

Civ. No. 1:22-cv-02430-CJN

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

EL PUENTE, et al.,

Plaintiffs,

v.

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

Defendants.

**AMICI CURIAE BRIEF OF AMIGXS DEL M.A.R. AND TOABAJEÑOS EN DEFENSA
DEL AMBIENTE IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY
JUDGMENT AND IN OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR
SUMMARY JUDGMENT**

Amigxs Del M.A.R. and Toabajenos En Defensa
Del Ambiente

By their attorneys,

/s/ Michael R. Harris

Alexius Paul
Rajeev Venkat
Student Attorneys

Environmental Justice Clinic
Vermont Law & Graduate School

Michael R. Harris (DC Bar # CO0049)
Associate Professor of Law
Environmental Justice Clinic
Vermont Law & Graduate School
164 Chelsea Street, PO Box 96
South Royalton, VT 05068
(802) 831-1364
mrharris@vermontlaw.edu

*Counsel for Amigxs Del M.A.R. and Toabajenos
En Defensa Del Ambiente*

CORPORATE AND FINANCIAL DISCLOSURE STATEMENT

I, the undersigned, counsel of record for *amici curiae*, Amigxs Del M.A.R. and Toabajenos En Defensa Del Ambiente, pursuant to Local Rule 7(o)(5) and Fed. R. App. P. 26.1, certify that DC Amigxs Del M.A.R. and Toabajenos En Defensa Del Ambiente are non-profit entities, have no corporate parent, and have no corporate stock.

STATEMENT OF COUNSEL

Pursuant to District Court Local Rule 7(o)(5) and Fed. R. App. P. 29(a)(4)(A),(E), Amigxs Del M.A.R. & Toabajenos En Defensa Del Ambiente also note that none of the parties to the above-captioned dispute, and none of their counsel, authored this brief in whole or in part or contributed money that was intended to fund preparing or submitting this brief. No person—other than Amigxs Del M.A.R. and Toabajenos En Defensa Del Ambiente—contributed money that was intended to fund the preparing or submitting of this brief.

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I. INTRODUCTION

Amigxs Del M.A.R. and Toabajenos En Defensa Del Ambiente (“Amici”) respectfully submit this brief in support of Plaintiffs’ motion for summary judgment and in opposition to the cross-motion for summary judgment of defendant U.S. Army Corps. of Engineers (the “Corps”). The Plaintiffs El Puente, CORALations, and Center for Biological Diversity claim the Corps illegally approved a major dredging project in San Juan Bay after improperly accelerating an erroneous environmental assessment in violation of the National Environmental Policy Act (“NEPA”) and failing to prepare the necessary environmental impact statement (“EIS”). Amici are community-based environmental organizations with an interest in advocating for the protection of Puerto Rico’s natural resources from the perspective of community members. Amici oppose the Dredging Project because it will harm their communities and deepen Puerto Rico’s energy dependence on dangerous fossil fuels.

As described in Plaintiffs’ motion for summary judgment, the San Juan Harbor Navigation Improvements Project at issue in this case (“Dredging Project”) should not be permitted. First, the Environmental Assessment (“EA”) completed by the Corps is unlawfully inadequate under NEPA. Second, the environmental justice communities where Amici members live and work, which have borne the brunt of industrial pollution and recent disasters driven by climate change, will experience significant adverse consequences from the Dredging Project. The Corps failed to address the scope of impact of the Dredging Project on these environmental justice communities as directed by NEPA. Additionally, because of the climate-change-driven natural disasters, these communities did not have a fair opportunity to meaningfully participate in the public comment period. Third, the Corps’ approval of the Dredging Project ignores commitments mandated by the Puerto Rico Energy Public Policy Act of 2019, which implements a transition to renewable energy. Finally, the EA fails to address the Dredging Project’s irreparable harms to wildlife and the environment.

As Plaintiffs argue, the Corps failed to abide by the requirements of NEPA and other federal laws to the great detriment of Amici's communities. Under the circumstances presented by this case, the Corps is required to prepare an Environmental Impact Statement to fully characterize the many significant environmental and community impacts of the Dredging Project. Yet, the Corps defied NEPA requirements and disregarded the renewable transition policy of the Puerto Rico Energy Public Policy Act of 2019. The Corps failed to account for all the impacts the Dredging Project will have on marginalized communities in the vicinity and their treasured environmental and wildlife resources. Without a valid EIS, the Corps failed to fully analyze and address the significant and detrimental environmental impacts of the Dredging Project. Amici support the Plaintiffs' arguments that the Dredging Project should not proceed until the Corps fully comply with NEPA, the Clean Water Act, the Endangered Species Act, and other federal laws, including by completing a valid EIS with a robust public participation process. The Court should grant the Plaintiffs' motion for summary judgment, deny the Corps' cross-motion for summary judgment, and send this Dredging Project back to the agency for further environmental review.

II. INTERESTS OF THE AMICI

Amigxs Del M.A.R (Movimiento Ambiental Revolucionario) ("Amigx") is an environmental organization founded in 1995 with the purpose of protecting the natural resources of Puerto Rico through education, awareness, and denunciation of environmental crimes. Amici's interests include the protection of Puerto Rico's environment and natural resources through social organization and education. Amici brings relevant expertise and unique perspective through its grassroots community organizing and education, interactions with local government to participate in public policy, and enactment of political activity through demonstrations advocating for the protection of natural resources. The organization believes in and encourages cooperation with community-based organizations and citizen management of natural areas. Amigxs Del M.A.R has

an interest in protecting the health of its members and the environment in which its members reside that will be directly affected by the Dredging Project.

Toabajefios En Defensa Del Ambiente (Toabajefios) is a community-based environmental organization founded in 2014. The organization is based in the coastal community of Toa Baja. Amici brings relevant expertise and unique perspective through its grassroots community organizing and engagement with public policy. Toabajefios works with the legislature to conserve and protect the Puerto Rican coast. The group engages in active outreach and participation in the San Juan area. The organization facilitates events and participates in group events and panels with local leaders and other organizations with similar goals. Toabajefios also participates in demonstrations to advocate for environmental issues affecting community members. Toabajefios has an interest in ensuring its members have a voice in matters involving environmental impacts in their community.

Amigx and Toabajefios (the “Amici”) support the Plaintiffs’ motion for summary judgment and oppose the defendants’ cross-motion for summary judgment. The Amici have interest in the Dredging Project because it directly affects the communities where they live, work, and play. First, the Dredging Project will directly amplify the existing pollution within Amici’s communities. Second, the Dredging Project will harm the wildlife and environment surrounding Amici. Members of Amici’s livelihoods are dependent on local ecosystems for food resources, economic benefits, and recreation. Catafio, for example, has a long history as a hub of the local fishing industry, especially the crab fishery. Third, the Dredging Project perpetuates long-term dependence on fossil fuels for Amici’s communities and Puerto Rico as a whole. This directly conflicts with the renewable energy transition in the Puerto Rico Energy Public Policy Act as well as the resilient future Amici envision. In the aftermath of the energy catastrophe caused by Hurricanes Irma and Maria, Amici’s communities have a crucial need for the resilience that comes with localized renewable energy. Finally, the Amici were deprived of the meaningful public participation they were entitled to. The Corps’ Environmental Assessment completely ignores

Amici's communities despite the Dredging Project directly affecting Amici in multiple ways. An adequate environmental review which includes Amici's participation is desirable to the Amici because the disposition of the matter asserted directly affects the Amici's communities. Furthermore, Amici has a unique perspective grounded in Amici's grassroots organizing efforts and political engagement.

III. ARGUMENT

A. The Environmental Assessment Arbitrarily Excludes Environmental Justice Communities from Its Analysis and Denied These Communities Meaningful Access to the Public Participation Process.

As the Plaintiffs point out in their motion for summary judgment, the Corps failed to consider the impacts of the Dredging Project on the environmental justice communities on the western side of the San Juan Bay associated with the Dredging Project. *See* Plaintiffs' Mem. Of Points and Authorities, Doc. No. 20-1 ("Plaintiff's Mem.") at 17-22. In a fatal and egregious omission, the municipalities of Cataño and Guaynabo, where many Amici members reside, were **not** considered in the environmental justice analysis despite the proximity of these communities to the Dredging Project. *See* SAN PUERTO HARBOR PUERTO RICO INTEGRATED FEASIBILITY REPORT & ENVIRONMENTAL ASSESSMENT EXECUTIVE SUMMARY AND MAIN REPORT at 1-2, *El Puente et al., v. United States Army USACE of Engineers*, No. 1:22-cv-02430-cjn (D.D.C. 2023) (showing the Corps opted to use the San Juan area for its analysis to the exclusion of Cataño and Guaynabo) [hereinafter "Corps EA"].

Additionally, residents of these areas were denied access to meaningful public participation by the Corps. These failures violate NEPA requirements, and this Court should find the Corps' EA fatally inadequate. *See Vecinos para el Bienestar de la Comunidad Costera v. FERC*, 6 F.4th 1321, 1330–31 (D.C. Cir. 2021) (noting that faulty environmental justice analysis renders NEPA evaluation unlawful).

NEPA requires federal agencies to prepare an EIS for all major federal actions that may significantly affect the quality of the human environment. 42 U.S.C. § 4332. The purpose of the EIS is to provide a detailed analysis of the potential environmental impacts of the proposed action, address alternatives, and identify measures that can be taken to mitigate those impacts. 40 C.F.R. § 1502.1. Here, the Corps opted to draft an EA rather than an EIS. Nonetheless, even the Corps' EA is insufficient in accordance with this Court's precedent.

In *Natural Resource Defense Council v. Herrington*, the D.C. Circuit established four factors for reviewing the adequacy of an EA. These factors are:

- (1) whether the agency took a 'hard look' at the problem;
- (2) **whether the agency identified the relevant areas of environmental concern**;
- (3) as to the problems studied and identified, whether the agency made a convincing case that the impact was insignificant; and
- (4) if there was an impact of true significance, whether the agency convincingly established that changes in the project sufficiently reduced it to a minimum.

Nat. Res. Def. Council v. Herrington, 768 F.2d 1355, 1430 (D.C. Cir. 1985) (quoting *Sierra Club v. Peterson*, 717 F.2d 1409 (D.C. Cir. 1983)) (emphasis added). Moreover, under NEPA, an environmental assessment must analyze all direct, indirect, and cumulative impacts of the action. 40 C.F.R. §§ 1508.7, 1508.8.

Here, the exclusion of Amici's communities of Cataño and Guaynabo from the EA's analysis renders the EA inadequate and in violation of the standard for this Court's review of the adequacy of an EA. The Corps' EA provides an inaccurate and incomplete analysis of the disproportionate and cumulative impacts experienced by the Amici's environmental justice communities. The Corps arbitrarily and capriciously drafted an EA rather than an EIS—the correct environmental review for a major project. The Corps knew an EIS would be needed and chose not to perform the more in-depth analysis and prepare the document while also excluding the Amici's communities from the EA and decision-making process.

Indeed, for environmental justice considerations specifically, Executive Order 12898 provides that agencies “shall make achieving environmental justice part of [their] mission by identifying and addressing . . . disproportionately high and adverse human health or environmental effects of . . . activities on minority populations and low-income populations.” Exec. Order No. 12898, 59 Fed. Reg. 7629 at § 1-101 (Feb 11, 1994). This Executive Order is especially important in the NEPA context. NEPA directives by the executive branch and the Council on Environmental Quality (“CEQ”) have stated “agencies should apply, and comply with, this [NEPA and Executive Order 12898 integration] prospectively.” CEQ, ENVIRONMENTAL JUSTICE GUIDANCE UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT 1, 21 (1997).

The Corps’s exclusion of Cataño and Guaynabo from the EA blatantly disregards the vulnerable, overburdened environmental justice communities that are closest to the Dredging Project and will surely suffer from the Dredging Project’s impacts. The Corps fail all four parts of the test applicable in this Court under *Herrington*. The neighborhoods in Cataño and Guaynabo, and particularly the Guaynabo neighborhoods of Vietnam, Amelia, and Sabana, have the most racially and economically marginalized populations in Puerto Rico, as depicted in Figure 1 below. *EJscreen*, EPA, <https://ejscreen.epa.gov/mapper/> (last visited Mar. 22, 2023). Members of Amici reside in these neighborhoods.

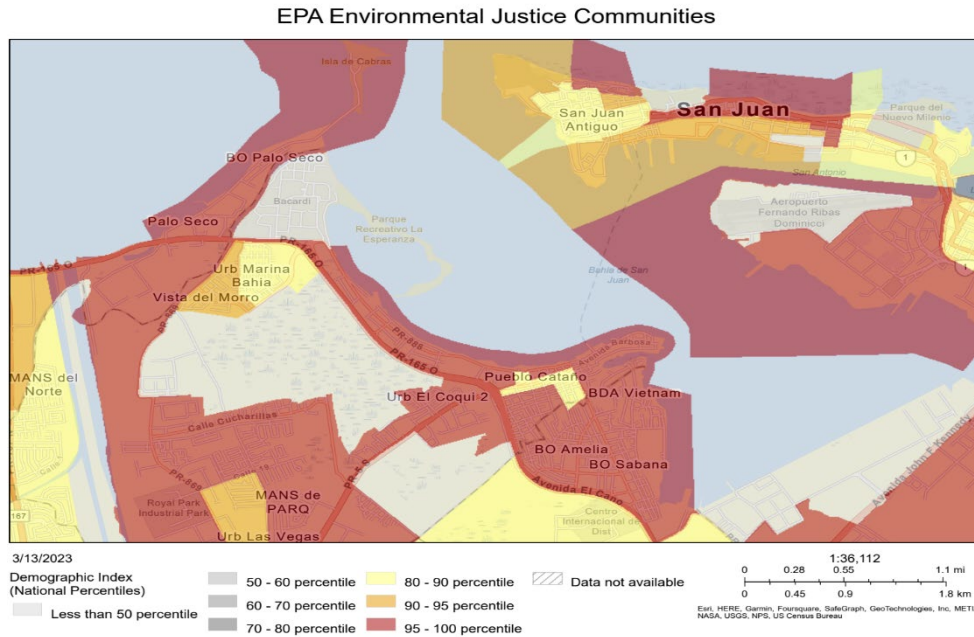


Figure 1

In analyzing the impacts of the Dredging Project, the Corps selected a one-mile radius in San Juan with a population that is, according to its own report, only 25% minority. USACE_000805. The Corps ignored the Cataño and Guaynabo areas in their EA and thereby failed to consider the many disproportionate environmental burdens that make members of Amici who reside there especially susceptible to the Dredging Project’s adverse cumulative impacts.

Cataño and especially the Guaynabo neighborhoods of Vietnam and Sabana are more vulnerable than the San Juan area to risks from toxic air pollution, as measured by EPA’s Air Toxics Cancer Risk and Air Toxics Respiratory Hazard Index. *EJScreen*, EPA, <https://ejscreen.epa.gov/mapper/> (last visited Mar. 22, 2023). The Cataño Air Basin has 67 emission sources, 17 of which are major emission sources. Nilsa I Loyo-Berrios et al., *Air Pollution Sources and Childhood Asthma Attacks in Cataño, Puerto Rico*, 165 AM. J. EPIDEMIOLOGY 927, 930 (2007). Two major sources of emissions in Cataño are the Palo Seco Power Plant and the Bacardi Distillery. *Superfund Public User Database*, EPA, <https://semspub.epa.gov/work/11/100000030.pdf> (last visited Mar. 22, 2023).

The study by Loyo-Berrios found that living within 4,000 meters of any polluting facility in Cataño significantly increases asthma-attack odds for children under seventeen. *See* Nilsa I Loyo-Berrios et al., *supra*, at 932. (demonstrating the increased risk of asthma for children in Cataño based on proximity to emission sources). Puerto Rico has a 2.5 times higher asthma mortality rate than the continental United States, stemming from shipping transportation pollution. EPA, DESIGNATION OF EMISSION CONTROL AREA TO REDUCE EMISSIONS FROM SHIPS IN THE U.S. CARIBBEAN 1 (2011), <https://nepis.epa.gov/Exe/ZyPDF.cgi/P100EG0X.PDF?Dockkey=P100EG0X.PDF>. The Dredging Project’s expansion of the shipping channel and shipping industry only magnify the existing pollution and health issues of Amici members and their neighbors.

The Corps failed to take a “hard look” at all of this readily available information. The Corps’ failure violates this Court’s third factor to determine the adequacy of an EA. *Herrington*, 768 F.2d at 1430. Given these glaring omissions, the Corps has not made a convincing case that the impact is insignificant. The cumulative effect of the addition of a larger ship channel will only add to the pollution sources already burdening the local population, which includes Amici

members. The larger ships and an LNG terminal will only intensify the health issues stemming from air pollution.

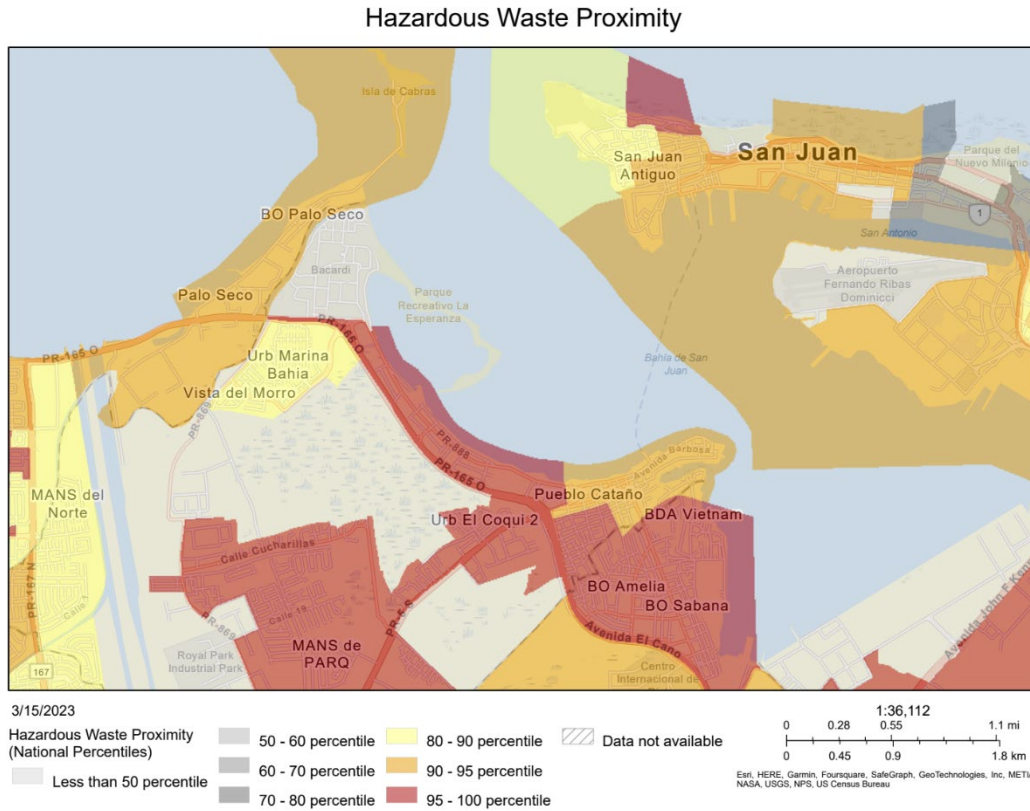


Figure 2

As shown in Figure 2, the Cataño and Guaynabo region contains many EPA-designated Superfund sites and landfills, increasing Amici members’ vulnerabilities to adverse environmental impacts. Both municipalities are overwhelmingly in the 95th-100th percentile for hazardous waste proximity. *EJScreen*, EPA, <https://ejscreen.epa.gov/mapper/> (last visited Mar. 22, 2023). The Guaynabo neighborhoods of Vietnam and Sabana are in the 99th percentile. *Id.*

Currently there are five Superfund sites in Cataño and four sites in Guaynabo. *Superfund Public User Database*, EPA, <https://semspub.epa.gov/work/11/100000030.pdf> (last visited Mar. 22, 2023). These facilities include the Barrio Vietnam Chemical Drum Storage and PRDOH Pesticide Warehouse. *Id.* Insecure municipal landfills in the area are also a danger; historically, “municipal landfills in Puerto Rico were not closed properly or abandoned, while others were

closed in accordance with applicable rules but have sustained physical changes from climatic and human events that have rendered them less secure.” EPA, AN EVALUATION AND ANALYSIS OF PAST LANDFILL CLOSURES IN PUERTO RICO AS GUIDANCE FOR CURRENT AND FUTURE CLOSURES 1 (2011), <https://nepis.epa.gov/Adobe/PDF/P100NG2L.pdf>. Puerto Rico overall has nearly 500 EPA-designated superfund sites, of which about half are active and pose ongoing risks to surrounding communities and ecosystems. Emily Hostadedter, *Big Pharma Is Flooding Puerto Rico With Toxic Waste*, MOTHER JONES (Oct. 22, 2022), <https://www.motherjones.com/environment/2022/10/big-pharma-is-flooding-puerto-rico-with-toxic-waste/>. These active superfund sites pose an ongoing risk to the surrounding communities and ecosystems and must be considered for an accurate environmental justice analysis. *Id.*

While there are many risks involved in proximity to superfund sites and landfills, the risks are cumulatively compounded by the risk of shipping accidents and natural disasters. Superfund sites in Amici’s communities are an especially crucial environmental hazard consideration in the face of natural disasters. Twelve of Puerto Rico’s Superfund sites sit on karst, a porous terrain that allows chemicals to flow down from the surface into groundwater. Sara Reardon, *Puerto Rico struggles to assess hurricane’s health effects*, 551 NATURE 282, 282 (2017). Flooding and other disturbances can seep toxic chemicals from these sites into the groundwater. *Id.* The toxic groundwater can contaminate the water supply. *Id.* Hurricanes Irma and Maria in 2017 and most recently Hurricane Fiona are a stark example of this danger. Additionally, shipping accidents can directly amplify the risk to the community. The Corps failed to consider how the Dredging Project will directly, indirectly, and cumulatively add to health hazards facing Amici’s communities.

The Corps’ deliberate exclusion of Amici in Cataño and Guaynabo has led to incomplete and inaccurate findings in its EA. These communities, which are in close proximity to the Dredging Project site, are already disproportionately overburdened with environmental vulnerabilities to air pollution and hazardous waste from power plants, industrial port operations, and multiple other sources of pollution. Furthermore, in contrast to the Corps’ selected area in San Juan, these

communities are overwhelmingly comprised of residents with low incomes and of people of color. Without a proper environmental review, the Amici and their members are impermissibly and illegally excluded from the decision-making process. The Corps failed to consider the environmental justice consequences of the Dredging Project to the Amici's communities. This failure was particularly compounded with the lack of access to the decision-making process, discussed in more detail below. Furthermore, the Corps failed to consider alternatives or opportunities to mitigate the impact for residents of Amici's communities who will be impacted by the Dredging Project. Community members including the Amici will be harmed by the Corps' inadequate environmental review.

The Corps has promised to “work to accommodate and encourage participation of all communities as partners in the assessments of need, studies, planning development, and project implementation.” *USACE EJI*, U.S. ARMY CORPS. OF ENG'RS., <https://www.usace.army.mil/Missions/Environmental-Justice> (last visited Mar. 11, 2023). The Corps undoubtedly failed to take a hard look at the problems and impacts that Amici's communities will face. The Corps also failed to identify the areas of environmental concern in the Amici community. Indeed, the Corps' EA flies in the face of the Corps' own commitment. In its EA, the Corps' one-mile radius is unrepresentative of the environmental justice communities likely to be affected by the Dredging Project. In fact, it is unrepresentative of the San Juan Bay area. These communities are closest to the Dredging Project's tanker channel, oil docks, and LNG terminal. See Plaintiffs' Mem. of Points and Authorities, Doc. No. 20-1 (“Plaintiff's Mem.”) at 12. The Corps has an obligation under Executive Order 12898 to address the high and adverse human health and environmental effects of the Dredging Project on marginalized populations such as the Amici members' communities. *See Id.* (citing Exec. Order No. 12898, 59 Fed. Reg. 7629 at § 1-101). Through these many failures, the Corps has circumvented NEPA mandates as well as the Corps' own stated mission to assess environmental justice considerations.

B. The Corps Did Not Facilitate Meaningful Public Participation During the Public Comment Period in the Catastrophic Wake of Hurricanes Irma and Maria.

CEQ NEPA regulations direct agencies to ensure adequate processes to secure meaningful public involvement. Accordingly, the Corps must:

(a) Make diligent efforts to involve the public in preparing and implementing their NEPA procedures

(b) Provide public notice of NEPA-related hearings, public meetings, and other opportunities for public involvement, and the availability of environmental documents so as to inform those persons and agencies who may be interested or affected by their proposed actions. When selecting appropriate methods for providing public notice, agencies shall consider the ability of affected persons and agencies to access electronic media.

40 C.F.R. § 1506.6. Furthermore, Executive Order 12898 provides that agencies shall conduct its programs, policies, and activities that substantially affect human health or environment in a manner that does not exclude participation. Exec. Order No. 12898 at § 2-2.

The refusal of the Corps to at least extend the public comment period effectively denied residents of these communities an equal and fair opportunity to meaningfully engage with the process. USACE_002303. This violates NEPA requirements for facilitating meaningful public participation. The public comment period for the Dredging Project took place during Hurricanes Irma and Maria. USACE_001554. The damage of the hurricanes was “widespread and catastrophic.” *Hurricanes Irma and Maria: Impact and Aftermath*, RAND CORP., <https://www.rand.org/hsrd/hsoac/projects/puerto-rico-recovery/hurricanes-irma-and-maria.html> (last visited Mar. 14, 2023). Critical infrastructural damage “resulted in cascading failures of the lifeline systems of energy, transportation, communications, water supply, and wastewater treatment and impeded response operations.” *Id.* Residents of Puerto Rico were without electricity, food, and water. *Id.* The hurricanes caused severe damage to the island’s electricity grid and led to an eleven-month blackout, the longest in US history. *Hurricane Recovery Can Take Years—But For Puerto Rico, 5 Years Show Its Unique Challenges*, GAO (Nov. 14, 2022),

<https://www.gao.gov/blog/hurricane-recovery-can-take-years-puerto-rico-5-years-show-its-unique-challenges>. More than 97% of roads were impassable, greatly limiting access to medical care. RAND CORP., *supra*. At least 2,975 people were killed, and over 200,000 residents left for the US either temporarily or permanently as a result of the hurricanes. Nicole Acevedo, *Puerto Rico sees more pain and little progress three years after Hurricane Maria*, NBC NEWS (Sept. 20, 2020), <https://www.nbcnews.com/news/latino/puerto-rico-sees-more-pain-little-progress-three-years-after-n1240513>. The Governor's Office estimated that 300,000 homes were destroyed by the hurricanes. FEMA, HURRICANES IRMA AND MARIA IN PUERTO RICO BUILDING PERFORMANCE, OBSERVATIONS, RECOMMENDATIONS, AND TECHNICAL GUIDANCE, 3-1 (2018), https://www.fema.gov/sites/default/files/2020-07/mat-report_hurricane-irma-maria-puerto-rico_2.pdf.

The Corps clearly violated NEPA regulations by excluding participation in the EA process. Without access to electricity or internet, Amici, Amici members, and their neighbors in local communities—who were in dire circumstances—could not possibly participate meaningfully in the public comment process. For some, the conditions within Puerto Rico made it **impossible** to publicly comment on the future of the Dredging Project. Despite these catastrophic circumstances in which residents of Puerto Rico were without electricity and water for months on end, the Corps chose not to extend the comment period.

Cataño and Guaynabo harshly suffered damages from the hurricanes. Both communities are environmentally overburdened and predominantly racially and economically marginalized communities. Still, a large disparity exists in the broadband internet access between the Amici communities and the Corps' selected area for NEPA evaluation in San Juan. *EJScreen*, EPA, <https://ejscreen.epa.gov/mapper/> (last visited Mar. 23, 2023).

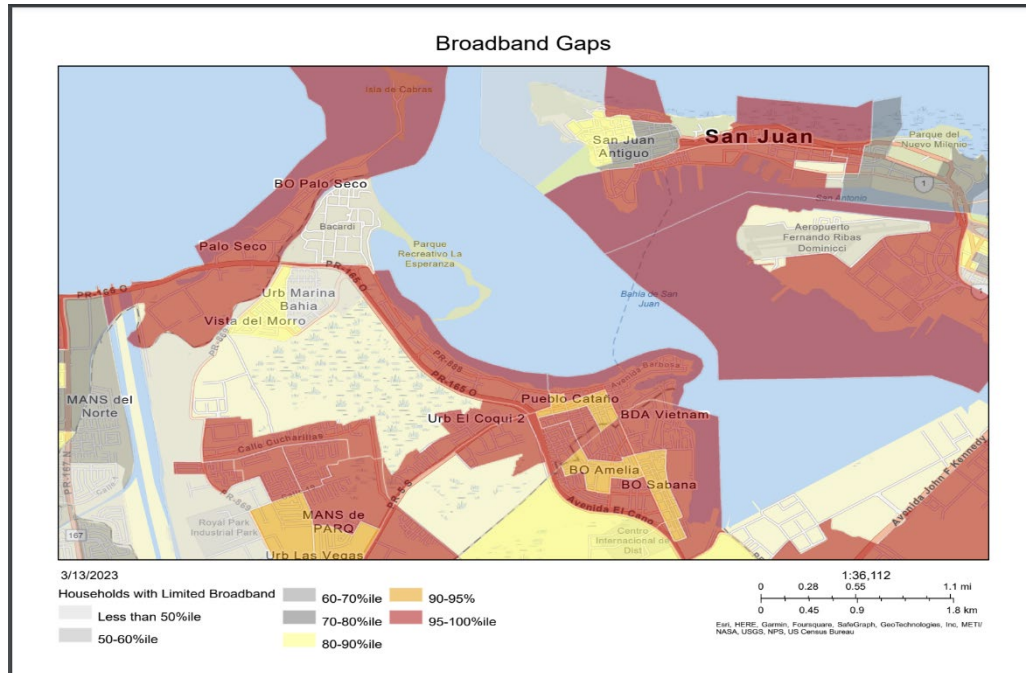


Figure 3

The lack of broadband access combined with the effects of the hurricanes made public comments unfeasible for many residents of San Juan and the broader San Juan region, including Amici members' communities. Because the Corps failed to accurately assess the Dredging Project's impacts in Amici's communities, and further because these residents did not have an opportunity to meaningfully participate in the Corps' NEPA process, we urge the Court to find the Corps' EA inadequate and grant Plaintiffs' motion for summary judgment to ensure the Dredging Project can receive full and robust community feedback.

C. The EA Inadequately Characterized the Air Pollution in San Juan Bay and the Additional Cumulative Impact of the Dredging Project Combined with the Pollution Sources on Vulnerable Areas.

1. The Corps Failed to Take a Hard Look at Foreseeable Air Pollution Impacts of the Dredging Project.

The Corps failed to assess the effects that the new LNG terminal, enabled by the Dredging Project will have on the population of San Juan, including the Amici. Given its connection with the terminal's development, the Dredging Project will increase the burning of fossil fuels—a clear health risk—which will increase air pollution. In addition, the dredging of the harbor will increase the traffic of larger vessels, undoubtedly creating more significant vessel emissions. Yet, the Corps fail to disclose the quantity, the method, or the effect of the Dredging Project's pollution. *See* Plaintiffs' Mem. of Points and Authorities, Doc. No. 20-1 ("Plaintiff's Mem.") at 22 (citing USAACE_000180). The Environmental Assessment only considers carbon dioxide pollution but neglects other greenhouse gasses such as sulfur dioxide, nitrous oxides, and other emissions. *Id.* The Corps' EA downplays the risks of new air pollution in the area by asserting that Puerto Rico Air Quality Control Region "is unclassifiable" in terms of Clean Air Act attainment. Corps EA at 2-35. This assertion is blatantly false. In the very same EA, the Corps admits that areas near the Dredging Project have a history of being an incompliant Air Quality Control Region. *Id.* This is a clear contradiction in the EA with no explanation offered. It is further clear that the Corps failed to take a hard look at the available data and failed to adequately study and identify the problems thoroughly and logically. Amici members are directly affected by the ongoing pollution and will be affected by any additional pollution caused by the larger ships and congestion formed due to the Dredging Project.

Furthermore, there have been studies on the air quality and the dangerous pollution levels in the San Juan region. Air pollutants, including ammonia, carbon monoxide, sulfur dioxide, nitrous oxides, methane, carbon dioxide, and chlorofluorocarbons, particulates (both organic and inorganic), and biological molecules are all known and proven to cause adverse health effects,

including respiratory diseases, asthma, and even premature deaths. *Air Pollution and Your Health*, Nat'l Inst. for Env'tl. Health Sci., <https://www.niehs.nih.gov/health/topics/agents/air-pollution/index.cfm> (last visited Mar. 3, 2023). The Dredging Project will bring larger ships. USACE_000161. Larger ships, which require the burning of high sulfur fuels for transportation, will undoubtedly increase sulfur dioxide emissions. Franziska Rosser *et al.*, *Annual SO2 exposure, asthma, atopy, and lung function in Puerto Rican children*, 55 PEDIATRIC PULMONOLOGY 1, 6 (2020). The results of Franziska Rosser *et al.*'s study of sulfur dioxide air pollution in Puerto Rico found that exposure of just 1 part per billion ("ppb") increases asthma and atopy in Puerto Rican children. *Id.* The EA inadequately characterizes the air pollution risks to the Amici communities. The Corps' EA failed to assess the impact that existing air pollution combined with the new air pollution the Dredging Project would bring directly affects the residents of the San Juan Bay, including the communities of the Amici. The Corps clearly did not take a hard look at the available data during their decision-making.

2. The Corps Failed to Account for and Take a Hard Look at the Additional Air Pollution and Other Impacts That Will Originate from Larger Ships.

Ships are significant contributors to emissions in Puerto Rico. EPA, DESIGNATION OF EMISSION CONTROL AREA TO REDUCE EMISSIONS FROM SHIPS IN THE U.S. CARIBBEAN 1 (2011). The EA prepared by the Corps acknowledges that the dredging will increase air emissions from ships. Still, it does not adequately analyze the extent of the impacts or propose adequate mitigation measures. Corps EA at 5-28. The EA also fails to consider the cumulative impacts of the increased shipping traffic on the air quality in the area.

Additionally, the EA fails to consider the potential health impacts of increased air pollution on Amici's communities. EPA has previously stated that "the dependency of the islands' economies on marine transportation, in combination with the physical and human geography of the territories, place these populations and environments at an elevated risk from ship-related pollution." EPA, DESIGNATION OF EMISSION CONTROL AREA TO REDUCE EMISSIONS FROM SHIPS

IN THE U.S. CARIBBEAN 2 (2011). The Amici's air quality will undoubtedly observe impacts from the resulting air pollution caused by larger ships. Furthermore, these ships will also have direct adverse impacts on water resources surrounding the Amici.

Ship emissions impact the marine ecosystem as well. Sulfur and nitrogen emissions from ships can cause acidification, eutrophication, and nutrient enrichment. FREDA FUNG ET AL., PREVENTION AND CONTROL OF SHIPPING AND PORT AIR EMISSIONS IN CHINA, NRDC 19 (2014). The acidification caused by emissions can lead to altered water chemistry and population declines in acid-sensitive marine organisms. *Id.* Acidification is mainly associated with coral declines. *Id.* Eutrophication and nutrient enrichment can cause toxic algae blooms that kill marine life. *Id.* Finally, ozone emissions from ships affect vegetation and reduce agricultural crop yield. *Id.*

The Corps also failed to assess the possibility of oil spills in its EA. Oil spills can occur from incidents other than vessel collisions. Small oil spills can occur when refueling ships. *Oil Spills*, NOAA, <https://www.noaa.gov/education/resource-collections/ocean-coasts/oil-spills>, (last visited Mar. 23, 2023). Expanding the San Juan Port to larger ships logically means there will be more oil spillage from refueling than before, due to the increased volume necessary to fuel the ships. Even these small spillages can directly and cumulatively impact the environment. An EIS is necessary to take a 'hard look' at the potential threats from oil spills occurring from all possible sources and the threat these spills pose to the environment.

The Corps failed to take a hard look at the effects the Dredging Project would have from an increase in shipping traffic. Furthermore, the Corps failed to identify the relevant areas of environmental concern. The Dredging Project poses a clear risk to humans and the environment. The Corps' EA ignored these possibilities. This failure by the Corps is a clear violation of NEPA. Many members of Amici are economically reliant on the integrity of their marine ecosystems. The Dredging Project poses risks to these ecosystems, and yet the Corps' EA ignores them. The Corps failed to assess the direct, indirect, and cumulative impacts air pollution from ship emissions will have on the environment and ecosystems that Amici members live in and economically rely on.

There is a clear and present health risk to communities in San Juan Bay that the Dredging Project would cumulatively add to. The Corps' failure to adequately consider the air pollution impacts of the Dredging Project violates NEPA and puts the health and well-being of the Amici communities at risk. Amici urge the Court to rule in favor of blocking the Dredging Project and order the Defendants to prepare an EIS that adequately analyzes the air pollution impacts of the project and proposes adequate mitigation measures. The health and well-being of the surrounding communities are at stake.

D. The Corps' EA Makes Egregious Errors in Analyzing Impacts on Marine Wildlife and Ecosystems.

As a large infrastructure project in a sensitive and valued marine ecosystem, the Dredging Project presents clear risks of harm to wildlife and the environment, especially threatened and endangered corals. This Court has previously stated:

The cumulative effects of other projects that can be expected to have similar impacts must be acknowledged. An agency may not... [treat] a project as an isolate "single-shot" venture in the face of persuasive evidence that it is but one of several substantially similar operations, each of which will have the same polluting effect in the same area. To ignore the prospective cumulative harm under such circumstances could be to risk ecological disaster.

North Slope Borough v. Andrus, 486 F. Supp. 332, 347 (1980) (citing *Nat. Res. Def. Couns. v. Callaway*, 524 F.2d 79, 88 (2nd Cir. 1975)). The increased sedimentation and turbidity from the dredging could harm the coral and other marine life in the area, leading to long-term damage to the ecosystem. The Corps clearly violated NEPA by ignoring the direct, indirect, and cumulative impacts to wildlife and the environment.

The Corps' EA fails to measure the risk of ecological disaster from the Dredging Project. Amici have a clear and significant interest in protecting the wildlife and marine environment in which they reside. A proper environmental review should acknowledge the potential cumulative

impacts to vulnerable species. *Id.* Without a proper EIS completed by the Corps, there is no formal evaluation on the ecological disasters that can occur from the Dredging Project.

In particular, the Corps' conclusion that corals are unaffected by the Dredging Project is senseless. The Corps inadequately evaluated the direct and indirect impacts of the threatened and endangered coral species listed under the Endangered Species Act ("ESA") residing near the Dredging Project area. Unbelievably, the Corps determined that increased sedimentation from the Dredging Project would not affect the corals in Puerto Rico. Def's Cross-Motion for Summary Judgment at 31. This is neither plausible nor supported by the record. *See, e.g.*, Plaintiffs' Mem. at 24-30. The ESA prohibits actions that "maliciously damage or destroy any such species on any such area; or remove, cut, dig up, or damage or destroy any such species." 16 U.S.C. §1538(a)(2)(B). The Corps failed to adequately assess the direct risk to surrounding wildlife and the environment in its EA.

Dredging operations destroy or kill coral reef habitats "directly due to the removal or burial of reefs, or indirectly as a consequence of lethal or sublethal stress to corals caused by elevated turbidity and sedimentation." Paul L.A. Erfteimeijer et al., *Environmental impacts of dredging and other sediment disturbances on corals: A review*, 64 MARINE POLLUTION BULL. 1738, 1738 (2012). Even a few inches of sedimentation negatively impacts most coral species and lead to catastrophic consequences. *Id.* at 1748. Puerto Rico has some of the most sensitive and pristine coral on Earth, including species protected by the ESA. These species will be directly impacted by the dredging during the Dredging Project. Moreover, the corals will be indirectly impacted by the larger ships that will come into San Juan Bay. The Corps arbitrarily determined that corals would not be affected in their environmental assessment and failed to take a hard look at the impacts the Dredging Project would have on the surrounding corals.

To deflect from its implausible conclusion, the Corps claims that there are many differences between the Dredging Project and the very similar 2013 Port of Miami dredging project. Def's Cross-Motion for Summary Judgment at 40. This claim is untrue. The impact zone

of the 2013 Port of Miami dredging project reached up to 15 miles and killed over half a million coral. Ross Cunning et al., *Extensive coral mortality and critical habitat loss following dredging and their association with remotely-sensed sediment plumes*, 145 MARINE POLLUTION BULL. 185. 193 (2019). The impact zone proposed by the Corps is 150 meters, which is a scientifically impossible impact zone for a project the size of the Dredging Project.

Furthermore, both projects failed to determine the harm of sediment on the coral. Elkhorn and Staghorn coral particularly have critical habitat, meaning habitat essential for their survival, in the area and other threatened corals have possessed critical habitat. Corps EA at 2-30. This critical habitat space ranges across the Dredging Project entrance and surrounding area. The Corps plan to remove 2.1 million cubic yards of material near the coral, transport the dredged material over the corals, and dump the dredged material near the coral. Def's Cross-Motion for Summary Judgment at 42. Yet, the Corps bafflingly concludes that there will be no leakage or harm to the surrounding coral.

The Corps' failure to adequately consider the impacts of the Dredging Project on marine wildlife and ecosystems violates NEPA, putting the health and well-being of the surrounding ecosystems at risk. This failure threatens the Amici's interests in protecting their surrounding marine environment. Furthermore, it invalidates the Corps' EA. The EA prepared by the Corps fails to adequately analyze the Dredging Project's impacts on the coral and marine environment or propose adequate mitigation measures. This failure violates this Court's third factor for determining EA adequacy. *Herrington*, 768 F.2d at 1430. Because of these egregious errors, the Corps has failed to make a convincing case that the impact was insignificant. We accordingly urge the Court to rule in favor of blocking the Dredging Project until a valid EIS has been completed that adequately analyzes the project's impacts on the coral and marine environment and proposes adequate mitigation measures.

E. To Build Resilience Against Future Disaster Events, it is Imperative That Puerto Rico Transitions to Renewable Energy in Accordance with the Puerto Rico Energy Public Policy Act.

The Dredging Project will increase Puerto Rico's dependence on fossil fuels, particularly with the addition of the LNG terminal. This increased reliance on non-renewable energy will impede Puerto Rico's statutory commitment to a complete renewable energy transition. The Puerto Rico Energy Public Policy Act set a required timeline for the renewable energy transition. The Act sets an ultimate goal of 100% renewable energy by 2050. 2019 P.R. Laws 17-2019 § 1.6(7). The Act also sets interim goals of 40% by 2025 and 60% by 2040. *Id.* Puerto Rico is not close to meeting these commitments today. In the fiscal year of 2022, only 3% of total electricity came from renewable energy. *Puerto Rico Profile*, U.S. ENERGY INFO. ADMIN., [https://www.eia.gov/state/print.php?sid=RQ#:~:text=For%20fiscal%20year%202022%20\(July,%2C%20and%20renewables%20generated%203%25](https://www.eia.gov/state/print.php?sid=RQ#:~:text=For%20fiscal%20year%202022%20(July,%2C%20and%20renewables%20generated%203%25) (last visited Mar. 23, 2023). However, the issue of transitioning to renewable energy in Puerto Rico is much bigger than simply achieving statutory goals.

Amici have a significant interest in the transition to distributed renewable energy. The Dredging Project, which will facilitate the import of more fossil fuels to Puerto Rico, is not in line with the Amici's goals and years of advocacy for a rapid transition to renewable energy. This transition is imperative to increase Puerto Rico's resilience against future disaster events such as Hurricanes Irma, Maria, and Fiona. Resilience is especially crucial to Amici's communities of racially and economically marginalized residents, who disproportionately experience the harms and disruptions of these storms.

The hurricanes wreaked havoc on the electric grid and left 1.5 million residents without power. Alexia Fernández Campbell, *It took 11 months to restore power to Puerto Rico after Hurricane Maria. A similar crisis could happen again*, VOX (Aug. 15, 2018), <https://www.vox.com/identities/2018/8/15/17692414/puerto-rico-power-electricity-restored->

hurricane-maria. The failure to restore energy was because the “current system of fewer, centralized and larger power plants takes longer to restore electricity across the island, especially in remote and mountainous regions.” Jeff Brady, *Solar energy could be key in Puerto Rico's transition to 100% renewables, study says*, NPR (Jan. 23, 2023). <https://www.npr.org/2023/01/23/1150775235/solar-energy-could-be-key-in-puerto-ricos-transition-to-100-renewables-study-say>. In the aftermath of this systemic energy catastrophe, Department of Energy researchers found that the island has significant renewable energy potential. NICK GRUE ET AL., QUANTIFYING THE SOLAR ENERGY RESOURCE FOR PUERTO RICO, National Renewable Energy Laboratory 22 (2021), <https://www.nrel.gov/docs/fy21osti/75524.pdf>.

Localized renewable energy systems provide residents of Puerto Rico with desperately needed resilience against natural disasters. “Distributed renewable energy” such as solar rooftop panels provide greater resiliency. Jeff Brady, *supra*, (citing to PR100, ONE-YEAR PROGRESS SUMMARY REPORT: PRELIMINARY MODELING RESULTS AND HIGH-RESOLUTION SOLAR AND WIND DATA SETS (2023)). Agustín Carbó, the Director of the Department of Energy's Puerto Rico Grid Modernization and Recovery Team, stated in an interview that “we were able to prove that these systems are resilient to hurricane winds, and they can provide pretty fast power, within hours after a storm.” *Id.* The current system of fewer, more centralized, and larger power plants takes longer to restore electricity across the island, especially in remote and mountainous regions.” *Id.* As fossil fuel emissions continue to exacerbate climate change, disaster events such as Hurricanes Irma and Maria are going to get “bigger and more powerful.” *Id.* The purpose of the Dredging Project is to import and store LNG for Puerto Rico’s energy system, which only serves to increase the island’s dependence on fossil fuels and disrupt the investments and construction of resilient renewable energy systems against future disasters.

After the hurricanes knocked out power in Puerto Rico, organizations set up solar power “micro-grids.” Arvind Dilawar, *Puerto Rican 'Anarchistic Organizers' Took Power Into Their Own Hands After Hurricane Maria*, NEWSWEEK (Sept. 11, 2018),

<https://www.newsweek.com/puerto-ricans-restore-power-after-hurricane-maria-1114070>. The microgrids are solar-powered and easily transportable. *Id.* Currently, less than 4% of Puerto Rico's energy generation is from renewable sources. Nicole Acevedo, *Five years after Hurricane Maria, Puerto Rico's power crisis and a new storm revive grim memories*, NBC NEWS (Sept. 18, 2022), <https://www.nbcnews.com/news/latino/puerto-rico-hurricane-maria-anniversary-power-grid-rcna47729>. Generating more distributed renewable energy is the key to Puerto Rico's survival, and a major priority for Amici and their members' communities.

Puerto Rico's energy grid has unique vulnerabilities that warrant a hard look at cumulative impacts. Most recently, Hurricane Fiona left 40% of Puerto Rico without power. Blanca Begert, *Puerto Ricans were already angry about the power grid. Then came Hurricane Fiona.*, GRIST (Sept. 27, 2022), <https://grist.org/extreme-weather/hurricane-fiona-puerto-rico-power-outage-luma-energy/>. Other disasters Puerto Rico faces include a string of earthquakes in 2020 that took a power plant offline. Patricia Mazzei et al., *With Earthquakes and Storms, Puerto Rico's Power Grid Can't Catch a Break*, NYT (Jan. 10, 2020), <https://www.nytimes.com/2020/01/10/us/puerto-rico-electricity-power-earthquake.html>. Puerto Rico has also suffered from an abundance of seaweed that clogs the water filters for condensers, which further jeopardizes the power grid. *Id.* The Corps failed to consider the direct, indirect, and cumulative impacts the LNG terminal would have on the Puerto Rican power grid.

While LNG has been sold to the world as a solution for energy insecurity, disruptions to supply chains recreate the energy insecurity. We have seen recent examples across the United States and Europe. The Dredging Project only serves to increase Puerto Rico's dependence on fossil fuel supply chains. Future disruptions abroad can devastate Puerto Rico's energy economy and economy as a whole.

The increased shipping of fossil fuels that would result from the Dredging Project would only exacerbate the negative impacts of climate change and hinder Puerto Rico's ability to transition to a more sustainable future. Amici believe that the Corps decision to move forward with

the Dredging Project without adequately considering the impacts on climate change violates NEPA and puts the future of Puerto Rico at risk. The Amici have a significant interest in the promotion of renewable energy in the communities they reside in. The Corps failed to adequately analyze the impacts of the Dredging Project on efforts to build energy and climate resilience in the Amici's communities. We therefore urge the Court to rule in favor of the Plaintiffs to ensure an adequate EIS is prepared that analyzes the impacts of increasing fossil fuel dependence in Amici's communities.

IV. CONCLUSION

In conclusion, Amici respectfully urges the Court to grant the Plaintiff's Motion for Summary Judgment and deny the Corps' Cross-Motion for Summary Judgment. As described herein, the Corps failed to examine: (1) environmental justice factors, (2) facilitate public participation during the comment period, (3) assess the risk of leakage of fuel, (4) take a hard look at the air pollution both individually from the larger ships coming to the port and cumulatively with the existing air pollution, (5) the impacts of the dredging on the wildlife and ecosystem of San Juan, and (6) the disregard of Puerto Rico energy policies and the island's commitment to renewable energy. The Corps failed to take a hard look at the impact and burden the Dredging Project would have on the people of Puerto Rico, including the Amici's communities. The Dredging Project should not proceed until the Corps' unlawful failure to complete an adequate EIS is corrected. The Corps' decision to move forward with the Dredging Project without a valid EIS violates NEPA and puts the surrounding communities' environment and human health at risk. The Dredging Project poses significant environmental and social risks that must be adequately considered before further actions are taken.

Certificate of Compliance

The foregoing brief was prepared in 12-point Times New Roman using Microsoft Word, and it complies with the typeface and typestyle requirements of LCvR 5.1 and 5.3. The brief contains 6941 words and complies with the type-volume limitation of Federal Rule of Civil Procedure 7(b)(1)-(2) and Fed. R. App. P. 29(a)(4).

/s/ Michael Harris

Michael Harris

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