

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA**

IN RE ACF BASIN WATER
LITIGATION

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: Case No. 1:18-MI-43-TWT
:
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**BRIEF OF *AMICI CURIAE* TRIP AUKEMAN, RICHARD BICKEL,
ALBERT BRYANT, SHANNON HARTSFIELD, LYNN MARTINA, KEVIN
MARTINA, CARMEN MCLEMORE, DANIEL TAUNTON, THOMAS
WARD, THE CITY OF APALACHICOLA, CALHOUN COUNTY,
FRANKLIN COUNTY, LIBERTY COUNTY, JACKSON COUNTY and the
FLORIDA COASTAL CONSERVATION ASSOCIATION**

IN SUPPORT OF PLAINTIFFS

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Dated January 15, 2021

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
STATEMENT OF INTEREST.....	1
INTRODUCTION.....	2
BACKGROUND.....	3
a. The Corps’ mismanagement of the Apalachicola River System began decades ago.....	6
b. The Corps’ PAA threatens an already-weakened seafood industry with ruin.....	9
c. The Corps’ PAA threatens to collapse the Tupelo honey industry.....	13
I. The Corps must consider interrelated economic, cultural, social effects, as well as disproportionate impacts on low-income communities.....	15
II. The Corps failed to consider the PAA’s impacts on downstream, low income communities.....	20
CONCLUSION.....	25
EXHIBIT 1: Declarations.....	A1
EXHIBIT 2: Publicly Available Data.....	B1

TABLE OF AUTHORITIES

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<i>American Rivers v. FERC</i> , 895 F.3d 32, 49 (D.C. Cir. 2018).....	15, 24, 25
<i>Barrie v. Kitsap Cnty</i> , 613 P.2d at 1148, 1157 (Wash. 1980).....	17
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<i>City of Rochester v. U.S. Postal Serv.</i> , 541 F.2d 967, 973 (2d Cir. 1976).....	17
<i>Earth Island Institute v. U.S. Forest Serv.</i> , 351 F.3d 1291 (9th Cir. 2003).....	18, 25
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<i>Hammond v. Norton</i> , 370 F. Supp. 2d 226, 243 (D.D.C. 2005).....	18, 23
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<i>Humane Soc. of U.S. v. Johanns</i> , 520 F. Supp. 2d 8, 26 (D.D.C. 2007).....	18
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STATEMENT OF INTEREST¹

Amici curiae include individuals, communities, and organizations from the Apalachicola Region of Florida who have been harmed by the United States' Army Corps of Engineers' ("Corps") mismanagement of the Apalachicola, Chattahoochee, Flint Watershed ("ACF"). As described by the *amici* in sworn declarations, low flows down the Apalachicola River have devastated regional economies, ruined generations-old businesses, and altered the region's culture.² However, these impacts were not considered in the Corps' 2016 final Environmental Impact Statement ("FEIS").

The individual *amici* live in communities whose ways of life and livelihoods have been tied to the Apalachicola River for generations. They represent ten industries and have deep personal knowledge of recent changes to the Apalachicola River watershed. Their stories are emblematic of communities in crisis.

Several Florida counties through which the Apalachicola River flows are *amici*. Franklin, Liberty, and Calhoun are heavily reliant on industries supported by

¹ All parties have consented to the filing of this brief. No party's counsel authored any part of this brief. Neither did any party, party's counsel, nor any person other than *amici* and their counsel contribute money to fund this brief.

² Evidence supporting this brief includes official sources of which the Court may take judicial notice as well as declarations pursuant to 28 U.S.C. § 1746.

the River. To the north, **Jackson County** also boasts substantial natural resources that draw tourists to the region.

The town of **Apalachicola** sits at the confluence of the Apalachicola River and Bay. Historically producing 10% of the United States' oysters, the city has been known as Florida's oyster capital for generations and a majority of its population once worked in the seafood industry.

The Florida **Coastal Conservation Association** ("CCA") is a non-profit organization comprised of 19,000 recreational anglers dedicated to protecting fisheries from further harm caused by low flow to the Apalachicola River.

The *amici* seek the consideration that the National Environmental Policy Act ("NEPA") guarantees. They ask that their lives and cultures be deemed relevant to the Corps' future water management plans. The *amici* offer this brief in support of Plaintiffs' Summary Judgment Motions (Dkt. 164, 165).

INTRODUCTION

Apalachicola communities are bound to the River. Their culture sprang from the River and the industries that it nourished. For decades, low flow regimes imposed by the Corps have wreaked havoc on the watershed, leaving communities tied to the River to struggle economically, culturally, and socially:

We've lost the soul of Apalachicola and Eastpoint with the demise of oystering and shrimping fisheries, and the character of the area....The

bottom line is that the Bay provided dignity, food and a livelihood.... Oystermen are a proud people and suddenly they can't provide for their families through no fault of their own. It's terribly difficult.³

The Corps' decision to adopt the Proposed Action Alternative ("PAA") ignored the fact that continued low flows will exacerbate these harms. Before the Corps' decision goes into effect, it must, pursuant to the National Environmental Policy Act ("NEPA"), take a hard look at the foreseeable harm the PAA will levy on the communities, including whether those harms disproportionately impact low-income communities in the Apalachicola Region. The Corps' failure to consider these things renders its FEIS inadequate. As a result, the agency's action must be set aside.

BACKGROUND

The Apalachicola watershed includes the River, a 144,000-acre floodplain forest, and the Apalachicola Bay ("River System").⁴ While the watershed experiences natural periods of high and low flow, months of moderate levels have historically filled the System each year.⁵ This natural rhythm not only supports the

³ Decl. Richard Bickel ¶¶ 16, 17, Dec. 19, 2020 (Mr. Bickel is a photojournalist who has lived in Apalachicola for 25 years and has photographed and interviewed hundreds of families in the seafood industry).

⁴ H. Lee Edmiston, *A River Meets the Bay: Apalachicola National Estuarine Research Reserve*, 49 (Dec. 2008), [hereinafter "Edmiston"] http://www.dep.state.fl.us/coastal/downloads/management_plans/A_River_Meets_the_Bay.pdf (last visited Jan. 14, 2021).

⁵ Melanie R. Darst & Helen M. Light, U.S. Dep't of the Interior, U.S. Geological Survey, *Drier Forest Composition Associated with Hydrologic Change in the*

health of the River System but also feeds local economies. During high season, the Ogeechee Tupelo tree blooms, providing the only source of nectar used to make Tupelo honey.⁶ Water coming from the floodplain also provides the System with nutrients year round, feeding seafood species throughout the Bay and Gulf of Mexico.⁷

Families in the Region have subsisted on the River System for generations,⁸ and locals practice beekeeping, fishing, and harvest oysters using the same methods

Apalachicola River Floodplain, Florida, 54 (2008), [hereinafter Darst], <https://pubs.er.usgs.gov/publication/sir20085062> (last visited Jan. 14, 2021).

⁶ Anthony Stallins et al., *Biogeomorphic Characterization of Floodplain Forest Change in Response to Reduced Flows Along the Apalachicola River, Florida*, 26 RIVER RESEARCH AND APPLICATIONS 3, 242-260, 256 (2009); Justin T. Maxwell & Paul A. Knapp, *Reconstructed Tupelo Honey Yield in Northwest Florida Inferred from Nyssa Ogeche Tree-Ring Data: 1850-2009*, AGRICULTURE, ECOSYSTEMS & ENV'T 149: 100-108 (2012).

⁷ Steven L. Morey et al., *Connectivity of the Apalachicola River Flow Variability and the Physical and Bio-optical Oceanic Properties of the Northern West Florida Shelf*, 29 CONTINENTAL SHELF RESEARCH 9, 1 (May 15, 2009) (“The Apalachicola River is a major nutrient source for the northeastern GoM... This nitrogen input enhances primary productivity in the near-shore waters.”) [hereinafter “Morey”], <https://doi.org/10.1016/j.csr.2009.02.003> (last visited Jan. 15, 2021); Harold C. Mattraw & John F. Elder, *Nutrient and Detritus Transport in the Apalachicola River, Florida C57* (1984) [hereinafter Mattraw]; Robert J. Livingston, *The Ecology of the Apalachicola Bay System: An Estuarine Profile* 9 (Sept. 1984) [hereinafter “Livingston I”], <http://npshistory.com/publications/usfws/biological-reports/82-05.pdf> (last visited Jan. 14, 2021).

⁸ See, e.g., Letter from Kevin Begos, Mayor of the City of Apalachicola, to Judge Trash (Dec. 30, 2020) [hereinafter Ltr. Mayor Begos]; Decl. of Thomas L. Ward, ¶ 3 Dec. 23, 2020; Decl. of Lynn C. Martina ¶ 3 Dec. 5, 2020; Decl. of Daniel Taunton ¶¶ 2, 3 Jan 8, 2021.

as their great grandparents.⁹ As Shannon Hartsfield, a fourth-generation oysterman from Eastpoint, explained “[h]ad the Apalachicola Bay oysters survived, my son would have been the fifth generation of Hartsfield oystermen.”¹⁰

Amici communities are disproportionately low-income based on the U.S. Census Bureau’s definition: more than 20% of residents in counties abutting the River lives below the poverty line.¹¹ In the cities of Apalachicola and Eastpoint—where economies rely on the seafood trade—low income residents make up 36% and 44% of the population, respectively.¹² Compared to the general populations of Florida and the United States—of which 12.7% and 10.5% are below the poverty line, respectively—the Apalachicola Region is disproportionately impoverished.¹³ Apalachicola communities are also disproportionately low-income compared to counties in Georgia whose water needs are met by the Corps: 13.5% of Fulton County residents and 5-13.2% of those in counties surrounding Lake Lanier live below the poverty line.¹⁴ Because communities in the Apalachicola Region rely on

⁹ See Decl. of Shannon Hartsfield ¶ 3, 5 Dec. 31, 2020; Decl. Bickel ¶ 12; Kelly Watson, *Alternative Economies of the Forest: Honey Production and Public Land Management in Northwest Florida*, 30(3) SOC & NATUR RESOUR 331, 334-335 (2017) [hereinafter “Watson”].

¹⁰ Decl. Hartsfield ¶ 3; see also Decl. Bickel ¶ 12; Decl. Ward ¶¶ 3, 4.

¹¹ See Exh. 2, *County & State Poverty Line Statistics: 2014-2018*, Table 1 B1.

¹² *Id.*, *EJ Screens for Apalachicola and Eastpoint*, Tables 3-4 B2.

¹³ *Id.* County & State Poverty Line Statistics: 2014-2018, Table 1 B1.

¹⁴ *Id.*

River-based industries, including seafood and logging, many also lack the formal education needed for employment in other fields.¹⁵

a. The Corps' mismanagement of the Apalachicola River System began decades ago.

Because eighty percent of the Apalachicola's water originates from the Chattahoochee and Flint Rivers,¹⁶ the Corps' increasingly restrictive water management is devastating the downstream River System. "Water-level declines have been greatest at low and medium flows, which are the most common flows (occurring about 80 percent of the time)...[and] Flood durations were shorter in all periods subsequent" to 1976.¹⁷ These changes have been attributed in part to the Corps' actions.¹⁸

Because "[p]eriods of low water levels are now more frequent and longer in duration,"¹⁹ dry conditions exist throughout the entire System. These changes are

¹⁵ Exh. 2, *EJ Screens for Apalachicola, Eastpoint and Wewahitchka*, Tables 3-5, B2-B3 (16-20% of each community has less than a high school education).

¹⁶ Edmiston, *supra* note 4 at 9.

¹⁷ Helen M. Light et al., U.S. Geological Survey, U.S. Dep't. of the Interior, *Water-Level Decline in the Apalachicola River, Florida, from 1954 to 2004, and Effects on Floodplain Habitats*, 1, 6 (2006); Darst, *supra* note 5 at 4 (finding "[w]ater levels have declined over the past 50 years").

¹⁸ Darst, *supra* note 5 at 7 ("Less flow during the spring and summer in recent decades is likely caused by a combination of changes in rainfall patterns and increased human activities in the ACF basin, including agricultural irrigation, municipal water use, flow regulation, and reservoir evaporation.").

¹⁹ Light, *supra* note 17 at 48.

reflected by the *amici*, who have observed that “the swamp [floodplain] is drying up...: the river basically runs dry in the summer.”²⁰ The Corps also makes no effort to mimic natural flow patterns. Instead, the System experiences unnatural lows.²¹ These findings reflect the experiences of the *amici*, who feel that “[t]he Corps sends too little or too much, so the River swings between flooded and dry and dusty while the Bay is either a flood of fresh or all salt.”²²

Physical changes to the River System have also made it harder for water to reach the floodplain (otherwise known as a swamp).²³ Until 2001, the Corps dredged sand from the riverbed to make a channel deep and straight enough for large barges.²⁴ The sand was redistributed on the riverbanks, blocking access to the floodplain.²⁵ As explained by *amicus* Daniel Taunton, “we used to need about 8 feet of water in the River to fill up the swamp near my house. Now you need 10-12 feet to get water back to the swamps because the sand along the Rivers’ banks is so high in some places.”²⁶

²⁰ Decl. of Albert Bryant ¶ 14 Dec. 22, 2020; *see also* Decl. Taunton ¶ 15; Decl. L. Martina ¶ 9; Decl. Hartsfield ¶ 11.

²¹ Light, *supra* note 14 at 4.

²² Decl. of Kevin Martina ¶ 14 Dec. 10, 2020.

²³ Darst *supra* note 5 at 1.

²⁴ Light, *supra* note 14 at 1, 6 (“Dredging in the deepest part of the channel [was] conducted annually from 1956 to 2001.”).

²⁵ Light, *supra* note 14 at 30; Decl. Taunton Decl. ¶ 9.

²⁶ Decl. Taunton ¶¶ 12, 13; Decl. Carmen McLemore ¶ 7 Dec. 30, 2020.

Rainfall fluctuation compounds problems: “Decreased spring and summer flows from the upstream watershed during drought conditions have resulted in further declines since 1975 that have lowered water levels throughout the entire river.”²⁷ As a result, the Apalachicola region’s water needs are not only competing against upstream “agricultural irrigation, municipal water use, flow regulation, and reservoir evaporation,” but also an ever drying climate.²⁸

²⁷ Darst, *supra* note 5 at 7; Light, *supra* note 14 at 1.

²⁸ Darst, *supra* note 5 at 7; *see also* Stallins, *supra* note 6 at 244, 246; Maxwell, *supra* note 6 at 100-101.

²⁸ NOAA Env’t Coop. Si. Ctr., *Apalachicola National Estuarine Research Reserve*, [hereinafter Apalachicola NERR] ecsc.famu.edu/t-apalachicola-nerr.html (last visited Jan 14, 2021); FEIS 2-215, 2-216.

²⁸ FEIS at 2-215.

²⁸ Decl. T. Ward ¶ 5.

²⁸ FEIS at 2-215.

²⁸ Apalachicola NERR, *supra* note 28; Laura E. Petes et al., *Impacts of Upstream Drought and Water Withdrawals on the Health and Survival of Downstream Estuarine Oyster Populations*, 2 *ECOLOGY AND EVOLUTION* 7, 1712-1724, 1712 (2012) [hereinafter Petes].

²⁸ Decl. Bickel ¶ 14; Decl. Hartsfield ¶ 19.

²⁸ Visit Florida, *Picking up the Pace: Florida’s Tourism Performance Jumps into a Higher Gear*, 27 (2018) (explaining that Franklin County brought 10k per resident in visitor expenditures in 2018), <https://www.visitflorida.org/media/30679/florida-visitor-economic-large-impact-study.pdf> (last visited Jan. 13, 2021); HOME, <https://www.floridaseafoodfestival.com/> (last visited Jan. 12, 2021).

²⁸ *See*, Ltr. Mayor Begos.

²⁸ Decl. Hartsfield ¶ 3; Decl. L.C. Martina ¶ 3; Decl. K. Martina ¶ 2; Decl. Ward ¶¶ 2-4; Decl. Bryant ¶ 3.

²⁸ *See* Decl. Hartsfield ¶¶ 3, 5; Decl. Ward ¶¶ 2-4; Decl. K. Martina ¶ 2; Decl. L.C. Martina ¶ 3; Ltr. Mayor Begos; Delc. Bickel ¶ 12.

²⁸ Decl. Taunton ¶ 3; Decl. Bickel ¶ 15; Decl. McLemore ¶ 6; Decl. Hartsfield

b. The Corps' PAA threatens an already-weakened seafood industry with ruin.

As one of the most productive estuaries in the United States, the Apalachicola Bay historically supported a prolific seafood industry.²⁹ The Bay also provided thick freshwater grasses in soft bottomed marshes used as habitat and hatcheries by many species.³⁰ By all accounts of the *amici*, it was “a little piece of heaven.”³¹

Small towns of Apalachicola and Eastpoint share in the Bay's productivity and rely heavily on the seafood industry.³² Approximately 80% of *amici* Franklin County's workforce used to be employed by the seafood industry and, until recently, oysters accounted for nearly half of the county's income.³³ These numbers are not confined to those who harvest in the Bay, but include seafood dealers, shuckers, truckers, and those employed by tourism.³⁴

¶ 20.

²⁸ *Id.*; see also Exh. 2, *Franklin County Commercial Landing Data*, Tables 6-12 B3-B6.

²⁸ See Petes, *supra* ___ at 1721.

Apalachicola NERR, *supra* note 28; Final Environmental Impact Statement, *Update of the Water Control Manual for the Apalachicola-Chattahoochee-Flint River Basin in Alabama, Florida, and Georgia and a Water Supply Storage Assessment*, 2-215, 2-216 (Dec. 2016) [hereinafter FEIS].

³⁰ FEIS 2-215.

³¹ Decl. T. Ward ¶ 5.

³² FEIS 2-215.

³³ Apalachicola NERR, *supra* note 28; Petes, *supra* note 28 at 1712.

³⁴ Decl. Bickel ¶ 14; Decl. Hartsfield ¶ 19; *Picking up the Pace: Florida's Tourism Performance Jumps into a Higher Gear*, 27 (2018),

The seafood industry is synonymous with family in the Region.³⁵ Every *amici* working in the industry comes from a multi-generational seafood family,³⁶ and many were taught their trade by parents and grandparents.³⁷ The Bay also provides an important food source that sustains low-income communities.³⁸ Recent seafood declines suggest that may no longer be true.³⁹

The Bay has suffered in recent years. Saltier waters caused by low freshwater flows have adversely impacted seafood species and destroyed marsh habitat on which they rely.⁴⁰ Increased salinity also invites more saltwater predators into the Bay, which *amicus* and seafood dealer Thomas Ward has observed directly: what “a lot of people don’t understand is that when the salinity level went so

<https://www.visitflorida.org/media/30679/florida-visitor-economic-large-impact-study.pdf> (last visited Jan. 13, 2021) (explaining that Franklin County brought \$10,000 per resident in visitor expenditures in 2018); HOME, <https://www.floridaseafoodfestival.com/> (last visited Jan. 12, 2021).

³⁵ See, Ltr. Mayor Begos.

³⁶ Decl. Hartsfield ¶ 3; Decl. L.C. Martina ¶ 3; Decl. K. Martina ¶ 2; Decl. Ward ¶¶ 2-4; Decl. Bryant ¶ 3.

³⁷ See Decl. Hartsfield ¶¶ 3, 5; Decl. Ward ¶¶ 2-4; Decl. K. Martina ¶ 2; Decl. L.C. Martina ¶ 3; Ltr. Mayor Begos; Delc. Bickel ¶ 12.

³⁸ Decl. Taunton ¶ 3; Decl. Bickel ¶ 15; Decl. McLemore ¶ 6; Decl. Hartsfield ¶ 20.

³⁹ Exh. 2, Franklin County Commercial Landing Data, Tables 6-12 B3-B6.

⁴⁰ See Petes, *supra* note 28 at 1714, 1721; Robert J. Livingston, *Importance of River Flow to the Apalachicola River-Bay System, Report to the Florida Department of Environmental Protection* 7, 12 (Sept. 2008) [hereinafter “Livingston II”], http://mayorvanjohnson.com/files/Livingston_Report.pdf.

high...predators—Oyster Drills, Southern Conch—annihilated all the oyster beds.”⁴¹

Low flow has also decreased the nutrients delivered to the Bay from up river.⁴² Traditionally, the River supports seafood species in the Bay and Gulf of Mexico when nutrient filled water from the floodplains moves downstream.⁴³ A steady flow regime into Apalachicola’s floodplains is required to support this effect.⁴⁴ As explained by Coastal Conservation Association’s Director of Advocacy, Trip Aukeman, “the river feeds nutrients from Apalachicola all the way to Tampa Bay. If we do not have water flow we lose water quality and then the resources that rely on the water and the nutrients in it.”⁴⁵

The Bay’s oyster population crashed in 2013 and needs more freshwater than allocated in the PPA to recover, even in non-drought years.⁴⁶ Landing data paints a

⁴¹ Decl. Ward , ¶ 13; *see also* Decl. K. Martina ¶¶ 8, 9; Livingston II, *supra* note 40 at 12, 64.

⁴² Livingston I, *supra* note 7 at 13.

⁴³ Morey, *supra* note 7 at 1 (“The Apalachicola River is a major nutrient source for the northeastern GoM...This nitrogen input enhances primary productivity in the near-shore waters.”) [hereinafter “Morey”].

⁴⁴ *Id.* at 1-2; Matraw, *supra* note 34, at C4.

⁴⁵ Decl. of Trip Aukeman ¶ 10 Dec. 14, 2020.

⁴⁶ *Commerce Secretary Pritzker Declares Fisheries Disaster for Florida Oyster Fishery*, <https://www.noaa.gov/commerce-secretary-pritzker-declares-fisheries-disaster-florida-oyster-fishery> (Aug. 12, 2013); Decl. Ward ¶¶ 11, 21; Decl. Hartsfield ¶¶ 15, 16.

bleak picture of the health of the Bay and the county's seafood industry:⁴⁷

Year	Pounds Harvested	No. Trips Taken	Average Price per Pound (\$)	Estimated Value (\$)
2012	3,037,217	53,921	2.93	8,897,465
2013	1,065,811	25,964	4.61	4,912,392
2014	608,538	18,515	5.55	3,376,427
2015	518,204	18,317	5.81	3,009,159
2016	374,051	16,462	6.94	2,595,146
2017	268,291	14,356	8.04	2,156,942
2018	58,324	2,878	7.80	455,039

The oyster crash was incredibly hard on Franklin County communities. In the early 2000s, 300 boats harvesting oysters filled the Bay daily⁴⁸ and over a dozen Eastpoint processing plants employed a dozen shuckers each.⁴⁹ During that time, oystermen “could go out in the morning and bring in enough to make \$200 by lunch time.”⁵⁰ In the years after the crash “you’d maybe see 4 boats out there bringing in a few bags a day”⁵¹ and only one Eastpoint processing plant remains open.⁵² *Amici* Lynn Martina and Thomas Ward lost their oyster processing businesses, while fourth generation oystermen Shannon Hartsfield lost 90% of his income.⁵³ In the wake of the 2012 crash, some *amici* have adapted by opening new businesses or cobbling

⁴⁷ Exh. 2, *Franklin Cnty Com. Landing Data: Oysters*, Table 6, B3.

⁴⁸ Decl. Hartsfield ¶ 17; Decl. L. Martina ¶ 7; Decl. Bickel ¶ 11.

⁴⁹ Decl. Bickel ¶ 14.

⁵⁰ Decl. Martina ¶ 7.

⁵¹ Decl. Hartsfield ¶ 17.

⁵² Decl. Hartsfield ¶ 19; Decl. Bickel ¶ 14.

⁵³ Decl. L.C. Martina ¶ 11; Decl. Ward ¶¶ 14, 16; Decl. Hartsfield ¶ 4.

together part time jobs, but none recouped the living that oysters provided.⁵⁴ Every *amici* involved in the trade discussed how thriving was no longer possible: survival is the goal.⁵⁵

In a last-ditch effort to save the industry, the State of Florida made the controversial decision to close the Bay to all wild oyster harvesting for up to 5 years in 2020.⁵⁶ While this may save the wild oyster population in the long term, *amici* recognize that it will harm the most vulnerable in the Region.⁵⁷ Because the moratorium includes recreational harvesting, the closure also represents the loss of a food source.⁵⁸ Assuming the closure helps the oysters rebound, several *amici* still expressed concern that, “[w]ithout more water from the Corps, the oysters will crash again the next time we have a dry year.”⁵⁹

c. The Corps’ PAA threatens to collapse the Tupelo honey industry.

The land surrounding the Apalachicola River was once populated by over 144,000 acres of forests full of Tupelo. Found only in South Georgia and North

⁵⁴ Decl. L.C. Martina ¶ 11; Decl. Hartsfield ¶¶ 18, 21; Decl. Ward ¶ 16.

⁵⁵ Decl. L.C. Martina ¶ 12; Decl. Hartsfield ¶ 22; Decl. Ward ¶ 16.

⁵⁶ Fla. Fish & Wildlife Conservation Comm’n, *Oysters*, <https://myfwc.com/fishing/saltwater/commercial/oysters/> (last visited Jan. 12, 2021).

⁵⁷ Decl. K. Martina, ¶ 23; Decl. Bickel ¶ 15; *but see* Decl. Ward ¶ 18.

⁵⁸ Decl. Hartsfield ¶ 20; *see also* Decl. Ward ¶ 18; Decl. McLemore ¶ 6.

⁵⁹ Decl. Hartsfield ¶ 16; *see also* Decl. Ward ¶ 19; Decl. McLemore ¶ 8.

Florida, Ogeechee Tupelo once supported the Region's \$2.3 million Tupelo honey industry and supports a thriving tourist trade.⁶⁰ Ogeechee Tupelo need total inundation nearly year-round to thrive and flowing water to propagate.⁶¹

Ten years ago, the Ogeechee's two-week blooming season provided a single apiary enough nectar for 100,000 pounds of Tupelo honey.⁶² For beekeepers like *amicus* Albert Bryant, two-thirds of a year's income historically came from Tupelo season.⁶³ The floodplains have supported this level of abundance in the Tupelo honey industry for generations.⁶⁴

The last few decades have decimated the Ogeechee Tupelo and its honey. Between 1976 and 2004, dredging and persistently low flows down the Apalachicola River dramatically decreased flow into the floodplain.⁶⁵ As a result, the floodplain is drying out: there were 4.3 million (17%) fewer floodplain trees in 2004 than 1976 and Ogeechee declined by at least 44%.⁶⁶ *Amicus* Al Bryant has witnessed these

⁶⁰ Watson, *supra* note 9 at 334-35; Maxwell, *supra* note 6 at 100; HOME, <http://www.tupelohoneyfestival.com> (last visited Jan. 12, 2021); Decl. Bryant ¶ 11.

⁶¹ Darst, *supra* note 5 at 2 ("During floods, floodwaters are contained within floodplains and, when waters subside, floodplain soils retain moisture, ameliorating the effects of both floods and droughts..."); Decl. A. Bryant ¶ 13.

⁶² Watson, *supra* note 9 at 334; Decl. Bryant ¶ 12.

⁶³ Decl. Bryant ¶ 12.

⁶⁴ Darst *supra* note 5 at 1, 53; Stallins, *supra* note 6 at 256.

⁶⁵ Light, *supra* note 14 at 1-2.

⁶⁶ Darst, *supra* note 5 at 1.

declines and says that instead of new growth typical of a floodplain forest, “[n]ow the swamp is just full of old, dry Tupelo.”⁶⁷ This trend has devastated the Tupelo Honey industry, resulting in a 30% decrease in production between 1990 and 2009 years and further reductions since then.⁶⁸

The Corps’ actions have brought communities in this area to their knees, and these impacts should have been considered before the PAA was finalized.

III. The Corps must consider interrelated economic, cultural, social effects, as well as disproportionate impacts on low-income communities.

NEPA (National Environmental Policy Act of 1969, § 2 *et seq.*, 42 U.S.C.A. § 4321 *et seq.*) requires federal agencies to take a hard look at the *total* impacts of their actions, including non-environmental impacts flowing from a project’s environmental effects.⁶⁹ Executive Order 12,898 heightens this obligation when, as

⁶⁷ Decl. Bryant ¶ 14.

⁶⁸ Maxwell, *supra* note 6 at 100, 195; *see also* Decl. Bryant ¶ 12l; Regan McCarthy, *Decreased water flow in the Apalachicola River could threaten the future of tupelo honey* (October 16, 2020), <https://news.wfsu.org/wfsu-local-news/2020-10-16/decreased-water-flow-in-the-apalachicola-river-could-threaten-the-future-of-tupelo-honey> (last visited Jan. 15, 2021).

⁶⁹ 40 C.F.R. § 1502.16 (2020); *American Rivers v. FERC*, 895 F.3d 32, 49 (D.C. Cir. 2018) (NEPA “compel[s] federal agencies to take a hard and honest look at the environmental consequences of their decisions...”); *National Ass’n of Government Emp. v. Rumsfeld*, 418 F. Supp. 1302, 1306 (E.D. Pa. 1976) (“[W]hen a federal action does have a significant environmental impact, social and economic impacts

here, low-income communities may be disproportionately impacted by an agency's action.⁷⁰ The Corps' failure to consider the disproportionate impacts of its project on low-income communities and the full scope of impacts required by NEPA is a clear procedural error that renders the agency's action arbitrary and capricious.⁷¹

Agencies must consider certain non-environmental impacts:⁷² "When an [EIS] is prepared and economic or social and natural or physical environmental effects are interrelated, then the [EIS] *will discuss all of these effects on the human environment.*"⁷³ In this context, "effects" includes foreseeable and interrelated cultural, economic, and social impacts⁷⁴ and "human environment" refers not only to the physical world, but also Americans' relationship with it.⁷⁵

must also be considered...."); *Lands Council v. Powell*, 395 F.3d 1019, 1028 (9th Cir. 2005) (EIS must "catalogue of past, present, and future projects....").

⁷⁰ Exec. Order No. 12,898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, 59 Fed. Reg. 7629 (Feb. 11, 1994), § 1–101 [herein after EO 12,898]; CEQ, *Environmental Justice: Guidance Under the National Environmental Policy Act* 9, 14 (1997) [hereinafter EJ Guidance] <https://ceq.doe.gov/docs/ceq-regulations-and-guidance/regs/ej/justice.pdf> (last visited Jan. 21, 2021).

⁷¹ The Administrative Procedure Act, 5 U.S.C.A. § 706(2)(A) [hereinafter APA]; *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983) (agency action is arbitrary and capricious if it "entirely failed to consider an important aspect of the problem").

⁷² 40 C.F.R. § 1502.16 (2020).

⁷³ 40 C.F.R. § 1508.14 (2019) (emphasis added).

⁷⁴ 40 C.F.R. § 1508.1(g)(1) (2020).

⁷⁵ *Id.*; see also 40 C.F.R. § 1508.1(m) (2020).

Courts have interpreted the scope of non-environmental impacts broadly, requiring agencies to consider how their projects may impact a community's "quality of life."⁷⁶ For example, cultural effects include impacts on culturally significant wildlife⁷⁷ and harm to the "character of the community;"⁷⁸ economic impacts include job loss⁷⁹ and the "probable degenerative effects" of an agency's action on communities;⁸⁰ and social harm includes analysis of how lost revenue may detract from a place's vibrancy.⁸¹

As a threshold matter, non-environmental impacts must be foreseeable and related to a physical environmental impact to be considered.⁸² The foreseeability requirement includes consideration of direct and indirect effects, which includes

⁷⁶ *Hanly v. Mitchell*, 460 F.2d 640, 647 (2d Cir. 1972).

⁷⁷ See, e.g., *Protect Our Cmty. Found. v. LaCounte*, 939 F.3d 1029, 1040-41 (9th Cir. 2019) (agency recognized the presence of culturally significant wildlife and assessed the threat its actions posed to it).

⁷⁸ *Pyramid Co. of Watertown v. Planning Bd. of Town of Watertown*, 24 A.D.3d 1312, 1315 (N.Y. App. Div. 2005) (EIS inadequate for failing to "include supporting data to respond to concerns raised during the public comment phase with respect to cultural, historic or archeological resources," including how project would impact "character of the community.").

⁷⁹ 40 C.F.R. § 1508.1(g)(1) (2020) (defining effects)

⁸⁰ *Barrie v. Kitsap Cnty*, 613 P.2d at 1148, 1157 (Wash. 1980) (agency must consider "real possibility" of lost jobs and "resultant decline" in city center); *City of Rochester v. U.S. Postal Serv.*, 541 F.2d 967, 973 (2d Cir. 1976) (same).

⁸¹ *Barrie*, 613 P.2d at 1157.

⁸² 40 C.F.R. §§ 1502.16 (2019); see *id.* 1508.14 (2019); see *Maiden Creek Associates, L.P. v. United States Department of Transportation*, 123 F.Supp. 3d 638, 654, (E.D. Pa. 2015).

those “sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision.”⁸³ Discussing “interrelatedness,” courts have concluded that “[w]hether an impact on the ‘human environment’ must be addressed depends on the closeness of the relationship between the change in the environment and the ‘effect’ at issue.”⁸⁴ Agencies cannot avoid analysis of these impacts by improperly narrowing the scope of an EIS,⁸⁵ failing to substantively respond to comments,⁸⁶ claiming lack of authority⁸⁷ or providing “mere cursory

⁸³ See, e.g., *Sierra Club v. Marsh*, 976 F.2d 763, 767 (1st Cir. 1992); see also *Izaak Walton League of America v. Marsh*, 655 F.2d 346, 377 (D.C. Cir. 1981) (“Detailed analysis is only required where impacts are likely.”) (citation omitted), *cert. denied*, 454 U.S. 1092 (1981).

⁸⁴ *Hammond v. Norton*, 370 F. Supp. 2d 226, 243 (D.D.C. 2005), quoting *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 771–72 (1983) (internal quotations omitted); see also *Rumsfeld*, 418 F. Supp. at 1306.

⁸⁵ See, e.g., *Earth Island Institute v. U.S. Forest Serv.*, 351 F.3d 1291 (9th Cir. 2003) (impact on neighboring forest must be considered); see also *State Farm*, 463 U.S. at 43 (agencies cannot ignore large aspects problems created by project).

⁸⁶ 40 C.F.R. § 1502.9(c) (2020) (agency shall discuss “responsible opposing view that was not adequately discussed in the draft statement and shall indicate the agency’s response to the issues raised.”); *State of Cal. v. Block*, 690 F.2d 753, 773 (9th Cir. 1982) (internal citations omitted) (“(t)here must be good faith, reasoned analysis in response [to comments]”).

⁸⁷ *Sierra Club v. Mainella*, 459 F.Supp.2d 76 (D.D.C.2006) (agencies must consider impacts when “there is a reasonably close causal relationship between such impacts” and the agency actions, even when actions occur outside the project’s area); *Humane Soc. of U.S. v. Johanns*, 520 F. Supp. 2d 8, 26 (D.D.C. 2007) (same); see also CEQ, *Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations*, 46 Fed. Reg. 18026, 18027 (Mar. 23, 1981) [hereinafter CEQ, Questions] (Alternative that is outside agency’s legal

examination.”⁸⁸ As discussed *infra* in Section III, the Corps’ FEIS is inadequate for all of these reasons.

Pursuant to EO 12,898, agencies must also identify and address the impact of its actions on “minority populations and low-income populations.”⁸⁹ To comply with this Order, agencies use demographic data to identify low-income or “minority” populations and analyze whether proposed actions may disproportionately impact them.⁹⁰ In this context, impacts includes “interrelated cultural, social, occupational, historical, or economic factors that may amplify” the environmental effect of an agency’s action.⁹¹ The presence of these impacts “should heighten agency attention to alternatives (including alternative sites), mitigation strategies, monitoring needs, and preferences expressed by the affected community or population.”⁹²

EO 12,898 does not confer an independent basis for judicial review, but courts have held it reviewable under the Administrative Procedure Act when an

jurisdiction must still be analyzed in the EIS if it is reasonable.); *Natural Res. Def. Council, Inc. v. Morton*, 458 F.2d 827, 853 (D.C. Cir. 1972) (same).

⁸⁸ See, e.g., *Pyramid*, 24 A.D.3d at 1315.

⁸⁹ See EO 12,898.

⁹⁰ EJ Guidance, *supra* note 70 at 9, 14.

⁹¹ *Id.* at 9.

⁹² *Id.* at 10; see also *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 440 F. Supp. 3d 1, 9 (D.D.C. 2020) [*Standing Rock 2020*] (finding agency’s EJ analysis too narrow).

agency's NEPA analysis includes environmental justice.⁹³ These courts recognize why such review is essential: negative impacts of government action often occur in the "poor area of town, not through the area where the politically powerful people live."⁹⁴ Further, for a variety of reasons, low-income and "minority" populations are often more susceptible to the types of environmental and socioeconomic impacts agencies must consider and are least able to absorb them unscathed.⁹⁵ Therefore, agencies must take care to not only identify the risk of disproportionate impacts on these communities but also address them throughout the FEIS process.⁹⁶

II. The Corps failed to consider the PAA's impacts on downstream, low income communities.

⁹³ EO 12,898 at § 6-609; APA, 5 U.S.C. § 706(2) (courts must "hold unlawful and set aside agency action, findings, and conclusions found to be – (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law...."); see, e.g., *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 541 (2003) (reviewing adequacy of environmental justice analysis within the context NEPA); *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 255 F. Supp. 3d 101, 140 (finding the failure of the Army Corps of Engineers to take a hard look at the environmental justice implications of the project arbitrary and capricious) [*Standing Rock 2017*].

⁹⁴ *Friends of Buckingham v. State Air Pollution Control Bd.*, 947 F.3d 68, 87 (4th Cir. 2020) (internal citation omitted) (reviewing similar provisions in Virginia state law); see also *Mid States Coal.*, 345 F.3d at 541.

⁹⁵ See, e.g., *Buckingham*, 947 F.3d at 88 (recognizing that "minority" populations are at greater risk of asthma and lung cancer).

⁹⁶ *Id.* at 92 ("environmental justice is not merely a box to be checked.").

The Corps failed to take a hard look at the disproportionate impacts of its PAA on low-income communities. The Corps also treated non-environmental impacts of its project with conclusory afterthoughts, silence, or by disclaiming responsibility for them entirely. As a result, the Corps' FEIS is inadequate under NEPA.

The Corps' consideration of impacts on low-income communities is surface level at best: "For Florida, the percentage of low-income persons is higher in the basin (20.9 percent) than in the state as a whole (15.6 percent) and the state rate is higher than the nationwide poverty rate of 12.8 percent."⁹⁷ While the FEIS recognizes that higher rates of poverty are more common in rural communities, it does not compare rural Apalachicola communities to more affluent counties in Georgia. The Corps does not assess interrelated economic, cultural, or social impacts that may amplify the environmental effect of an agency's action and gives no heightened consideration to alternatives or mitigation that may lessen these impacts.⁹⁸ Such cursory treatment of low-income communities does not satisfy EO 12,898.⁹⁹

⁹⁷ FEIS at 2-253.

⁹⁸ EJ Guidance, *supra* note 70 at 9-10.

⁹⁹ *Id.*; see also *Standing Rock 2017*, 255 F.Supp.3d at 136-138 (citing E.O. 12,898 and finding the scope of the Corps' assessment too narrow);

The Corps concludes that the PAA would not have an adverse effect on low-income populations along the Apalachicola River and Bay unless it “change[d] conditions in the river and bay to the extent that populations of commercially harvested species would be adversely affected.”¹⁰⁰ However, the FEIS does not determine whether its PAA will adversely affect seafood species because “metrics to quantify potential impacts to eastern oysters, white shrimp, and other species have not been developed to date.”¹⁰¹ This abbreviated consideration also fails to satisfy EO 12,898.¹⁰²

The Corps also failed to adequately respond to comments about impacts on low-income communities in the Bay.¹⁰³ For example, one expressed concern that area residents may go hungry as a result of the Corps’ continuing refusal to increase flow to Florida: “This increasingly low-income, often multi-generational population of resource users also relies on subsistence to supplement their diets. The oystermen are facing suicide, homelessness, drug addiction, and other social

¹⁰⁰ FEIS at 6-376.

¹⁰¹ FEIS at 6-325; *see also id.* at 6-313 (illustrating, however, a long-term decrease in spawning habitat in Table 6.4-1).

¹⁰² *See generally* EJ Guidance, *supra* note 70; *Standing Rock 2017*, 255 F.Supp.3d at 136-138 (citing E.O. 12,898 and finding the scope of the Corps’ assessment too narrow).

¹⁰³ *See, e.g.*, FEIS, App’x C Vol. 4 Part 2b C-226, 258-259, 400, 729; *id.* at App’x C Vol. 4 Part 2f C-957.

ills related to resource disaster in the Apalachicola Bay.”¹⁰⁴ In response, the Corps directed the commenter to the “environmental justice discussion” summarized above,¹⁰⁵ but that discussion contains nothing more than unsupported and conclusory statements assuming lack of impact.¹⁰⁶

The non-environmental impacts described herein represent foreseeable consequences of the Corps’ PAA that are interrelated to the environmental harm it will cause.¹⁰⁷ These harms predate the FEIS and are caused by the Corps’ persistent refusal to send more water from upstream sources.¹⁰⁸ Given that the PAA will send even less water to the region,¹⁰⁹ worsening non-environmental impacts

¹⁰⁴ FEIS at App’x C Vol. 4 Part 2b C-259.

¹⁰⁵ *Id.*

¹⁰⁶ 40 C.F.R. § 1502.9(c) (2020) (FEIS must address comments) 40 C.F.R. § 1502.3.4 (2020) (manner of response); *Center for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1168 (9th Cir. 2003) (Agencies must “disclose and discuss the responsible opposing views in the final impact statement.”) *Block*, 690 F.2d at 773 (“There must be good faith, reasoned analysis in response [to comments]”); *Nat’l Wildlife*, 440 F. Supp. at 1253 (finding mere admission of impacts insufficient).

¹⁰⁷ *See, e.g., Sierra Club*, 976 F.2d at 767 (defining foreseeability to include effects “sufficiently likely to occur”); *Hammond*, 370 F. Supp. 2d 226 (examining “closeness of the relationship between the change in the environment and the ‘effect’ at issue.”).

¹⁰⁸ *Kentucky Riverkeeper, Inc. v. Rowlette*, 714 F.3d 402 (6th Cir. 2013) (past actions must be considered).

¹⁰⁹ *See Conservation Plaintiff’s SJM* at 46.

are “sufficiently likely” such that the Corps should have taken them into account.¹¹⁰

The Corps’ FEIS illustrates this point. For example, the agency recognizes the oyster decline,¹¹¹ but does not take the rational next step to ask what non-environmental harms may flow from it or assess how “aggregate effects of past actions” may have caused it.¹¹² The agency also acknowledges that low flow has caused tree loss suffered throughout the floodplain but does not question whether the losses will have economic consequences.¹¹³ The FEIS also fails to adequately consider the impacts its past water management practices have had on the current state of the River System and Apalachicola communities.¹¹⁴ NEPA regulations require the Corps to ask these questions.¹¹⁵

The Corps attempts to avoid the foreseeability requirement by disclaiming responsibility for the harm it has caused. In response to public comment, the Corps

¹¹⁰ See, e.g., *Sierra Club*, 976 F.2d at 767.

¹¹¹ FEIS at 2-244 (“The National Agricultural Statistical Service reported sales revenue of oysters in Franklin County of \$302,000 in its 2012 survey. This is down from over \$600,000 in its 2007 survey”).

¹¹² CEQ, *Guidance on the Consideration of Past Actions in Cumulative Impacts Analysis*, 1-2 (2005), available at <http://energy.gov/nepa/downloads/guidance-consideration-past-actions-cumulative-effects-analysis>.

¹¹³ *Rumsfeld*, 418 F. Supp. at 1305.

¹¹⁴ *League of Wilderness Defenders-Blue Mountains Biodiversity Project v. U.S. Forest Serv.*, 549 F.3d 1211, 1218 (9th Cir. 2008) (must consider past projects).

¹¹⁵ 40 C.F.R. § 1500.2(d) (2019), 1508.7 (2019); *American Rivers*, 895 F.3d at 49.

states that “Apalachicola Bay is not a part of the ACF system and [] the authorized purposes of the ACF system do not include a specific directive to provide freshwater inflows to Apalachicola Bay to sustain the resources of the bay.”¹¹⁶ The Corps cannot avoid consideration of foreseeable impacts on the Bay by narrowly defining the geographic scope of its responsibility.¹¹⁷

These omissions violate NEPA’s requirement that agencies identify the *total* impacts of their actions and deprived the public of a forthright account of potential harms.¹¹⁸

CONCLUSION

The Corps’ failure to adequately identify and analyze the social, cultural and economic harms suffered by the *amici* was arbitrary and capricious and renders its FEIS inadequate. For the foregoing reasons, *amici* respectfully submit this brief in support of the Plaintiffs.

¹¹⁶ FEIS at App’x C Vol. 4 Part 2e C-830.

¹¹⁷ *Earth Island*, 351 F.3d 1291 (impact on neighboring forest must be considered); *Mainella*, 459 F.Supp.2d 76 (agencies must consider impacts with close relationship to its actions); *see also State Farm*, 463 U.S. at 43 (agencies cannot ignore large aspects problems created by project).

¹¹⁸ *State Farm*, 463 U.S. at 43 (agency action is arbitrary and capricious if it “entirely failed to consider an important aspect of the problem”); *Standing Rock 2017*, 255 F. Supp. 3d at 113; *Standing Rock 2020*, 440 F. Supp. 3d at 8; *American Rivers*, 895 F.3d at 49.

This 15th day of January, 2021.

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This brief complies with the type-volume limitations of L.R.7.1(D) because it is 25 pages, as determined by Microsoft Word 2020, excluding the parts of the brief exempted by Fed. R. Civ. P. 32(f).

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Dated: January 15, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on January 15, 2021, I electronically filed the foregoing Brief of Amici Curiae in Support of Plaintiffs using the Court's CM/ECF system, which will serve notice of the filing to all registered users.

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