)).

⁷² Letter from Pam Spees, Senior Staff Attorney, Ctr. for Const. Rts. to Neil Gauthier, Project Manager, U.S. Army Corps of Engineers (Dec. 18, 2019).

⁷³ *Id.*

⁷⁴ Periwinkle Institute, *supra*, note 48, at 34.

DATED: July 17, 2020

Respectfully submitted,

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*Joining with member per LCvR 83.2(c)(1)
Pro Hac Vice pending*

Christopher Gowen
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Attorneys for Amicus Curiae

CERTIFICATE OF COMPLIANCE

Pursuant to Rules 29(a)(4)(G) and 32(g)(1) of the Federal Rules of Appellate Procedure and LCvR 7(o)(5), I hereby certify that the foregoing complies with LCvR 7(o)(4) because it does not exceed 25 pages.

Respectfully submitted,

/s/ Chris Gowen
Christopher Gowen
DC Bar No.: 995102

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of July, 2020, I caused a true and correct copy of the

foregoing document to be served on all parties of record via the CM/ECF system.

Respectfully submitted,

/s/ Chris Gowen
Christopher Gowen
DC Bar No.: 995102

The following resolution was offered and moved for adoption by Councilman _____ and seconded by Councilman _____:

**RESOLUTION 20-
ST. JAMES PARISH COUNCIL**

**A RESOLUTION TO APPROVE DISBURSEMENT OF PAYROLL FOR THE
AUGUST 7, 2020 PAYROLL**

WHEREAS, the employee payroll is August 7, 2020 and said payroll is reflected in the payroll disbursement report presented to the Parish Council with this Resolution.

WHEREAS, according to the Home Rule Charter, Article III §C(2)(a)(v), all checks and warrants drawn against the parish treasury shall be approved by a majority vote of the St. James Parish Council and the Parish Council by Resolution authorizes the administration to execute, sign or countersign any such check or draft in accordance with said provision.

THEREFORE, BE IT RESOLVED, that the St. James Parish Council does hereby approve disbursement of the August 7, 2020 payroll and further authorizes the Parish President and Director of Finance to execute all necessary documents, including but not limited to wire transfer forms with financial services institutions, to perfect the disbursement of payroll.

This resolution having been submitted to a vote, the vote thereon was as follows:

YEAS:
NAYS:
ABSTAIN:
ABSENT:

And the resolution was declared adopted on this, the 5th day of August 2020.

Council Chairman

Secretary

Delivered to Parish President: _____

Approved: _____

Disapproved: _____

Parish President

Returned to Secretary on _____

At _____ AM/PM

Received by _____

* * * * *

C E R T I F I C A T E

I, Linda Hubbell, Secretary of the Council of the Parish of St. James, State of Louisiana, hereby certify that the foregoing is a true and correct copy of a resolution adopted by the St. James Parish Council in regular meeting held on the 5th day of August 2020.

Signed at Vacherie, Louisiana, this 6th day of August 2020.

(S E A L)

Linda Hubbell
Secretary

The following resolution was offered and moved for adoption by Councilman _____ and seconded by Councilman _____:

**RESOLUTION 20-
ST. JAMES PARISH COUNCIL**

**A RESOLUTION TO APPROVE DISBURSEMENT OF FUNDS TO PAY
PENDING CURRENT INVOICES AND PAYABLES**

WHEREAS, invoices payable to vendors, employees and other reimbursements due and all other current payables to be processed this week; and.

WHEREAS, according to the Home Rule Charter, Article III §C(2)(a)(v), all checks and warrants drawn against the parish treasury shall be approved by a majority vote of the St. James Parish Council and the Parish Council by Resolution authorizes the administration to execute, sign or countersign any such check or draft in accordance with said provision.

THEREFORE, BE IT RESOLVED, that the St. James Parish Council does hereby approve the disbursement of funds per the distribution report presented to the Parish Council reflecting the pending current invoices and other payables as of Thursday, August 6, 2020.

This resolution having been submitted to a vote, the vote thereon was as follows:

YEAS:
NAYS:
ABSTAIN:
ABSENT:

And the resolution was declared adopted on this, the 5th day of August 2020.

Council Chairman

Secretary

Delivered to Parish President: _____

Approved: _____

Disapproved: _____

Parish President

Returned to Secretary on _____

At _____ AM/PM

Received by _____

* * * * *

C E R T I F I C A T E

I, Linda Hubbell, Secretary of the Council of the Parish of St. James, State of Louisiana, hereby certify that the foregoing is a true and correct copy of a resolution adopted by the St. James Parish Council in regular meeting held on the 5th day of August 2020.

Signed at Vacherie, Louisiana, this 6th day of August 2020.

(S E A L)

Linda Hubbell
Secretary

The following resolution was offered and moved for adoption by Councilman _____ and seconded by Councilman _____:

**RESOLUTION 20-
ST. JAMES PARISH COUNCIL**

A RESOLUTION AUTHORIZING THE ST. JAMES PARISH PRESIDENT TO SIGN AND EXECUTE TWO SEPERATE CONTRACT WITH FRANCIS HORTICULTURAL SERVICES FOR THE CONSTRUCTION OF A SPLASH PARK IN DISTRICT 4 AND IN DISTRICT 5

WHEREAS, St. James Parish desires to enter into a public works contract with Francis Horticultural Services for the construction of two (2) Splash Parks; and,

WHEREAS, the Scope of services to be provided under each contract will be defined through the Exhibit A attached to the contracts signed by both parties; and,

WHEREAS, compensation for the Splash Park located in District 4 is \$54,300.00 and compensation for the splash park in District 5 is \$91,300.00

BE IT RESOLVED, by the St. James Parish Council, that Parish President Peter A. Dufresne, is hereby duly authorized and empowered on behalf of the St. James Council to execute two separate contracts between St. James Parish and Francis Horticultural Services to construct a Splash Park in District 4 Romeville and in District 5 Welcome Park in accordance with the terms of the contracts.

This resolution having been submitted to a vote; the vote thereon was as follows:

- YEAS:
- NAYS:
- ABSTAIN:
- ABSENT:

And the resolution was declared adopted on this, the 5th day of August 2020.

Council Chairman

Secretary

Delivered to Parish President: _____

Approved: _____

Disapproved: _____

Parish President

Returned to Secretary on _____

At _____ AM/PM

Received by _____

* * * * *

C E R T I F I C A T E

I, Linda Hubbell, Secretary of the Council of the Parish of St. James, State of Louisiana, hereby certify that the foregoing is a true and correct copy of a resolution adopted by the St. James Parish Council in regular meeting held on the 5th day of August 2020.

Signed at Vacherie, Louisiana, this 6th day of August 2020.

(S E A L)

Linda Hubbell
Secretary

**MASTER CONTRACT
for
PUBLIC WORKS/CONSTRUCTION**

BE IT KNOWN that on this ____ day of _____, 20__,

St. James Parish Government, by and through the Office of the Parish President (hereinafter sometimes referred to as the "OWNER"), as approved by Resolution adopted by the Parish Council of St. James on the ____ day of _____, 2020.

And

Francis Horticultural Services qualified to do and doing business in this State and Parish (hereinafter referred to as "CONTRACTOR") and authorized to enter into this contract;

do hereby enter into contract under the following terms and conditions:

NOTE: This Contract or Agreement governs the relationship and rights between the Parties. While there may be other Documents (for example, General Conditions) which might exist between the Parties, those documents **do not** control in the event or to the extent that there is any conflict or contradiction with the terms of this Agreement or Contract. In the event that there is any conflict between the terms of this Agreement/Contract and any other document between the parties, THE PARTIES AGREE THAT THIS AGREEMENT/CONTRACT SHALL CONTROL AND GOVERN.

1. SCOPE OF SERVICES/WORK

A. CONTRACTOR shall complete all WORK as specified or indicated in the Contract Document **Exhibit A** in conjunction with:

District 4 – Romeville Splash Park

B. The Scope of services to be provided by the Consultant may be entered as a scope document, or written proposal signed by both parties to this contract. The Scope shall be attached hereto as an Exhibit and made a part hereof as if written herein in full. All work shall be under the direction of the Brent Dicharry of the Recreation Department, hereinafter called the PROJECT MANAGER, and all plans, specifications, and the like shall be submitted to him, and all approvals and administration of this contract shall be through him.

C. The compensation to the Provider for these services shall be set out in the attached scope document, Task Order, or written proposal signed by both parties to this contract.

D. There will be absolutely no fees or charges paid to Provider to cover overhead costs,

general expenses, capital expenses, expenses for principal/branch/field offices, employees' salaries, direct and indirect costs, additional costs or profit of any nature whatsoever. In each case, the work is initiated only upon receipt of a written work order from the PROJECT MANAGER, all which must include the maximum fee to be charged.

2. TERM OF CONTRACT

- A. The Work will be substantially completed within 45 calendar days from the date identified on the Notice to proceed from the Engineer/Parish
- B. The Notice to Proceed shall be issued within ten (10) days from the execution of this contract unless the Owner or Owner's representative and the Contractor agree in writing to another specified date.
- C. This construction contract shall remain in full force and effect until all work has been completed and accepted by OWNER and all payments required to be made to Contractor.
- D. However, this contract may be terminated for any of the following:
 - 1. As per the terms and conditions of Paragraph 15 and/or
 - 2. As per operation of law, and/or
 - 3. As per agreement between the parties, and/or
 - 4. As per the Parish Charter.

3. ENGINEER - Not applicable

- A. The Drawings have been prepared by Engineer, PEO., [REDACTED] who is hereinafter call ENGINEER and who is to act as OWNER'S representative, assume all duties and responsibilities and have the rights and authority assigned to ENGINEER in the Contract Documents in connection with completion of the Work in accordance with the Contract Documents.

4. PROJECT SCHEDULE

- A. CONTRACTOR shall submit and strictly adhere to a project construction schedule throughout the allocated contract and associated time frame. CONTRACTOR is aware that OWNER may have a representative at each site where WORK is being performed and that CONTRACTOR needs to coordinate with the OWNER'S REPRESENTATIVE or PROJECT MANAGER where Work on the CONTRACT will be performed. CONTRACTOR will coordinate with the OWNER'S REPRESENTATIVE by strictly following the project construction schedule or Progress Schedule. OWNER recognizes and understands that changes in project

construction schedule or Progress Schedule may become necessary during the course of the project. However, in the event of any such change, the CONTRACTOR shall notify the OWNER'S REPRESENTATIVE **in writing** of a proposed change. Said written notice shall be provided at least 12 hours prior to the revised construction activity. Said notice shall be provided by emailing notice of change to (*email address of contact*) and (*email address of contact*) and other contacts including testing company that is a team for member for the project.

- B. Should the CONTRACTOR fail to timely notify the OWNER'S REPRESENTATIVE of such change, the OWNER'S REPRESENTATIVE will document the CONTRACTOR'S failure to notify of the change in work and SHALL assess stipulated damages as follows. For EACH failure to notify the OWNER'S REPRESENTATIVE of any change in the project construction schedule or Progress Schedule, the CONTRACTOR AGREES TO PAY **\$150.00 per failure to notify the OWNER'S REPRESENTATIVE**. CONTRACTOR agrees that these stipulated damages reflect the lost time, manpower, and mileage incurred by OWNER attempting to locate the CONTRACTOR where a change in schedule occurs and the required notice was not provided. CONTRACTOR further agrees that **said amount shall be paid** by directly reducing the amount of monthly invoices/pay applications by the amount of penalties issued. The Penalty fees shall be itemized on monthly invoices.

5. LIQUIDATED DAMAGES

- A. OWNER and CONTRACTOR recognize that time is of the essence of this Agreement and the OWNER will suffer financial loss if the Work is not completed within the times specified in section 2 above, plus any extensions thereof allowed in accordance with the contract conditions and approved time changes thereto. There are delays, expenses and difficulties involved in proving in a legal arbitration preceding the actual loss suffered by OWNER if the Work is not completed on time. Accordingly, instead of requiring proof, OWNER and CONTRACTOR agree that as liquidated damages for delay (but not as a penalty) CONTRACTOR shall pay OWNER the amount of **Eight hundred fifty (\$850.00) Dollars** for each day that expires after the time specified in section 2 for Substantial Completion until the Work is substantially complete.

6. CONTRACT PRICE

- A. OWNER shall pay CONTRACTOR for completion of the Work completed in accordance with the Contract Documents in the amount specified therein, subject to adjustment as provided in the Contract Documents or amendments thereto. This is unit price contract based on the estimated quantities and unit cost awarded with an estimated total of **\$54,300**

7. PAYMENT PROCEDURES

- A. CONTRACTOR shall submit Applications for Payment in accordance with Article 14 of the General Conditions. Applications for Payment will be processed by ENGINEER as provided in the General Conditions.
- B. Invoices for services shall be submitted by CONTRACTOR to the OPERATIONS DEPARTMENT for review and approval:

St. James Parish Government
P.O. Box 106
Convent, LA 70723

- C. **Progress Payments.** OWNER shall make progress payments on account of the Contract Price on the basis of CONTRACTOR'S Applications for Payment as recommended by ENGINEER, once each month during construction. All progress payments will be on the basis of progress of the Work measured by the schedule of values established in paragraph 2.07.A of the General Conditions (and in each case of Unite Price Work based on the number of units completed) or, in the event there is no schedule of values, as provided in the General Requirements. Payment will be made on work that that been installed, inspected, tested, verified, and done so to the satisfaction of the engineer.
- D. Pursuant to La. R.S. 38:2248 (Public Contract Law), Owner shall withhold retainage from each progress payment until payment is due under terms and conditions governing substantial completion or final payment. Retainage shall be ten percent of the amount of work completed to date if the contract amount is up to \$500,000 and five percent of the work complete to date if the contract amount is over \$500,000.
- E. **Fuel or Asphalt/Concrete Adjustments.** There shall be NO adjustments for prices or costs of any fuel or asphalt/concrete on this project, arising out of the work on this project/contract, or arising out of this contract. Further, the CONTRACTOR hereby waives any price adjustment for fuel or asphalt/concrete or the ability or right to request any price adjustment for fuel or asphalt/concrete. Particularly, the Louisiana DOTD provisions (or any such or similar provisions by any other third party) pertaining to or related to fuel or asphalt/concrete adjustments are not part of this contract, are not incorporated by reference or otherwise in this Contract, and shall not apply in any form or fashion to the contract. Any language in this Contract which implies that the CONTRACTOR may obtain an adjustment in price for fuel or asphalt/concrete is hereby to be interpreted that CONTRACTOR shall **not** receive any such adjustment. CONTRACTOR shall not assert that any language in the CONTRACT creates any vagueness or ambiguity in the CONTRACT entitling CONTRACTOR to price adjustments for fuel or asphalt/concrete. CONTRACTOR hereby waives any right or ability to request any price adjustment for fuel or asphalt/concrete and CONTRACTOR shall **not** submit any request for any change in price for fuel or asphalt/concrete adjustments to the OWNER in any form.

- F. **Final Payment.** Upon final completion and acceptance of the Work in accordance with paragraph 14.07 of the General Conditions and Supplementary Conditions SC-9.03(B) (13). OWNER shall pay the remainder of the Contract Price as recommended by ENGINEER.
- G. There shall be no fees charged by, nor paid to, CONTRACTOR for consultation with the Parish.
- H. CONTRACTOR hereby agrees that the responsibility for payment of taxes from the funds thus received under this agreement shall be said CONTRACTOR'S obligation and identified under Federal Tax Identification Number as listed in the Scope.
- I. The Parish agrees to make payment to CONTRACTOR for services upon receipt and approval of each invoice. The Parish will pay CONTRACTOR the amount due and payable within thirty (30) days or unless a conflict results in a delay of payment. Upon receipt of each invoice, the Parish shall have the right and opportunity to review, confirm or otherwise determine the accuracy of each invoice and performance of service. In the event that the Parish disputes or otherwise may question the accuracy of each invoice or quality of all work performed, the Parish may withhold payment of any invoice until a successful and satisfactory resolution can be had between the parties. Parish agrees to not unreasonably withhold payments of any invoice.
- J. Other than the fee schedule herein, there will be absolutely no additional fees due CONTRACTOR to cover its overhead costs, general expenses, capital expenses, expenses for principal/branch/field offices, employees' salaries, direct and indirect costs, additional costs or profit of any nature whatsoever in excess of the previously agreed hourly rate.

8. CONTRACTOR'S REPRESENTATIVES

In order to induce OWNER to enter into this Agreement, CONTRACTOR makes the following representations:

- A. CONTRACTOR is familiar with the nature and extent of the Contract Documents. Work site, locality and all local conditions and Laws and Regulations that in any manner may affect cost, progress, performance or furnishing of the Work.
- B. CONTRACTOR has reviewed and checked all information and data shown or indicated on the Contract Documents with respect to existing Underground Facilities. No additional examinations, investigations, explorations, tests, reports, studies, or similar information or data in respect of said Underground Facilities are or will be required by CONTRACTOR in order to perform and furnish the Work at the Contract Price, within the Contract Time and in accordance with the other terms and conditions of the Contract Documents,

including specifically the provisions of paragraph 4.3 of the General Conditions.

- C. CONTRACTOR has correlated the results of all such observations, examinations, investigations, explorations, tests, reports, and studies with the terms and conditions of the Contract Documents.
- D. CONTRACTOR has given ENGINEER written notice of all conflicts, errors, or discrepancies that he has discovered in the Contract Documents and the written resolution thereof by ENGINEER is acceptable to CONTRACTOR.

9. CONTRACT DOCUMENTS

The Contract Documents which comprise of the contract between OWNER and CONTRACTOR, attached hereto and made a part hereof, consist of the documents listed in Table of Contents, and the documents identified below.

- a. CONTRACTOR Quote Documents
- b. Bid Bonds
- c. Agreement
- d. Payment Bond
- e. Performance Bond
- f. Notice of Award
- g. Notice to Proceed
- h. Technical Specifications prepared by engineer – Not applicable
- i. Standard General Conditions – Not applicable
- j. Drawings prepared by engineers – Not applicable

10. CONTRACTOR DOCUMENTS

- A. The CONTRACTOR shall also furnish sufficient as-built sets of plans, specifications & contract document.
- B. All data collected by the CONTRACTOR and all documents, notes, drawings, tracings, and files shall remain the property of the Owner except as otherwise provided herein. The CONTRACTOR shall furnish to the PROJECT MANAGER originals of any project documents used in completion of the project or in any way related to this project to the Project Manager.
- C. The Owner shall furnish without charge all standard plans and specifications and any other information which the Owner now has in its files which may be of use to the CONTRACTOR. CONTRACTOR has the duty to and must confirm and verify all information contained therein.
- D. Construction Documents. The CONTRACTOR shall use the most current versions of the

standard forms of documents adopted and specified by the Owner in the performance of the Contract, all as of the date of the signing of this contract. Notwithstanding anything to the contrary in any other provision of this contract, none of the contract documents provided by the Owner are or will become the property of the CONTRACTOR but shall remain the property of the Owner to the extent the Owner has a property interest therein.

E. Notwithstanding any Section hereinafter, there will be retention of all related records:

- (1) All records, reports, documents and other material delivered or transmitted to CONTRACTOR by Parish shall remain the property of Parish, and shall be returned by CONTRACTOR to Parish, at CONTRACTOR'S expense, at termination or expiration of this contract. All records, reports, documents, exhibits or other material related to this contract and/or obtained or prepared by CONTRACTOR in connection with the performance of the services contracted for herein shall become the property of Parish, and shall be returned by CONTRACTOR to Parish, at CONTRACTOR'S expense, at termination or expiration of this contract.
- (2) The Parish and CONTRACTOR acknowledge and agree that the Parish has the right to review retain all records, reports, worksheets or any other material of either party related to this contract. CONTRACTOR further agrees that CONTRACTOR will furnish to the Parish copies of any and all records, reports, worksheets, bills, statements or any other material of CONTRACTOR or Parish related to this contract.
- (3) CONTRACTOR shall maintain all books, documents, papers, accounting records and other evidence pertaining to costs incurred and shall make such materials available at its offices at any reasonable time for inspection and copying by the Parish.
- (4) CONTRACTOR shall retain all of its records and supporting documentation applicable to this contract with the Parish for a period of five (5) years after termination of the contract in accordance with state law, except as follows:
 - (a) Records that are subject to Federal Funds and/or audit findings shall be retained for five (5) years after such findings have been resolved, close out has been issued.
 - (b) All such records and supporting documentation shall be made readily available for inspection, copying or audit by representatives of the Parish. In the event the CONTRACTOR goes out of existence, it shall turn over to the Parish all of its records relating to this contract to be retained by the Parish for the required period of

time.

- F. In the event there is re-use of any documents created by CONTRACTOR, CONTRACTOR invokes the privileges afforded it as per La. Revised Statute R.S. 38:2317.
- G. The Parish agrees not to use CONTRACTOR'S work product on any other project without the express written notice to the CONTRACTOR.
- H. All of CONTRACTOR'S pre-existing or proprietary computer programs, software, information, standard details or material developed by CONTRACTOR outside of this agreement shall remain the exclusive property of the CONTRACTOR.

11. NON-ASSIGNABILITY

- A. CONTRACTOR shall not assign nor transfer any interest in this contract (whether by assignment or novation) without prior written consent of the Parish, provided however, that claims for money due or to become due to the CONTRACTOR from the Parish under this contract may be assigned to a bank, trust company, or other financial institution without such prior written consent. Notice of any such assignment or transfer shall be furnished promptly to the Parish.
- B. No assignment by a party hereto of any rights under or interests in the Contract Documents will be binding on another party hereto without the written consent of the party sought to be bound; and specifically but without limitation moneys that may become due and moneys that are due may not be assigned without consent (except to the extent that the effect of this restriction may be limited by law), and unless specifically stated to the contrary in any written consent to an assignment, no assignment will release or discharge the assignor from any duty or responsibility under the Contract Documents.
- C. OWNER and CONTRACTOR each binds itself, its partners, successors, assigns and legal representative to the other party hereto, its partners, successors, assigns, and legal representatives in respect to all covenants, agreements and obligations contained in the Contract Documents.

12. BUDGET LIMITATION

- A. It is the responsibility of the CONTRACTOR to advise the Parish in advance if contract funds or contract terms may be insufficient to complete contract objectives. CONTRACTOR understands and specifically warrants that it assumes the sole responsibility to advise the Parish in advance if contract funds or contract terms may be insufficient to complete contract objectives. In providing opinions of probable construction cost, the Parish understands that the CONTRACTOR has no control over costs and price of labor, equipment or materials or over the general CONTRACTOR'S method of pricing, and that the opinion of probable costs provided herein are made on the basis of the CONTRACTOR'S qualifications and experience.

- B. The continuation of this contract is contingent upon the appropriation of funds by the Parish to fulfill the requirements of the contract. If the Parish fails to appropriate sufficient monies to provide for the continuation of this or any other related contract, or if such appropriation is reduced by the veto of Parish President by any means provided in the appropriations Ordinance to prevent the total appropriation for the year from exceeding revenues for that year, or for any other lawful purpose, and the effect of such reduction is to provide insufficient monies for the continuation of the contract, the contract shall terminate on the date of the beginning of the first fiscal year for which funds are not appropriated.

13. INSURANCE

- A. The CONTRACTOR shall secure and maintain at its expense such insurance that will protect it and the Parish from claims under the Workmen's Compensation Acts and from claims for bodily injury, death or property damage which may arise from the performance of services under this agreement. All certificates of insurance shall be furnished to the Parish and shall provide that insurance shall not be canceled without thirty (30) days prior notice of cancellation given to the Parish of Ascension, in writing, on all of the required coverage provided to St. James Parish. Where possible, all policies and notices should name the CONTRACTOR and Parish. The Parish may examine the policies at any time.
- B. All policies and certificates of insurance shall contain the following clauses:
 - 1. The CONTRACTOR'S insurers will have no right of recovery or subrogation against the Parish of Ascension, it being the intention of the parties that the insurance policy so affected shall protect both parties and be the primary coverage for any and all losses covered by the below described insurance.
 - 2. The Parish of St. James shall be named as additional named insured with respect to automobile and general liability.
 - 3. The insurance companies issuing the policy or policies shall have no recourse against the Parish of St. James for payment of any premiums or for assessments under any form of policy.
 - 4. Any and all deductible in the described insurance policies shall be assumed by and be at the sole risk of the CONTRACTOR.
- C. Prior to the execution of this agreement, the CONTRACTOR shall provide at its own expense, proof of the following insurance coverage required by the contract to the Parish of St. James by insurance companies authorized to do business in the State of Louisiana. Insurance is to be placed with insurers with an A.M. Best rating

of no less than B+.

1. Worker s compensation Insurance: As required by Louisiana State Statute exception; employer's liability shall be at least \$500,000 per occurrence.
2. Commercial General Liability Insurance in an amount not less than \$1,000,000.00 per occurrence, and \$2,000,000.00 aggregate combined single limit for bodily injury and property damage. This insurance shall include coverage for bodily injury and property damage, and indicate on the certificate of insurance the following:
 - a) Premises - operations;
 - b) Broad form contractual liability;
 - c) Products and completed operations;
 - d) Personal Injury;
 - e) Broad form property damage;
 - f) Explosion, collapse and underground coverage. Not needed for design
3. Business Automobile Liability Insurance with a Combined Single Limit of \$1,000,000 per Occurrence for bodily injury and property damage, unless otherwise indicated. This insurance shall include for bodily injury and property damage the following coverage:
 - a) Any automobiles;
 - b) Owned automobiles;
 - c) Hired automobiles;
 - d) Non-owned automobiles;
 - e) Uninsured motorist.
4. An umbrella policy or excess policy may be used to meet minimum requirements where applicable.
5. All policies of insurance shall meet the requirements of the Parish of St. James prior to the commencing of any work. The Parish of St. James has the right, but not the duty, to approve all insurance policies prior to commencing of any work. If at any time, it becomes known that any of the said policies shall be or becomes unsatisfactory to the Parish of St. James as to form or substance; or if a company issuing any such policy shall be or become unsatisfactory to the Parish of Ascension, the CONTRACTOR shall promptly obtain a new policy, timely submit same to the Parish of St. James for approval and submit a certificate thereof as provided above. The Parish agrees to not unreasonably withhold approval of any insurance carrier selected by CONTRACTOR. In the event that Parish cannot agree

or otherwise authorize said carrier, CONTRACTOR shall have the option of selecting and submitting new insurance carrier within 30 days of said notice by the Parish. In the event that the second submission is insufficient or is not approved, then the Parish shall have the unilateral opportunity to thereafter select a responsive and responsible insurance carrier all at the cost of CONTRACTOR and thereafter deduct from CONTRACTOR'S fee the cost of such insurance.

6. Upon failure of CONTRACTOR to furnish, deliver and/or maintain such insurance as above provided, this contract, at the election of the Parish of Ascension, may be forthwith declared suspended, discontinued or terminated. Failure of the CONTRACTOR to maintain insurance shall not relieve the CONTRACTOR from any liability under the contract, nor shall the insurance requirements be construed to conflict with the obligation of the CONTRACTOR concerning indemnification.
7. WAIVER: Except as otherwise provided by law, the coverage requirements of this section may be waived in whole or in part on agreements under \$50,000.00, and the Parish is authorized to use its discretion in regard to insurance requirements for such contracts. Except as otherwise provided by law, the Parish President or the Parish Chief Administrative Officer is authorized to omit in whole or in part the insurance requirements of this section in connection with such contracts.

- D. CONTRACTOR shall maintain a current copy of all annual insurance policies and provide same to the Parish of St. James on an annual basis or as may be reasonably requested.

14. OTHER TERMS AND CONDITIONS

- A. **Licenses and Commissions.** The CONTRACTOR shall, at all times during the term of this contract, maintain valid Louisiana licenses and commissions as are customarily required of such a CONTRACTOR, including but not limited to those that may be required by this State and/or Parish. The CONTRACTOR agrees to renew and or keep current all licenses and commissions herein. The CONTRACTOR agrees to maintain a copy of all such licenses or commissions on file at all time and make same available for review as may be reasonably requested by the Parish of Ascension.
- B. The professional and technical adequacy and accuracy of designs, drawings, specifications, documents, and other work products furnished under this agreement will be conducted in a manner consistent with that level of care and skill ordinarily exercised by members of the profession in the Baton Rouge Metropolitan area including the parishes surrounding St. James Parish. In the event the Parish must

have work done by change order or addition resulting from an error or omission by the CONTRACTOR, CONTRACTOR shall provide, at no cost to Parish, all professional services attributable to the change order. This is in addition to Parish's right to recover from CONTRACTOR any damages for its errors and omissions.

- C. The CONTRACTOR shall defend, indemnify, and hold the Parish harmless from against any and all actions, claims, demands, complaints, or lawsuits of any kind (whether in tort or in contract) for any sums of money, costs, liabilities, judgments, fines, or penalties asserted or alleged by any person, party, entity, firm or generation for any damage, injury, claim, or cause of action (of any kind) including, but not limited to, pecuniary and non-pecuniary damages/losses to person or property which are alleged to have been caused by or which were caused by or (wholly or partially), which grow out of, which arise from, or which result from any negligent acts, errors, or omissions by CONTRACTOR, its agents, servants, or employees while engaged in connection with services required to be performed by the CONTRACTOR under this agreement. This paragraph is to be broadly interpreted to include any and all causes of action which result wholly or partially from the conduct or the CONTRACTOR.
- D. This agreement shall be binding upon the successors and assigns for the parties hereto.
- E. This agreement represents the entire Agreement between Parish and CONTRACTOR.
- F. If there is any dispute concerning this agreement, the laws of Louisiana shall apply. The exclusive venue and jurisdiction for all lawsuits, claims, disputes, and other matters in questions between the parties to this agreement or any breach thereof shall be in the 23rd Judicial District Court for the Parish of Ascension, State of Louisiana. It is also understood and agreed that the laws and ordinances of St. James shall apply.
- G. In the event that the CONTRACTOR modifies the Parish's contract documents without the expressed prior written consent of the Parish, the CONTRACTOR shall indemnify and hold harmless the Parish from any claims, lawsuits, or damages that arise out of or are attributable to the modification. This indemnification and hold harmless obligation shall include not only the damages suffered by the Parish but also all reasonable expenses including, but not limited to, any and all litigation or other dispute resolution costs and any and all professional fees incurred by the Parish as a result of the CONTRACTOR'S deviation from the Parish's contract documents.
- H. CONTRACTOR agrees to a covenant against contingent fees. CONTRACTOR warrants that it has not employed or retained any company or person, other than a

bona fide employee working solely for the CONTRACTOR, to solicit or secure this Contract, and that it has not paid or agreed to pay any company or person, other than a bona fide employee working solely for the CONTRACTOR, any fee, commission, percentage, brokerage fee, gifts, or any other consideration, contingent upon or resulting from the award or making of this Contract. For breach or violation of this warranty, the Parish shall have the right to annul this contract without liability.

- I. This contract may be amended only by mutual written consent of the respective parties.
- J. Third Party Beneficiary: it is specifically agreed by and between the parties to this contract that no person or party is intended, deemed, considered, or construed to be a third party beneficiary of this contract.
- K. Neither party will be liable for failure to fulfill its obligations when due to causes beyond its reasonable control.
- L. Any failure or delay by either party in exercising any right or remedy will not constitute a waiver.
- M. Severability: if any provision or item in this contract is held invalid or unenforceable for any reason, then such invalidity or unenforceability shall not affect other provisions or items of this contract. In such event, the remaining portions shall be given full force and effect without the invalid provision or item, and to this end the provisions or items of this contract are hereby declared severable.
- N. It is specifically understood that the terms "agreement" and "contract" may be used interchangeably. It is specifically understood that the terms "Owner", "PROJECT MANAGER" and "Parish" and "the Parish of Ascension" may be used interchangeably.
- O. Conflict of Interest: it is understood and agreed between the parties hereto that CONTRACTOR is not retained exclusively by the Parish but that the Parish may retain other CONTRACTORS during the term of this Contract. In the event of reasonably known conflicts of interest or potential conflicts of interest between the Parish and other parties who have engaged CONTRACTOR, the CONTRACTOR agrees to make full disclosure of the same, and that they will take no action on behalf of any other client directly adverse to the Parish, nor will CONTRACTOR take any action on behalf of the Parish directly adverse to any other client.
- P. CONTRACTOR warrants that CONTRACTOR is qualified to perform the intended purposes of this agreement. In the event that CONTRACTOR becomes not fit nor qualified for any reason whatsoever, then CONTRACTOR agrees to

withdraw from work herein at no cost to the Parish. In the event that the Parish determines that CONTRACTOR is not suited for Parish purposes or otherwise fails to represent Parish policies to the satisfaction of the Parish, then CONTRACTOR agrees to withdraw from this agreement.

- Q. CONTRACTOR specifically agrees and understands that CONTRACTOR shall not maintain or otherwise claim that it possesses any security interest in any aspect of the work that forms the basis of this agreement.
- R. CONTRACTOR agrees to ensure that its personnel are, at all times, educated and trained, and further, that CONTRACTOR and its personnel will perform all work and services in a workmanlike and professional manner.
- S. CONTRACTOR recognizes and understands that time is of the essence. CONTRACTOR agrees to perform and provide services in accordance with this agreement and all incorporated attachments.
- T. CONTRACTOR shall be responsible for any and all losses and damages suffered or incurred by the Parish, including but not limited to all costs, attorney's fees, out of pocket expenses, any & all Parish employee time, and any other expenditure by the Parish to defend, remedy, repair, replace, correct, or cure any condition or liability created or arising out of the actions or omissions to act of the CONTRACTOR, it's agents, officer, servants, or employees. This includes the payment of any cost or fees of any type or kind incurred by the Parish in defending any lawsuit, complaint, claim, claim filed or arising out of the action or omission to act of the CONTRACTOR.
- U. CONTRACTOR agrees that it will be responsible for all of its own actual and reasonably related expenses for its on & off-site office work. CONTRACTOR further agrees that Parish will not be responsible for or in any way liable for CONTRACTOR'S payroll costs, indirect or direct expenses, overhead, or any other amounts associated with CONTRACTOR'S business other than the specific fees & costs generated under the terms of this agreement.

15. TERMINATION AND SUSPENSION

A. Termination for Cause

The Parish may terminate this Contract for cause based upon the failure of the CONTRACTOR to comply with the terms and/or conditions of the Contract, provided that the Parish shall give the CONTRACTOR written notice specifying the failure. If within thirty (30) days after receipt of such notice, the CONTRACTOR shall not have corrected such failure and thereafter proceeded diligently to complete such correction, then the Parish may, at its sole and exclusive

option, place the CONTRACTOR in default and this contract shall terminate on the date specified in such notice. Work to be performed during this 30-day period shall not proceed without the actual knowledge of the Parish and specifically supervised by the Parish. Any work performed by CONTRACTOR during this period without the actual knowledge of the Parish and not under the supervision of the Parish shall not be compensated nor honored; CONTRACTOR specifically waives and forfeits any and all claims to payment, compensation, quantum merit, and/or reimbursement from the Parish of any work performed during this period in violation of this paragraph. CONTRACTOR agrees and understands specifically that satisfactory performance shall be unilaterally and exclusively determined by the Parish.

B. Termination for Convenience

Notwithstanding any other section herein, the Parish may terminate this contract at any time for any reason whatsoever by giving thirty (30) days written notice to the CONTRACTOR. The CONTRACTOR shall be entitled to payment for deliverables in progress; to the extent work has been actually and satisfactorily performed.

C. Right to Cancel

(1) The continuation of this contract is contingent upon the appropriation of funds to fulfill the requirements of the contract by the Parish. If the Parish fails to appropriate sufficient monies to provide for the continuation of this or any other contract, or if such appropriation is reduced by the veto of Parish President by any means provided in the appropriations Ordinance to prevent the total appropriation for the year from exceeding revenues for that year, or for any other lawful purpose, and the effect of such reduction is to provide insufficient monies for the continuation of the contract, the contract shall terminate on the date of the beginning of the first fiscal year for which funds are not appropriated. It is understood and agreed that the paragraph below may preempt this paragraph, all at the exclusive and unilateral option of the Parish.

D. Additional Causes for Termination or suspension:

1. By mutual agreement and consent of the parties hereto.
2. By the Parish as a consequence of the CONTRACTOR'S failure to comply with the terms, progress or quality of work in a satisfactory manner, proper allowances being made for circumstances beyond the control of the CONTRACTOR.
3. By either party upon failure of the opposing party to fulfill its obligations as set forth in this contract, provided that written notice of said non-

fulfillment is given to the opposing party and said obligation is not properly fulfilled within fifteen (15) days of said notice.

4. In the event of the abandonment of the project by the Parish.
 5. A Stop Work Order can be immediately issued by the Parish if they deem it necessary to protect the health, safety, and welfare of the community.
-
- E. Upon termination, the CONTRACTOR shall be paid for actual work performed prior to the notice of termination on a pro-rata share of the basic fee based on the phase or percentage of work actually completed.
 - F. Upon termination, the CONTRACTOR shall deliver to the Parish all original documents, notes, drawings, tracings, computer files, and files except the CONTRACTOR'S personal and administrative files.
 - G. Should the Parish desire to suspend the work, but not definitely terminate the contract, this may be done by thirty (30) day notice given by the Parish to that effect, and the work may be reinstated and resumed in full force & effect upon receipt from the Parish of thirty (30) day notice in writing to that effect. CONTRACTOR shall receive no additional compensation during the suspension period. The parties agree to revisit the terms of this contract during the suspension period which shall not exceed six (6) months, unless mutually agreed upon.
 - H. There is a right to cancel by the Parish by giving thirty (30) day notice to Provider and paying undisputed fees due for services on that portion of the work that has been satisfactorily, timely and/or professionally completed, all in the exclusive discretion of the Parish at any time herein.
 - I. In the event of a default and/or breach of this agreement and this matter is forwarded to legal counsel, then the prevailing party may be entitled to collect a reasonable attorney fees and all costs associated therewith whether or not litigation is initiated. Attorney fees shall be based upon the current, reasonable prevailing rate for counsel as provided on the fee schedule of the Louisiana Attorney General or in the private sector, whichever is greater. The parties agree to be responsible for such attorney fees, together for all with legal interest from date of agreement breach, plus all costs of collection.
 - J. Termination or cancellation of this agreement will not affect any rights or duties arising under any term or condition herein.
 - K. As to the filing of bankruptcy, voluntarily or involuntarily, by CONTRACTOR, CONTRACTOR agrees that if any execution or legal process is levied upon its interest in this contract, or if any liens or privileges are filed against its interest, or if a petition in bankruptcy is filed against it, or if it is adjudicated bankrupt in involuntary proceedings, or if it should breach this contract in any material respect,

the Parish shall have the right, at its unilateral option, to immediately cancel and terminate this contract. In the event that CONTRACTOR is placed in any chapter of bankruptcy, voluntarily or involuntarily, or otherwise triggers any provision of the preceding sentence herein, it is understood and agreed that all materials, goods and/or services provided shall be and remain the property of the Parish. All rights of CONTRACTOR as to goods, wares, products, services, materials and the like supplied to Parish shall be deemed forfeited.

16. AUDITORS

Notwithstanding other Sections herein, CONTRACTOR shall maintain all records for a period of three years after the date of final payment under this contract. It is hereby agreed that the Parish Department of Finance or its designated auditor shall have the sole, unilateral and exclusive option of auditing all accounts of CONTRACTOR which relate to this contract. Such audit may be commenced at any reasonable time. CONTRACTOR agrees not to delay, retard, interrupt or unduly interfere with commencement and completion of such an audit. If in the exclusive and unilateral opinion of the Parish that CONTRACTOR delays, retards, interferes with or otherwise interrupts such an audit, the Parish may seek such relief as per law. In such an event, CONTRACTOR agrees to be liable for all reasonable attorney fees, costs of auditors, court costs, and any other reasonably related expenses with such litigation.

17. DISCRIMINATION CLAUSE

CONTRACTOR agrees to comply with the Americans with Disabilities Act of 1990 and any current amendments thereto. All individuals shall have equal access to employment opportunities available to a similarly suited individual. CONTRACTOR agrees not to discriminate in its employment practices, and will render services under this contract without regard to race, color, religion, sex, national origin, veteran status, political affiliation, or disabilities. Any act of discrimination committed by CONTRACTOR, or failure to comply with these statutory obligations when applicable shall be grounds for termination of this contract. CONTRACTOR agrees to abide by the requirements of all local, state, and/or federal law, including but not limited to the following: Title VI and VII of the Civil Rights Act of 1964, as amended by the Equal Opportunity Act of 1972, Federal Executive Order 11246, the Federal Rehabilitation Act of 1973, as amended, the Vietnam Era Veteran's Readjustment Assistance Act of 1974, Title IX of the Education Amendments of 1972, the Age Act of 1975, and the requirements of the Americans with Disabilities Act of 1990. CONTRACTOR warrants and guarantees that it is an Equal Employment Opportunity employer. In all hiring or employment made possible by or resulting from this Contract, there shall not be any discrimination against any person because of race, color, religion, sex, national origin, disability, age or veterans status; and where applicable, affirmative action will be taken to ensure that CONTRACTOR'S employees are treated equally during employment without regard to their race, color, religion, sex, national origin, disability, age, political affiliation, disabilities or veteran

status. This requirement shall apply to but not be limited to the following: employment upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. All solicitations or advertisements for employees shall state that all applicants will receive consideration for employment without regard to race, color, religion, sex, national origin, disability, age or veteran status.

18. INDEPENDENT CONTRACTOR

- A. While in the performance of services or carrying out obligations herein, the CONTRACTOR shall be acting in the capacity of an independent contractor and not as an employee of the Parish. The Parish shall not be obliged to any person, firm or corporation for any obligations of the CONTRACTOR arising from the performance of its services under this agreement. The CONTRACTOR shall not be authorized to represent the Parish with respect to services being performed, dealings with other agencies, and administration of specifically related contracts, unless done so in writing by the Parish.
- B. CONTRACTOR hereby agrees to be responsible for payment of taxes from the funds thus received under this Contract. CONTRACTOR agrees to be responsible for and to pay all applicable federal income taxes, federal social security tax (or self-employment taxes in lieu thereof) and any other applicable federal or state unemployment taxes. CONTRACTOR agrees to indemnify and hold the Parish harmless for any and all federal and/or state income tax liability, including taxes, interest and penalties, resulting from the Parish's treatment of CONTRACTOR as independent contractor.
- C. CONTRACTOR further agrees to reimburse Parish for any and all costs it incurs, including, but not limited to, accounting fees and legal fees, in defending itself against any such liability.
- D. CONTRACTOR agrees and acknowledges that it (and its employees) is an **independent contractor** as defined in R.S. 23: 1021 (or any other provision of law) and as such nothing herein shall make CONTRACTOR an employee of the Parish nor create a partnership between CONTRACTOR and the Parish.
- E. CONTRACTOR acknowledges exclusion of Workmen's Compensation Coverage. CONTRACTOR acknowledges of the exclusion of Unemployment Compensation coverage.
- F. CONTRACTOR agrees to a waiver of any and all sick and annual benefits from the Parish. It is expressly agreed and understood between the parties entering into this personal service contract, that CONTRACTOR, acting as an independent agent, shall not receive any sick and annual leave from the Parish.

19. NOTICES

All notices shall be by certified mail, return receipt requested, and sent to the following individuals at the following addresses. Changes of person and addresses are to be exchanged in a like manner:

Parish of St. James: Operations Department
P.O. Box 106
Convent, LA 70723

Contractor: Francise Horticultural Services Inc

20. AUTHORITY TO ENTER CONTRACT

The undersigned representative of CONTRACTOR warrants and personally guarantees that he/she has the requisite and necessary authority to enter and sign this contract on behalf of the corporate entity. The undersigned parties warrant and represent that they each have the respective authority and permission to enter this agreement. The Parish shall require, as an additional provision, that CONTRACTOR provide a certified copy of a corporate resolution authorizing the undersigned to enter and sign this agreement in the event that CONTRACTOR is a member of a corporation, partnership, LLC, LLP, and any other juridical entity.

This agreement is executed in two (2) originals. IN TESTIMONY WHEREOF, they have executed this agreement, the day and year first above written.

WITNESSES

Title: Parish President
St. James Parish Government
Date: _____

WITNESSES

Title: _____
License No.
Date: _____

Francise Horticultural Services, Inc.
6816 Pine Thicket Dr.
Baton Rouge, LA 70817
225-921-6881
225-755-1938 (fax)

PROPOSAL

March 27, 2019

TO: St. James Recreation
Attn: Mr. Brent Dicharry

RE: Proposal for Romeville Splashpark

We propose the following:

1. Concrete (2,300 sq. ft. @ 8.00 each):	\$18,400.00
2. Fill and Mats if needed:	5,000.00
3. Piping and Equipment Installation:	24,500.00
4. Cool Deck (1600 sq. ft. At 4.00 each):	<u>6,400.00</u>
TOTAL:	\$54,300.00

**MASTER CONTRACT
for
PUBLIC WORKS/CONSTRUCTION**

BE IT KNOWN that on this ____ day of _____, 20__,

St. James Parish Government, by and through the Office of the Parish President (hereinafter sometimes referred to as the "OWNER"), as approved by Resolution adopted by the Parish Council of St. James on the ____ day of _____, 2020.

And

Francis Horticultural Services qualified to do and doing business in this State and Parish (hereinafter referred to as "CONTRACTOR") and authorized to enter into this contract;

do hereby enter into contract under the following terms and conditions:

NOTE: This Contract or Agreement governs the relationship and rights between the Parties. While there may be other Documents (for example, General Conditions) which might exist between the Parties, those documents **do not** control in the event or to the extent that there is any conflict or contradiction with the terms of this Agreement or Contract. In the event that there is any conflict between the terms of this Agreement/Contract and any other document between the parties, THE PARTIES AGREE THAT THIS AGREEMENT/CONTRACT SHALL CONTROL AND GOVERN.

1. SCOPE OF SERVICES/WORK

A. CONTRACTOR shall complete all WORK as specified or indicated in the Contract Document **Exhibit A** in conjunction with:

District 5 – Welcome Splash Park

B. The Scope of services to be provided by the Consultant may be entered as a scope document, or written proposal signed by both parties to this contract. The Scope shall be attached hereto as an Exhibit and made a part hereof as if written herein in full. All work shall be under the direction of the Brent Dicharry of the Recreation Department, hereinafter called the PROJECT MANAGER, and all plans, specifications, and the like shall be submitted to him, and all approvals and administration of this contract shall be through him.

C. The compensation to the Provider for these services shall be set out in the attached scope document, Task Order, or written proposal signed by both parties to this contract.

D. There will be absolutely no fees or charges paid to Provider to cover overhead costs,

general expenses, capital expenses, expenses for principal/branch/field offices, employees' salaries, direct and indirect costs, additional costs or profit of any nature whatsoever. In each case, the work is initiated only upon receipt of a written work order from the PROJECT MANAGER, all which must include the maximum fee to be charged.

2. TERM OF CONTRACT

- A. The Work will be substantially completed within 45 calendar days from the date identified on the Notice to proceed from the Engineer/Parish
- B. The Notice to Proceed shall be issued within ten (10) days from the execution of this contract unless the Owner or Owner's representative and the Contractor agree in writing to another specified date.
- C. This construction contract shall remain in full force and effect until all work has been completed and accepted by OWNER and all payments required to be made to Contractor.
- D. However, this contract may be terminated for any of the following:
 - 1. As per the terms and conditions of Paragraph 15 and/or
 - 2. As per operation of law, and/or
 - 3. As per agreement between the parties, and/or
 - 4. As per the Parish Charter.

3. ENGINEER - Not applicable

- A. The Drawings have been prepared by Engineer, PEO., [REDACTED] who is hereinafter call ENGINEER and who is to act as OWNER'S representative, assume all duties and responsibilities and have the rights and authority assigned to ENGINEER in the Contract Documents in connection with completion of the Work in accordance with the Contract Documents.

4. PROJECT SCHEDULE

- A. CONTRACTOR shall submit and strictly adhere to a project construction schedule throughout the allocated contract and associated time frame. CONTRACTOR is aware that OWNER may have a representative at each site where WORK is being performed and that CONTRACTOR needs to coordinate with the OWNER'S REPRESENTATIVE or PROJECT MANAGER where Work on the CONTRACT will be performed. CONTRACTOR will coordinate with the OWNER'S REPRESENTATIVE by strictly following the project construction schedule or Progress Schedule. OWNER recognizes and understands that changes in project

construction schedule or Progress Schedule may become necessary during the course of the project. However, in the event of any such change, the CONTRACTOR shall notify the OWNER'S REPRESENTATIVE **in writing** of a proposed change. Said written notice shall be provided at least 12 hours prior to the revised construction activity. Said notice shall be provided by emailing notice of change to (*email address of contact*) and (*email address of contact*) and other contacts including testing company that is a team for member for the project.

- B. Should the CONTRACTOR fail to timely notify the OWNER'S REPRESENTATIVE of such change, the OWNER'S REPRESENTATIVE will document the CONTRACTOR'S failure to notify of the change in work and SHALL assess stipulated damages as follows. For EACH failure to notify the OWNER'S REPRESENTATIVE of any change in the project construction schedule or Progress Schedule, the CONTRACTOR AGREES TO PAY **\$150.00 per failure to notify the OWNER'S REPRESENTATIVE**. CONTRACTOR agrees that these stipulated damages reflect the lost time, manpower, and mileage incurred by OWNER attempting to locate the CONTRACTOR where a change in schedule occurs and the required notice was not provided. CONTRACTOR further agrees that **said amount shall be paid** by directly reducing the amount of monthly invoices/pay applications by the amount of penalties issued. The Penalty fees shall be itemized on monthly invoices.

5. LIQUIDATED DAMAGES

- A. OWNER and CONTRACTOR recognize that time is of the essence of this Agreement and the OWNER will suffer financial loss if the Work is not completed within the times specified in section 2 above, plus any extensions thereof allowed in accordance with the contract conditions and approved time changes thereto. There are delays, expenses and difficulties involved in proving in a legal arbitration preceding the actual loss suffered by OWNER if the Work is not completed on time. Accordingly, instead of requiring proof, OWNER and CONTRACTOR agree that as liquidated damages for delay (but not as a penalty) CONTRACTOR shall pay OWNER the amount of **Eight hundred fifty (\$850.00) Dollars** for each day that expires after the time specified in section 2 for Substantial Completion until the Work is substantially complete.

6. CONTRACT PRICE

- A. OWNER shall pay CONTRACTOR for completion of the Work completed in accordance with the Contract Documents in the amount specified therein, subject to adjustment as provided in the Contract Documents or amendments thereto. This is unit price contract based on the estimated quantities and unit cost awarded with an estimated total of **\$91,300.**

7. PAYMENT PROCEDURES

- A. CONTRACTOR shall submit Applications for Payment in accordance with Article 14 of the General Conditions. Applications for Payment will be processed by ENGINEER as provided in the General Conditions.
- B. Invoices for services shall be submitted by CONTRACTOR to the OPERATIONS DEPARTMENT for review and approval:

St. James Parish Government
P.O. Box 106
Convent, LA 70723

- C. **Progress Payments.** OWNER shall make progress payments on account of the Contract Price on the basis of CONTRACTOR'S Applications for Payment as recommended by ENGINEER, once each month during construction. All progress payments will be on the basis of progress of the Work measured by the schedule of values established in paragraph 2.07.A of the General Conditions (and in each case of Unite Price Work based on the number of units completed) or, in the event there is no schedule of values, as provided in the General Requirements. Payment will be made on work that that been installed, inspected, tested, verified, and done so to the satisfaction of the engineer.
- D. Pursuant to La. R.S. 38:2248 (Public Contract Law), Owner shall withhold retainage from each progress payment until payment is due under terms and conditions governing substantial completion or final payment. Retainage shall be ten percent of the amount of work completed to date if the contract amount is up to \$500,000 and five percent of the work complete to date if the contract amount is over \$500,000.
- E. **Fuel or Asphalt/Concrete Adjustments.** There shall be NO adjustments for prices or costs of any fuel or asphalt/concrete on this project, arising out of the work on this project/contract, or arising out of this contract. Further, the CONTRACTOR hereby waives any price adjustment for fuel or asphalt/concrete or the ability or right to request any price adjustment for fuel or asphalt/concrete. Particularly, the Louisiana DOTD provisions (or any such or similar provisions by any other third party) pertaining to or related to fuel or asphalt/concrete adjustments are not part of this contract, are not incorporated by reference or otherwise in this Contract, and shall not apply in any form or fashion to the contract. Any language in this Contract which implies that the CONTRACTOR may obtain an adjustment in price for fuel or asphalt/concrete is hereby to be interpreted that CONTRACTOR shall **not** receive any such adjustment. CONTRACTOR shall not assert that any language in the CONTRACT creates any vagueness or ambiguity in the CONTRACT entitling CONTRACTOR to price adjustments for fuel or asphalt/concrete. CONTRACTOR hereby waives any right or ability to request any price adjustment for fuel or asphalt/concrete and CONTRACTOR shall **not** submit any request for any change in price for fuel or asphalt/concrete adjustments to the OWNER in any form.

- F. **Final Payment.** Upon final completion and acceptance of the Work in accordance with paragraph 14.07 of the General Conditions and Supplementary Conditions SC-9.03(B) (13). OWNER shall pay the remainder of the Contract Price as recommended by ENGINEER.
- G. There shall be no fees charged by, nor paid to, CONTRACTOR for consultation with the Parish.
- H. CONTRACTOR hereby agrees that the responsibility for payment of taxes from the funds thus received under this agreement shall be said CONTRACTOR'S obligation and identified under Federal Tax Identification Number as listed in the Scope.
- I. The Parish agrees to make payment to CONTRACTOR for services upon receipt and approval of each invoice. The Parish will pay CONTRACTOR the amount due and payable within thirty (30) days or unless a conflict results in a delay of payment. Upon receipt of each invoice, the Parish shall have the right and opportunity to review, confirm or otherwise determine the accuracy of each invoice and performance of service. In the event that the Parish disputes or otherwise may question the accuracy of each invoice or quality of all work performed, the Parish may withhold payment of any invoice until a successful and satisfactory resolution can be had between the parties. Parish agrees to not unreasonably withhold payments of any invoice.
- J. Other than the fee schedule herein, there will be absolutely no additional fees due CONTRACTOR to cover its overhead costs, general expenses, capital expenses, expenses for principal/branch/field offices, employees' salaries, direct and indirect costs, additional costs or profit of any nature whatsoever in excess of the previously agreed hourly rate.

8. CONTRACTOR'S REPRESENTATIVES

In order to induce OWNER to enter into this Agreement, CONTRACTOR makes the following representations:

- A. CONTRACTOR is familiar with the nature and extent of the Contract Documents. Work site, locality and all local conditions and Laws and Regulations that in any manner may affect cost, progress, performance or furnishing of the Work.
- B. CONTRACTOR has reviewed and checked all information and data shown or indicated on the Contract Documents with respect to existing Underground Facilities. No additional examinations, investigations, explorations, tests, reports, studies, or similar information or data in respect of said Underground Facilities are or will be required by CONTRACTOR in order to perform and furnish the Work at the Contract Price, within the Contract Time and in accordance with the other terms and conditions of the Contract Documents,

including specifically the provisions of paragraph 4.3 of the General Conditions.

- C. CONTRACTOR has correlated the results of all such observations, examinations, investigations, explorations, tests, reports, and studies with the terms and conditions of the Contract Documents.
- D. CONTRACTOR has given ENGINEER written notice of all conflicts, errors, or discrepancies that he has discovered in the Contract Documents and the written resolution thereof by ENGINEER is acceptable to CONTRACTOR.

9. CONTRACT DOCUMENTS

The Contract Documents which comprise of the contract between OWNER and CONTRACTOR, attached hereto and made a part hereof, consist of the documents listed in Table of Contents, and the documents identified below.

- a. CONTRACTOR Quote Documents
- b. Bid Bonds
- c. Agreement
- d. Payment Bond
- e. Performance Bond
- f. Notice of Award
- g. Notice to Proceed
- h. Technical Specifications prepared by engineer – Not applicable
- i. Standard General Conditions – Not applicable
- j. Drawings prepared by engineers – Not applicable

10. CONTRACTOR DOCUMENTS

- A. The CONTRACTOR shall also furnish sufficient as-built sets of plans, specifications & contract document.
- B. All data collected by the CONTRACTOR and all documents, notes, drawings, tracings, and files shall remain the property of the Owner except as otherwise provided herein. The CONTRACTOR shall furnish to the PROJECT MANAGER originals of any project documents used in completion of the project or in any way related to this project to the Project Manager.
- C. The Owner shall furnish without charge all standard plans and specifications and any other information which the Owner now has in its files which may be of use to the CONTRACTOR. CONTRACTOR has the duty to and must confirm and verify all information contained therein.
- D. Construction Documents. The CONTRACTOR shall use the most current versions of the

standard forms of documents adopted and specified by the Owner in the performance of the Contract, all as of the date of the signing of this contract. Notwithstanding anything to the contrary in any other provision of this contract, none of the contract documents provided by the Owner are or will become the property of the CONTRACTOR but shall remain the property of the Owner to the extent the Owner has a property interest therein.

E. Notwithstanding any Section hereinafter, there will be retention of all related records:

- (1) All records, reports, documents and other material delivered or transmitted to CONTRACTOR by Parish shall remain the property of Parish, and shall be returned by CONTRACTOR to Parish, at CONTRACTOR'S expense, at termination or expiration of this contract. All records, reports, documents, exhibits or other material related to this contract and/or obtained or prepared by CONTRACTOR in connection with the performance of the services contracted for herein shall become the property of Parish, and shall be returned by CONTRACTOR to Parish, at CONTRACTOR'S expense, at termination or expiration of this contract.
- (2) The Parish and CONTRACTOR acknowledge and agree that the Parish has the right to review retain all records, reports, worksheets or any other material of either party related to this contract. CONTRACTOR further agrees that CONTRACTOR will furnish to the Parish copies of any and all records, reports, worksheets, bills, statements or any other material of CONTRACTOR or Parish related to this contract.
- (3) CONTRACTOR shall maintain all books, documents, papers, accounting records and other evidence pertaining to costs incurred and shall make such materials available at its offices at any reasonable time for inspection and copying by the Parish.
- (4) CONTRACTOR shall retain all of its records and supporting documentation applicable to this contract with the Parish for a period of five (5) years after termination of the contract in accordance with state law, except as follows:
 - (a) Records that are subject to Federal Funds and/or audit findings shall be retained for five (5) years after such findings have been resolved, close out has been issued.
 - (b) All such records and supporting documentation shall be made readily available for inspection, copying or audit by representatives of the Parish. In the event the CONTRACTOR goes out of existence, it shall turn over to the Parish all of its records relating to this contract to be retained by the Parish for the required period of

time.

- F. In the event there is re-use of any documents created by CONTRACTOR, CONTRACTOR invokes the privileges afforded it as per La. Revised Statute R.S. 38:2317.
- G. The Parish agrees not to use CONTRACTOR'S work product on any other project without the express written notice to the CONTRACTOR.
- H. All of CONTRACTOR'S pre-existing or proprietary computer programs, software, information, standard details or material developed by CONTRACTOR outside of this agreement shall remain the exclusive property of the CONTRACTOR.

11. NON-ASSIGNABILITY

- A. CONTRACTOR shall not assign nor transfer any interest in this contract (whether by assignment or novation) without prior written consent of the Parish, provided however, that claims for money due or to become due to the CONTRACTOR from the Parish under this contract may be assigned to a bank, trust company, or other financial institution without such prior written consent. Notice of any such assignment or transfer shall be furnished promptly to the Parish.
- B. No assignment by a party hereto of any rights under or interests in the Contract Documents will be binding on another party hereto without the written consent of the party sought to be bound; and specifically but without limitation moneys that may become due and moneys that are due may not be assigned without consent (except to the extent that the effect of this restriction may be limited by law), and unless specifically stated to the contrary in any written consent to an assignment, no assignment will release or discharge the assignor from any duty or responsibility under the Contract Documents.
- C. OWNER and CONTRACTOR each binds itself, its partners, successors, assigns and legal representative to the other party hereto, its partners, successors, assigns, and legal representatives in respect to all covenants, agreements and obligations contained in the Contract Documents.

12. BUDGET LIMITATION

- A. It is the responsibility of the CONTRACTOR to advise the Parish in advance if contract funds or contract terms may be insufficient to complete contract objectives. CONTRACTOR understands and specifically warrants that it assumes the sole responsibility to advise the Parish in advance if contract funds or contract terms may be insufficient to complete contract objectives. In providing opinions of probable construction cost, the Parish understands that the CONTRACTOR has no control over costs and price of labor, equipment or materials or over the general CONTRACTOR'S method of pricing, and that the opinion of probable costs provided herein are made on the basis of the CONTRACTOR'S qualifications and experience.

- B. The continuation of this contract is contingent upon the appropriation of funds by the Parish to fulfill the requirements of the contract. If the Parish fails to appropriate sufficient monies to provide for the continuation of this or any other related contract, or if such appropriation is reduced by the veto of Parish President by any means provided in the appropriations Ordinance to prevent the total appropriation for the year from exceeding revenues for that year, or for any other lawful purpose, and the effect of such reduction is to provide insufficient monies for the continuation of the contract, the contract shall terminate on the date of the beginning of the first fiscal year for which funds are not appropriated.

13. INSURANCE

- A. The CONTRACTOR shall secure and maintain at its expense such insurance that will protect it and the Parish from claims under the Workmen's Compensation Acts and from claims for bodily injury, death or property damage which may arise from the performance of services under this agreement. All certificates of insurance shall be furnished to the Parish and shall provide that insurance shall not be canceled without thirty (30) days prior notice of cancellation given to the Parish of Ascension, in writing, on all of the required coverage provided to St. James Parish. Where possible, all policies and notices should name the CONTRACTOR and Parish. The Parish may examine the policies at any time.
- B. All policies and certificates of insurance shall contain the following clauses:
1. The CONTRACTOR'S insurers will have no right of recovery or subrogation against the Parish of Ascension, it being the intention of the parties that the insurance policy so affected shall protect both parties and be the primary coverage for any and all losses covered by the below described insurance.
 2. The Parish of St. James shall be named as additional named insured with respect to automobile and general liability.
 3. The insurance companies issuing the policy or policies shall have no recourse against the Parish of St. James for payment of any premiums or for assessments under any form of policy.
 4. Any and all deductible in the described insurance policies shall be assumed by and be at the sole risk of the CONTRACTOR.
- C. Prior to the execution of this agreement, the CONTRACTOR shall provide at its own expense, proof of the following insurance coverage required by the contract to the Parish of St. James by insurance companies authorized to do business in the State of Louisiana. Insurance is to be placed with insurers with an A.M. Best rating

of no less than B+.

1. Worker s compensation Insurance: As required by Louisiana State Statute exception; employer's liability shall be at least \$500,000 per occurrence.
2. Commercial General Liability Insurance in an amount not less than \$1,000,000.00 per occurrence, and \$2,000,000.00 aggregate combined single limit for bodily injury and property damage. This insurance shall include coverage for bodily injury and property damage, and indicate on the certificate of insurance the following:
 - a) Premises - operations;
 - b) Broad form contractual liability;
 - c) Products and completed operations;
 - d) Personal Injury;
 - e) Broad form property damage;
 - f) Explosion, collapse and underground coverage. Not needed for design
3. Business Automobile Liability Insurance with a Combined Single Limit of \$1,000,000 per Occurrence for bodily injury and property damage, unless otherwise indicated. This insurance shall include for bodily injury and property damage the following coverage:
 - a) Any automobiles;
 - b) Owned automobiles;
 - c) Hired automobiles;
 - d) Non-owned automobiles;
 - e) Uninsured motorist.
4. An umbrella policy or excess policy may be used to meet minimum requirements where applicable.
5. All policies of insurance shall meet the requirements of the Parish of St. James prior to the commencing of any work. The Parish of St. James has the right, but not the duty, to approve all insurance policies prior to commencing of any work. If at any time, it becomes known that any of the said policies shall be or becomes unsatisfactory to the Parish of St. James as to form or substance; or if a company issuing any such policy shall be or become unsatisfactory to the Parish of Ascension, the CONTRACTOR shall promptly obtain a new policy, timely submit same to the Parish of St. James for approval and submit a certificate thereof as provided above. The Parish agrees to not unreasonably withhold approval of any insurance carrier selected by CONTRACTOR. In the event that Parish cannot agree

or otherwise authorize said carrier, CONTRACTOR shall have the option of selecting and submitting new insurance carrier within 30 days of said notice by the Parish. In the event that the second submission is insufficient or is not approved, then the Parish shall have the unilateral opportunity to thereafter select a responsive and responsible insurance carrier all at the cost of CONTRACTOR and thereafter deduct from CONTRACTOR'S fee the cost of such insurance.

6. Upon failure of CONTRACTOR to furnish, deliver and/or maintain such insurance as above provided, this contract, at the election of the Parish of Ascension, may be forthwith declared suspended, discontinued or terminated. Failure of the CONTRACTOR to maintain insurance shall not relieve the CONTRACTOR from any liability under the contract, nor shall the insurance requirements be construed to conflict with the obligation of the CONTRACTOR concerning indemnification.

7. WAIVER: Except as otherwise provided by law, the coverage requirements of this section may be waived in whole or in part on agreements under \$50,000.00, and the Parish is authorized to use its discretion in regard to insurance requirements for such contracts. Except as otherwise provided by law, the Parish President or the Parish Chief Administrative Officer is authorized to omit in whole or in part the insurance requirements of this section in connection with such contracts.

D. CONTRACTOR shall maintain a current copy of all annual insurance policies and provide same to the Parish of St. James on an annual basis or as may be reasonably requested.

14. OTHER TERMS AND CONDITIONS

A. **Licenses and Commissions.** The CONTRACTOR shall, at all times during the term of this contract, maintain valid Louisiana licenses and commissions as are customarily required of such a CONTRACTOR, including but not limited to those that may be required by this State and/or Parish. The CONTRACTOR agrees to renew and or keep current all licenses and commissions herein. The CONTRACTOR agrees to maintain a copy of all such licenses or commissions on file at all time and make same available for review as may be reasonably requested by the Parish of Ascension.

B. The professional and technical adequacy and accuracy of designs, drawings, specifications, documents, and other work products furnished under this agreement will be conducted in a manner consistent with that level of care and skill ordinarily exercised by members of the profession in the Baton Rouge Metropolitan area including the parishes surrounding St. James Parish. In the event the Parish must

have work done by change order or addition resulting from an error or omission by the CONTRACTOR, CONTRACTOR shall provide, at no cost to Parish, all professional services attributable to the change order. This is in addition to Parish's right to recover from CONTRACTOR any damages for its errors and omissions.

- C. The CONTRACTOR shall defend, indemnify, and hold the Parish harmless from against any and all actions, claims, demands, complaints, or lawsuits of any kind (whether in tort or in contract) for any sums of money, costs, liabilities, judgments, fines, or penalties asserted or alleged by any person, party, entity, firm or generation for any damage, injury, claim, or cause of action (of any kind) including, but not limited to, pecuniary and non-pecuniary damages/losses to person or property which are alleged to have been caused by or which were caused by or (wholly or partially), which grow out of, which arise from, or which result from any negligent acts, errors, or omissions by CONTRACTOR, its agents, servants, or employees while engaged in connection with services required to be performed by the CONTRACTOR under this agreement. This paragraph is to be broadly interpreted to include any and all causes of action which result wholly or partially from the conduct of the CONTRACTOR.
- D. This agreement shall be binding upon the successors and assigns for the parties hereto.
- E. This agreement represents the entire Agreement between Parish and CONTRACTOR.
- F. If there is any dispute concerning this agreement, the laws of Louisiana shall apply. The exclusive venue and jurisdiction for all lawsuits, claims, disputes, and other matters in questions between the parties to this agreement or any breach thereof shall be in the 23rd Judicial District Court for the Parish of Ascension, State of Louisiana. It is also understood and agreed that the laws and ordinances of St. James shall apply.
- G. In the event that the CONTRACTOR modifies the Parish's contract documents without the expressed prior written consent of the Parish, the CONTRACTOR shall indemnify and hold harmless the Parish from any claims, lawsuits, or damages that arise out of or are attributable to the modification. This indemnification and hold harmless obligation shall include not only the damages suffered by the Parish but also all reasonable expenses including, but not limited to, any and all litigation or other dispute resolution costs and any and all professional fees incurred by the Parish as a result of the CONTRACTOR'S deviation from the Parish's contract documents.
- H. CONTRACTOR agrees to a covenant against contingent fees. CONTRACTOR warrants that it has not employed or retained any company or person, other than a

bona fide employee working solely for the CONTRACTOR, to solicit or secure this Contract, and that it has not paid or agreed to pay any company or person, other than a bona fide employee working solely for the CONTRACTOR, any fee, commission, percentage, brokerage fee, gifts, or any other consideration, contingent upon or resulting from the award or making of this Contract. For breach or violation of this warranty, the Parish shall have the right to annul this contract without liability.

- I. This contract may be amended only by mutual written consent of the respective parties.
- J. Third Party Beneficiary: it is specifically agreed by and between the parties to this contract that no person or party is intended, deemed, considered, or construed to be a third party beneficiary of this contract.
- K. Neither party will be liable for failure to fulfill its obligations when due to causes beyond its reasonable control.
- L. Any failure or delay by either party in exercising any right or remedy will not constitute a waiver.
- M. Severability: if any provision or item in this contract is held invalid or unenforceable for any reason, then such invalidity or unenforceability shall not affect other provisions or items of this contract. In such event, the remaining portions shall be given full force and effect without the invalid provision or item, and to this end the provisions or items of this contract are hereby declared severable.
- N. It is specifically understood that the terms "agreement" and "contract" may be used interchangeably. It is specifically understood that the terms "Owner", "PROJECT MANAGER" and "Parish" and "the Parish of Ascension" may be used interchangeably.
- O. Conflict of Interest: it is understood and agreed between the parties hereto that CONTRACTOR is not retained exclusively by the Parish but that the Parish may retain other CONTRACTORS during the term of this Contract. In the event of reasonably known conflicts of interest or potential conflicts of interest between the Parish and other parties who have engaged CONTRACTOR, the CONTRACTOR agrees to make full disclosure of the same, and that they will take no action on behalf of any other client directly adverse to the Parish, nor will CONTRACTOR take any action on behalf of the Parish directly adverse to any other client.
- P. CONTRACTOR warrants that CONTRACTOR is qualified to perform the intended purposes of this agreement. In the event that CONTRACTOR becomes not fit nor qualified for any reason whatsoever, then CONTRACTOR agrees to

withdraw from work herein at no cost to the Parish. In the event that the Parish determines that CONTRACTOR is not suited for Parish purposes or otherwise fails to represent Parish policies to the satisfaction of the Parish, then CONTRACTOR agrees to withdraw from this agreement.

- Q. CONTRACTOR specifically agrees and understands that CONTRACTOR shall not maintain or otherwise claim that it possesses any security interest in any aspect of the work that forms the basis of this agreement.
- R. CONTRACTOR agrees to ensure that its personnel are, at all times, educated and trained, and further, that CONTRACTOR and its personnel will perform all work and services in a workmanlike and professional manner.
- S. CONTRACTOR recognizes and understands that time is of the essence. CONTRACTOR agrees to perform and provide services in accordance with this agreement and all incorporated attachments.
- T. CONTRACTOR shall be responsible for any and all losses and damages suffered or incurred by the Parish, including but not limited to all costs, attorney's fees, out of pocket expenses, any & all Parish employee time, and any other expenditure by the Parish to defend, remedy, repair, replace, correct, or cure any condition or liability created or arising out of the actions or omissions to act of the CONTRACTOR, it's agents, officer, servants, or employees. This includes the payment of any cost or fees of any type or kind incurred by the Parish in defending any lawsuit, complaint, claim, claim filed or arising out of the action or omission to act of the CONTRACTOR.
- U. CONTRACTOR agrees that it will be responsible for all of its own actual and reasonably related expenses for its on & off-site office work. CONTRACTOR further agrees that Parish will not be responsible for or in any way liable for CONTRACTOR'S payroll costs, indirect or direct expenses, overhead, or any other amounts associated with CONTRACTOR'S business other than the specific fees & costs generated under the terms of this agreement.

15. TERMINATION AND SUSPENSION

A. Termination for Cause

The Parish may terminate this Contract for cause based upon the failure of the CONTRACTOR to comply with the terms and/or conditions of the Contract, provided that the Parish shall give the CONTRACTOR written notice specifying the failure. If within thirty (30) days after receipt of such notice, the CONTRACTOR shall not have corrected such failure and thereafter proceeded diligently to complete such correction, then the Parish may, at its sole and exclusive

option, place the CONTRACTOR in default and this contract shall terminate on the date specified in such notice. Work to be performed during this 30-day period shall not proceed without the actual knowledge of the Parish and specifically supervised by the Parish. Any work performed by CONTRACTOR during this period without the actual knowledge of the Parish and not under the supervision of the Parish shall not be compensated nor honored; CONTRACTOR specifically waives and forfeits any and all claims to payment, compensation, quantum merit, and/or reimbursement from the Parish of any work performed during this period in violation of this paragraph. CONTRACTOR agrees and understands specifically that satisfactory performance shall be unilaterally and exclusively determined by the Parish.

B. Termination for Convenience

Notwithstanding any other section herein, the Parish may terminate this contract at any time for any reason whatsoever by giving thirty (30) days written notice to the CONTRACTOR. The CONTRACTOR shall be entitled to payment for deliverables in progress; to the extent work has been actually and satisfactorily performed.

C. Right to Cancel

(1) The continuation of this contract is contingent upon the appropriation of funds to fulfill the requirements of the contract by the Parish. If the Parish fails to appropriate sufficient monies to provide for the continuation of this or any other contract, or if such appropriation is reduced by the veto of Parish President by any means provided in the appropriations Ordinance to prevent the total appropriation for the year from exceeding revenues for that year, or for any other lawful purpose, and the effect of such reduction is to provide insufficient monies for the continuation of the contract, the contract shall terminate on the date of the beginning of the first fiscal year for which funds are not appropriated. It is understood and agreed that the paragraph below may preempt this paragraph, all at the exclusive and unilateral option of the Parish.

D. Additional Causes for Termination or suspension:

1. By mutual agreement and consent of the parties hereto.
2. By the Parish as a consequence of the CONTRACTOR'S failure to comply with the terms, progress or quality of work in a satisfactory manner, proper allowances being made for circumstances beyond the control of the CONTRACTOR.
3. By either party upon failure of the opposing party to fulfill its obligations as set forth in this contract, provided that written notice of said non-

fulfillment is given to the opposing party and said obligation is not properly fulfilled within fifteen (15) days of said notice.

4. In the event of the abandonment of the project by the Parish.
 5. A Stop Work Order can be immediately issued by the Parish if they deem it necessary to protect the health, safety, and welfare of the community.
-
- E. Upon termination, the CONTRACTOR shall be paid for actual work performed prior to the notice of termination on a pro-rata share of the basic fee based on the phase or percentage of work actually completed.
 - F. Upon termination, the CONTRACTOR shall deliver to the Parish all original documents, notes, drawings, tracings, computer files, and files except the CONTRACTOR'S personal and administrative files.
 - G. Should the Parish desire to suspend the work, but not definitely terminate the contract, this may be done by thirty (30) day notice given by the Parish to that effect, and the work may be reinstated and resumed in full force & effect upon receipt from the Parish of thirty (30) day notice in writing to that effect. CONTRACTOR shall receive no additional compensation during the suspension period. The parties agree to revisit the terms of this contract during the suspension period which shall not exceed six (6) months, unless mutually agreed upon.
 - H. There is a right to cancel by the Parish by giving thirty (30) day notice to Provider and paying undisputed fees due for services on that portion of the work that has been satisfactorily, timely and/or professionally completed, all in the exclusive discretion of the Parish at any time herein.
 - I. In the event of a default and/or breach of this agreement and this matter is forwarded to legal counsel, then the prevailing party may be entitled to collect a reasonable attorney fees and all costs associated therewith whether or not litigation is initiated. Attorney fees shall be based upon the current, reasonable prevailing rate for counsel as provided on the fee schedule of the Louisiana Attorney General or in the private sector, whichever is greater. The parties agree to be responsible for such attorney fees, together for all with legal interest from date of agreement breach, plus all costs of collection.
 - J. Termination or cancellation of this agreement will not affect any rights or duties arising under any term or condition herein.
 - K. As to the filing of bankruptcy, voluntarily or involuntarily, by CONTRACTOR, CONTRACTOR agrees that if any execution or legal process is levied upon its interest in this contract, or if any liens or privileges are filed against its interest, or if a petition in bankruptcy is filed against it, or if it is adjudicated bankrupt in involuntary proceedings, or if it should breach this contract in any material respect,

the Parish shall have the right, at its unilateral option, to immediately cancel and terminate this contract. In the event that CONTRACTOR is placed in any chapter of bankruptcy, voluntarily or involuntarily, or otherwise triggers any provision of the preceding sentence herein, it is understood and agreed that all materials, goods and/or services provided shall be and remain the property of the Parish. All rights of CONTRACTOR as to goods, wares, products, services, materials and the like supplied to Parish shall be deemed forfeited.

16. AUDITORS

Notwithstanding other Sections herein, CONTRACTOR shall maintain all records for a period of three years after the date of final payment under this contract. It is hereby agreed that the Parish Department of Finance or its designated auditor shall have the sole, unilateral and exclusive option of auditing all accounts of CONTRACTOR which relate to this contract. Such audit may be commenced at any reasonable time. CONTRACTOR agrees not to delay, retard, interrupt or unduly interfere with commencement and completion of such an audit. If in the exclusive and unilateral opinion of the Parish that CONTRACTOR delays, retards, interferes with or otherwise interrupts such an audit, the Parish may seek such relief as per law. In such an event, CONTRACTOR agrees to be liable for all reasonable attorney fees, costs of auditors, court costs, and any other reasonably related expenses with such litigation.

17. DISCRIMINATION CLAUSE

CONTRACTOR agrees to comply with the Americans with Disabilities Act of 1990 and any current amendments thereto. All individuals shall have equal access to employment opportunities available to a similarly suited individual. CONTRACTOR agrees not to discriminate in its employment practices, and will render services under this contract without regard to race, color, religion, sex, national origin, veteran status, political affiliation, or disabilities. Any act of discrimination committed by CONTRACTOR, or failure to comply with these statutory obligations when applicable shall be grounds for termination of this contract. CONTRACTOR agrees to abide by the requirements of all local, state, and/or federal law, including but not limited to the following: Title VI and VII of the Civil Rights Act of 1964, as amended by the Equal Opportunity Act of 1972, Federal Executive Order 11246, the Federal Rehabilitation Act of 1973, as amended, the Vietnam Era Veteran's Readjustment Assistance Act of 1974, Title IX of the Education Amendments of 1972, the Age Act of 1975, and the requirements of the Americans with Disabilities Act of 1990. CONTRACTOR warrants and guarantees that it is an Equal Employment Opportunity employer. In all hiring or employment made possible by or resulting from this Contract, there shall not be any discrimination against any person because of race, color, religion, sex, national origin, disability, age or veterans status; and where applicable, affirmative action will be taken to ensure that CONTRACTOR'S employees are treated equally during employment without regard to their race, color, religion, sex, national origin, disability, age, political affiliation, disabilities or veteran

status. This requirement shall apply to but not be limited to the following: employment upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. All solicitations or advertisements for employees shall state that all applicants will receive consideration for employment without regard to race, color, religion, sex, national origin, disability, age or veteran status.

18. INDEPENDENT CONTRACTOR

- A. While in the performance of services or carrying out obligations herein, the CONTRACTOR shall be acting in the capacity of an independent contractor and not as an employee of the Parish. The Parish shall not be obliged to any person, firm or corporation for any obligations of the CONTRACTOR arising from the performance of its services under this agreement. The CONTRACTOR shall not be authorized to represent the Parish with respect to services being performed, dealings with other agencies, and administration of specifically related contracts, unless done so in writing by the Parish.
- B. CONTRACTOR hereby agrees to be responsible for payment of taxes from the funds thus received under this Contract. CONTRACTOR agrees to be responsible for and to pay all applicable federal income taxes, federal social security tax (or self-employment taxes in lieu thereof) and any other applicable federal or state unemployment taxes. CONTRACTOR agrees to indemnify and hold the Parish harmless for any and all federal and/or state income tax liability, including taxes, interest and penalties, resulting from the Parish's treatment of CONTRACTOR as independent contractor.
- C. CONTRACTOR further agrees to reimburse Parish for any and all costs it incurs, including, but not limited to, accounting fees and legal fees, in defending itself against any such liability.
- D. CONTRACTOR agrees and acknowledges that it (and its employees) is an **independent contractor** as defined in R.S. 23: 1021 (or any other provision of law) and as such nothing herein shall make CONTRACTOR an employee of the Parish nor create a partnership between CONTRACTOR and the Parish.
- E. CONTRACTOR acknowledges exclusion of Workmen's Compensation Coverage. CONTRACTOR acknowledges of the exclusion of Unemployment Compensation coverage.
- F. CONTRACTOR agrees to a waiver of any and all sick and annual benefits from the Parish. It is expressly agreed and understood between the parties entering into this personal service contract, that CONTRACTOR, acting as an independent agent, shall not receive any sick and annual leave from the Parish.

19. NOTICES

All notices shall be by certified mail, return receipt requested, and sent to the following individuals at the following addresses. Changes of person and addresses are to be exchanged in a like manner:

Parish of St. James: Operations Department
P.O. Box 106
Convent, LA 70723

Contractor: Francise Horticultural Services Inc

20. AUTHORITY TO ENTER CONTRACT

The undersigned representative of CONTRACTOR warrants and personally guarantees that he/she has the requisite and necessary authority to enter and sign this contract on behalf of the corporate entity. The undersigned parties warrant and represent that they each have the respective authority and permission to enter this agreement. The Parish shall require, as an additional provision, that CONTRACTOR provide a certified copy of a corporate resolution authorizing the undersigned to enter and sign this agreement in the event that CONTRACTOR is a member of a corporation, partnership, LLC, LLP, and any other juridical entity.

This agreement is executed in two (2) originals. IN TESTIMONY WHEREOF, they have executed this agreement, the day and year first above written.

WITNESSES

Title: Parish President
St. James Parish Government
Date: _____

WITNESSES

Title: _____
License No. _____
Date: _____

Francise Horticultural Services, Inc.
6816 Pine Thicket Dr.
Baton Rouge, LA 70817
225-921-6881

PROPOSAL

June 17, 2020

To: St. James Parish Recreation
Attn: Mr. Brent Dicharry

RE: Welcome Park Splashpad

We propose to furnish the following:

-Waterworks International Equipment as Chosen by Owner	\$37,000.00
-Concrete (2300 sq. ft. @ 8.00/ft.):	18,400.00
-Site Work and Fill Material (if needed):	5,000.00
-Piping and Equipment Installation:	24,500.00
-Cool Deck (1600 sq. ft. @4.00/ft.)	<u>6,400.00</u>
TOTAL:	91,300.00

The following resolution was offered and moved for adoption by Councilman _____ and seconded by Councilman _____:

**RESOLUTION 20-
ST. JAMES PARISH COUNCIL**

**A RESOLUTION AUTHORIZING THE ST. JAMES PARISH PRESIDENT
TO SIGN AN INTERGOVERNMENTAL WITH THE TOWN OF LUTCHER
FOR THE MARQUETTE DRIVE DRAINAGE PROJECT**

WHEREAS, St. James Parish has received a request from the Town of Lutcher to complete a drainage project located in the Town of Lutcher; and,

WHEREAS, The Parish and the Town of Lutcher agree to each enter into a contract with Meyers Engineering for the design, bid, and project inspection of the Marquette Drive Drainage project; and,

WHEREAS, the Scope of Work to be provided will be defined through the Exhibit A attached to the contracts signed by both parties, with compensation for the Project to be \$172,211.00

BE IT RESOLVED, by the St. James Parish Council, that Parish President Peter A. Dufresne, is hereby duly authorized and empowered on behalf of the St. James Parish Council, to sign and execute an Intergovernmental Agreement with the Town of Lutcher for the Marquette Drive Drainage Project.

This resolution having been submitted to a vote, the vote thereon was as follows:

YEAS:
NAYS:
ABSTAIN:
ABSENT:

And the resolution was declared adopted on this, the 5th day of August 2020.

Council Chairman

Secretary

Delivered to Parish President: _____

Approved: _____

Disapproved: _____

Parish President

Returned to Secretary on _____

At _____ AM/PM

Received by _____

* * * * *

C E R T I F I C A T E

I, Linda Hubbell, Secretary of the Council of the Parish of St. James, State of Louisiana, hereby certify that the foregoing is a true and correct copy of a resolution adopted by the St. James Parish Council in regular meeting held on the 5th day of August 2020.

Signed at Vacherie, Louisiana, this 6th day of August 2020.

Linda Hubbell
Secretary

(S E A L)

INTERGOVERNMENTAL AGREEMENT

ST. JAMES PARISH
STATE OF LOUISIANA

BY AND BETWEEN THE
ST. JAMES PARISH GOVERNMENT
AND
TOWN OF LUTCHER

THIS AGREEMENT is entered into on this ____ day of _____, 2020, by and between the St. James Parish Government, a political subdivision of the State of Louisiana, existing under the laws of the State of Louisiana, and the Town of Lutcher, an incorporated municipality within the Parish of St. James, existing under and by virtue of the laws of the State of Louisiana.

The parties do hereby mutually agree to cooperate in the undertaking of project named "Marquette Drive Drainage". This project is under the authority granted by virtue of the Louisiana Revised Statutes 33:1321, et seq and particular provisions thereof commonly known as the "Intergovernmental Functions Act"; to wit:

1. The St. James Parish Government (Parish) has received a request by the Town of Lutcher (Town) to complete a drainage project located in the Town.
2. The Parish and Town hereby agree to each enter into a contract Meyers Engineer for the design, bid, and project inspection of the Marquette Drive Drainage project.
3. The Parish and Town hereby agree that the Parish does hereby assume responsibility for the proper administration, implementation, and payment for such project as submitted by the Town. Furthermore, the Town hereby agrees to hold the Parish harmless from any and all acts, omissions, errors, etc. relating to such project.
4. The Parish and Town do hereby agree that the Parish shall pay all project costs, including but not limited to administration fees, engineering costs, and construction and material costs of the Town's project named "Marquette Drive Drainage".
5. The Parish and Town do hereby agree that all improvements, purchases, or acquisitions shall become the property of the Town and the Town shall properly operate and maintain the project in accordance with the approved application and project completion.

Thus done and signed by authority granted as per attached resolutions of the above respective governmental bodies through the undersigned duly authorized officers.

WITNESSES:

ST. JAMES PARISH GOVERNMENT

Peter Dufresne
Parish President

TOWN OF LUTCHER

Patrick St. Pierre
Mayor

Richard C. Meyer, P.E.
President
David H. Dupré, P.E.
Vice President

Mark A. Schutt, P.E.
Ann M. Theriot, P.E.
Eric M. Colwart, P.E.
Kenneth J. Belou, P.E.
Raymond G. Hartley, P.E.
Robert W. Klare, P.E.
Donovan P. Duffy, P.E.
Randall G. Oustalet, P.E.
Christopher D. Rowan, P.E.



Charles E. Meyer, P.E.
Executive Vice President
Jitendra C. Shah, P.E.
Vice President

James J. Papia, AIA, NCARB, CSI
Adrianna G. Eschete, LEED, AP
Don P. Mauras, Architect
Ray J. Brown, AIA
Jennifer M. Wickham, AIA, NCARB
Elena G. Anderson, NCIDQ, IIDA

June 24, 2020

VIA EMAIL

Mr. Rick Webre
St. James Parish Government
P.O. Box 106
Convent, Louisiana 70723-0106
EMAIL: rick.webre@stjamesla.com

Re: Marquette Drive Drainage Improvements
A/E Project No. 20-2035

Dear Mr. Webre,

Enclosed are the following for the above referenced project:

1. Scope of Work dated June 24, 2020
2. Preliminary Statement of Probable Cost dated June 24, 2020
3. Facility, Planning and Control Fee Schedule dated June 24, 2020
4. Marquette Drainage Improvements – Exhibit 1 dated June 19, 2020

If acceptable, we will put together the contract documents. We appreciate the opportunity and look forward to working with the Parish on this project.

Sincerely,

Meyer Engineers, Ltd.

Donovan P. Duffy, P.E.

DPD/tmt

Enclosures

cc: Ashley Poche, EMAIL: ashley.poche@stjamesla.com
Jason Amato, EMAIL: jason.amato@stjamesparishla.gov
Mayor Patrick St. Pierre, EMAIL: Patrick@TownOfLutcher.com

METAIRIE OFFICE
t | 504.885.9892 f | 504.887.5056
4377 Hearst Street, Suite 1B, Metairie, Louisiana 70001

PRAIRIEVILLE OFFICE
t | 225.677.0901
36505 Oak Plaza Ave., Suite A, Prairieville, Louisiana 70769

MAIL: P.O. Box 763 | Metairie, Louisiana 70004
E-MAIL: meyer@meyer-e-l.com

20-2035.SW

SCOPE OF WORK
MARQUETTE DRIVE DRAINAGE IMPROVEMENTS
A/E PROJECT NO. 20-2035 JUNE 24, 2020

Project consists of upgrading 510' of existing subsurface drainage along Marquette Drive between Lafitte Drive and Maurepas Drive (see attached exhibit). Meyer shall determine the best location for the required drainage to be placed, either in the asphalt roadway next to the existing drainage or on the opposite side of the road from the existing drainage. The drainage design shall include drain manholes and catch basins for both new and existing drainage along Marquette Drive. The asphalt roadway shall be sawcut and removed/replaced as required (full street reconstruction is not included). All existing concrete driveways shall be removed as necessary and replaced in-kind.

After approval of this SOW and Fee Proposal, Meyer Engineers will begin preparing a set of Construction Documents to be reviewed by St. James Parish and the Town of Litcher.

After approval of the Construction Documents, Meyer Engineers will assist in obtaining bids to perform the overall scope of work indicated on the Contract Documents.

Meyer Engineers will also provide Construction Administration services during the Construction Phase of the Work.

Supplemental Services: (Upon Approval of St. James)

1. Topographical Survey: \$4,000 (Estimate)
2. Resident Project Inspection: \$5,000 (Hourly, Not to Exceed)

202035PCC

PROBABLE CONSTRUCTION COST
MARQUETTE DRIVE DRAINAGE IMPROVEMENTS
TOWN OF LUTCHER
A/E PROJECT NO. 20-2035 JUNE 24, 2020

SAW-CUT	510 LF	@	\$10	\$5,100
ASPHALT REMOVAL	365 SY	@	\$15	\$5,475
CATCH BASIN/DROP INLET MODIFICATION	2 EA	@	\$5,500	\$11,000
CATCH BASIN	1 EA	@	\$7,000	\$7,000
24" RCPA DRAIN PIPE	458 LF	@	\$110	\$50,380
30" RCPA DRAIN PIPE	51 LF	@	\$130	\$6,630
BASE AND BACKFILL MATERIAL	200 CY	@	\$80	\$16,000
ASPHALT REPLACEMENT	365 SY	@	\$90	<u>\$32,850</u>
SUBTOTAL				\$134,435
CONSTRUCTION CONTINGENCY			10%	<u>\$13,444</u>
TOTAL CONSTRUCTION COST				<u>\$147,879</u>
ENGINEERING (PER FP&C Fee Curve)				\$15,332
<u>SUPPLEMENTAL SERVICES</u>				
TOPOGRAPHIC SURVEY				\$4,000
RESIDENT PROJECT INSPECTION				<u>\$5,000</u>
TOTAL PROJECT COST				<u>\$172,211</u>

FPC State Fee Schedule

PROJECT NAME **MARQUETTE DRIVE DRAINAGE IMPROVEMENTS**
 PROJECT NUMBER **20-2035**
 DATE **6/24/2020**
 Filename: C:\Users\trahan\AppData\Local\Microsoft\Windows\INetCache\Content.Outlook\LOIXKJMM\[20-2035-FPC-fee-calc (002).xls]2020

original file: \\tech\2004000-FPC-fee-calc.xls
 Dec 10, 2003; Revised Mar. 15, 2008, Mar. 24, 2009, May 19, 2010, November 30, 2011, July 17, 2012, March 18, 2014, April 4, 2016,
 February 26, 2018, February 5, 2019, February 27, 2020

FOR 2020 PROJECTS

AFC	\$	147,879
1975 BCI		1306
2019 BCI		6136 <small>www.enr.com for future index</small>
1975 CPI		53.8
2019 CPI		255.7 <small>www.bls.gov for future index</small>

Calculation

		46.10
1975 BCI/2019 BCI ===		0.21284
AFC	\$	147,879
log		4.498
46.1/(log(1975 BCI/2019 BCI x AFC) =		10.25% <small>1975 FEE Percentage</small>
1975 AFC = Current AFC x (1975 BCI/2019 BCI)=	\$	31,474.90
Fee % x 1975 AFC		3,226 <small>1975 Fee</small>

1975 Fee X (2019CPI/1975 CPI) = **15,332 2018 FEE**

Fee Percentage = 10.3679%

Note: Adjust BCI and CPI Index to amount at date of bid

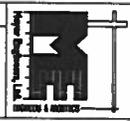


DESIGN DEVELOPMENT
PRELIMINARY
FOR REVIEW ONLY

ENGINEER: DOONOVAN DUFFY
LICENSE # 41844
DATE: JUNE 19, 2002 (REV. 1-1)

DRAINAGE EXHIBIT
HYMEL DRAINAGE

Sheet no. 1
of 1 sheets



Meyer Engineers, Ltd.
4937 Hearse Street, Suite 1B, Metairie, Louisiana 70001
phone. 504.885.9892, fax. 504-887-5056
website. www.meyer-e-l.com

Project no. 20-114
Drawn by: JLS
Checked by: JLS
Date: 06.19.2002
Revised:

The following resolution was offered and moved for adoption by Councilman _____ and seconded by Councilman _____:

**RESOLUTION 20-
ST. JAMES PARISH COUNCIL**

**RESOLUTION TO TERMINATE SPECIAL COUNSEL RETAINED FOR
THE OPIOID LITIGATION PURSUANT TO ST. JAMES PARISH
RESOLUTION 18-74 ADOPTED BY THE ST. JAMES PARISH COUNCIL**

WHEREAS, the St. James Parish Council as constituted on April 4, 2018 authorized the former St. James Parish President via Resolution 18-74 on April 4, 2018 to hire John Young; Smith Stag, LLC; Smith & Fawyer, LLC; Alvendia Kelly and Demarest, LLC; Anthony Irpino of Irpino, Avin and Hawykins, LLC; and Chehardy, Sherman, Williams, Murray, Recile, Stakelum & Hayes, LLP and/or any associated counsel (collectively referred to hereinbelow as "Attorney(s)") for the purpose of providing services related to damages sustained by the abuse of opioids;

WHEREAS, pursuant to St. James Parish Resolution 18-74, the previous administration through the Parish President executed a Contract for Legal Services with the Attorneys which provides therein that said contract may be terminated;

WHEREAS, it is the express desire of the St. James Parish Council and Parish President Peter Dufresne to terminate the Contract for Legal Services with the Attorneys pursuant to Section 7 of the Contract which provides that St. James Parish has the right to terminate the Contract upon written notice to the Attorneys;

NOW, THEREFORE BE IT RESOLVED, that the ST. JAMES PARISH COUNCIL hereby directs and authorizes Parish President Peter Dufresne on behalf of St. James Parish to terminate the Contract for Legal Services with the Attorneys identified in SJP Resolution 18-74, which includes but not limited to John Young; Smith Stag, LLC; Smith & Fawyer, LLC; Alvendia Kelly and Demarest, LLC; Anthony Irpino of Irpino, Avin and Hawykins, LLC; and Chehardy, Sherman, Williams, Murray, Recile, Stakelum & Hayes, LLP and/or any associated counsel pursuant to Section 7 of the Contract by providing the Attorneys written notice of termination and to execute any and all other documentation necessary to accomplish the termination of their employment in providing legal services related to the filing and litigation of civil action for damages against any and all opioid manufacturers and distributors as provided in the Contract for Legal Services signed by the previous Parish President and to obtain all files, pleadings, documents etc., from the attorneys filed on behalf of St. James Parish and/or which otherwise pertain in any way to their representation of the Parish.

This resolution having been submitted to a vote, the vote thereon was as follows:

YEAS:
NAYS:
ABSTAIN:
ABSENT:

And the resolution was declared adopted on this, the 5th day of August 2020.

Council Chairman

Secretary

Delivered to Parish President: _____

Approved: _____

Disapproved: _____

Parish President

Returned to Secretary on _____

At _____ AM/PM

Received by _____

* * * * *

C E R T I F I C A T E

I, Linda Hubbell, Secretary of the Council of the Parish of St. James, State of Louisiana, hereby certify that the foregoing is a true and correct copy of a resolution adopted by the St. James Parish Council in regular meeting held on the 5th day of August 2020.

Signed at Vacherie, Louisiana, this 6th day of August 2020.

(S E A L)

Linda Hubbell
Secretary

The following resolution was offered and moved for adoption by Councilman _____ and seconded by Councilman _____:

**RESOLUTION 20-
ST. JAMES PARISH COUNCIL**

RESOLUTION TO OBTAIN SPECIAL COUNSEL FOR OPIOID-RELATED CLAIMS

WHEREAS, opioid use and issues and treatment related thereto have become a huge societal problem locally and nationally; and

WHEREAS, various entities and governmental bodies, including the municipalities and school board located within St. James Parish are attempting to recover past and future damages associated with this opioid epidemic and have retained the services of the law firms identified hereinbelow; and

WHEREAS, St. James Parish, in the past years and in the future, has been and will be affected by the opioid crisis; and

WHEREAS, St. James Parish should attempt to recover its damages past and future associated with this epidemic; and

WHEREAS, the St. James Parish Council wishes to align its interest and its representation with the municipalities and School Board located within St. James Parish and to retain the services of special legal counsel identified hereinbelow; and

WHEREAS, the St. James Parish Council recommends the appointment of Leger & Shaw and the Law Offices of Bruce G. Mohon, LLC and associated attorneys and paralegals. Leger & Shaw and the Law Offices of Bruce G. Mohon, LLC are experienced attorneys with the requisite expertise to render special counsel services and represent the St. James Parish regarding opioid litigation

NOW, THEREFORE BE IT RESOLVED, that the ST. JAMES PARISH COUNCIL avers that a necessity exists for the employment of special counsel, and the St. James Parish Council, ratifies and approves the employment of Leger & Shaw and the Law Offices of Bruce G. Mohon, LLC and associated attorneys and paralegals, as special counsel for St. James Parish in the above described matters and to take any and all actions necessary to pursue any right or claim of the St. James Parish related to the opioid crisis and litigation. It is further resolved that Parish President Peter Dufresne and/or his designee(s) is duly authorized to sign and execute any and all documents necessary related to the opioid crisis and litigation, including but not limited to a contingency fee retainer agreement and/or contract for legal services in order to retain the services of the aforementioned firms, counsel and associated attorneys and paralegals.

This resolution having been submitted to a vote, the vote thereon was as follows:

- YEAS:
- NAYS:
- ABSTAIN:
- ABSENT:

And the resolution was declared adopted on this, the 5th day of August 2020.

Council Chairman

Secretary

Delivered to Parish President: _____

Approved: _____

Disapproved: _____

Parish President

Returned to Secretary on _____

At _____ AM/PM

Received by _____

* * * * *

C E R T I F I C A T E

I, Linda Hubbell, Secretary of the Council of the Parish of St. James, State of Louisiana, hereby certify that the foregoing is a true and correct copy of a resolution adopted by the St. James Parish Council in regular meeting held on the 5th day of August 2020.

Signed at Vacherie, Louisiana, this 6th day of August 2020.

(S E A L)

Linda Hubbell
Secretary