



Tulane Environmental Law Clinic

May 4, 2009

Via U.S. Mail, Fax (504)862-2088 and e-mail to richard.e.boe@usace.army.mil.

Mr. Richard Boe
U.S. Army Corps of Engineers
P.O. Box 60267
New Orleans, LA 70160-0267

Re: **Comments on the Final Supplemental Environmental Impact Statement for the Inner Harbor Navigation Canal Lock Replacement Project on behalf of Holy Cross Neighborhood Association, Gulf Restoration Network and Louisiana Environmental Action Network.**

Dear Mr. Boe:

On behalf of the Holy Cross Neighborhood Association,¹ the Gulf Restoration Network,² and the Louisiana Environmental Action Network,³ please consider the following comments on the Final Supplemental Environmental Impact Statement ("FSEIS") for the Inner Harbor Navigation Canal Lock Replacement Project. For the reasons set forth below, Holy Cross, Gulf Restoration Network, and Louisiana Environmental Action Network oppose the lock replacement project on the grounds that the Corps' FSEIS and recommended plan violate the National Environmental Protection Act, the Clean Water Act, and the Corps' own guidance. We reserve the right to rely on all comments submitted, including those we previously submitted, and we request notification of issuance of the Record of Decision.

¹ The Holy Cross Neighborhood Association is a non-profit corporation composed of residents of the Holy Cross neighborhood. Holy Cross Neighborhood Association is dedicated to making their community the best place in the city to live and raise a family.

² The Gulf Restoration Network is a non-profit corporation committed to uniting and empowering people to protect and restore the valuable resources of the Gulf of Mexico. The Gulf Restoration Network has members in the five Gulf States of Texas, Louisiana, Mississippi, Alabama and Florida.

³ Louisiana Environmental Action Network ("LEAN") is a non-profit corporation organized under the laws of the State of Louisiana. LEAN serves as an umbrella organization for environmental and citizen groups. LEAN's purpose is to preserve and protect the state's land, air, water, and other natural resources, and to protect its members and other residents of the state from the threats of pollution. LEAN has members statewide, including members who live, work, or recreate in the project area.

I. THE CORPS' FINAL SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT DOES NOT COMPLY WITH THE NATIONAL ENVIRONMENTAL POLICY ACT BECAUSE IT DOES NOT CONSIDER ALL REASONABLE ALTERNATIVES.

Under the National Environmental Protection Act (NEPA), all agencies undertaking a major federal action significantly affecting the environment are required to create "a detailed statement by the responsible official on...alternatives to the proposed action." 42 U.S.C § 4332 (C)(iii). This requires agencies to "rigorously explore and objectively evaluate all reasonable alternatives." 40 C.F.R. § 1502.14(a). The purpose of the alternatives requirement is "to allow agency officials to make a fully informed and well-considered decision." *Concerned Citizens Coalition v. Federal Highway Admin.*, 330 F.Supp.2d 787, 796 (W.D. La 2004); *Vt. Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558 (1978). Under NEPA, alternatives "are to be evaluated in relation to the objectives of the proposed project, as described in the EIS." *Concerned Citizens Coalition*, F.Supp.2d 787 at 796. This requirement is limited only to the extent that an agency must consider "reasonable, non-speculative" alternatives. *Id.* Because a shallow draft lock is a reasonable alternative that would accomplish the same objectives as a deep draft lock, the Corps' failure to consider it in its FSEIS renders the analysis inadequate under NEPA.

A. A Shallow Draft Lock is a Reasonable Alternative.

In 1997, the Corps examined the possibility of building locks of various sizes, ranging from a shallow, 22-foot deep lock to a 36-foot deep, deep-draft lock. *See* 1997 Final Environmental Impact Statement, abstract . The 22-foot deep lock was the national economic development plan option because it had the best benefit-cost ratio. *Id.* Yet, in 1997 the Corps selected the 36-foot deep lock as the "tentatively selected plan" because the port of New Orleans preferred that alternative, and the Port "would be responsible for its added incremental cost." *Id.*

When the Corps completed its FSEIS twelve years later, it failed to consider the alternative of building a shallow lock and failed to explain why it was not considering the shallow lock as an alternative, especially given the changed circumstances over the past twelve years. First, the Mississippi River Gulf Outlet has been deauthorized for deep-draft navigation. *See* FSEIS, vol. 6, App. O at O-4. Second, the Corps acknowledges that "WRDA of 2007 authorized funds to be appropriated to the Assistant Secretary of Economic Development to support the relocation of Port of New Orleans deep draft facilities from the MRGO, the GIWW and the INHC to the Mississippi River." FSEIS, vol. 6, App. Q at Q-8. Third, the Corps admits that the project provides no deep-draft navigation benefits. *See* FSEIS, vol. 6, App. O at O-5 ("[T]his SEIS assumes no deep draft benefits associated with the authorized plan over the period of analysis."). Fourth, the Corps now claims that the Port of New Orleans only needs to pay "25

percent of the incremental construction costs for the deep-draft portion of the project.” FSEIS, vol. 1 at 35.

The Corps' stated project purpose and need is “to reduce or eliminate delays to navigation,” “to avoid and minimize relocation and other impacts on local residents and businesses,” “to avoid and minimize environmental impacts [to] the maximum extent practicable,” and “to design and recommend appropriate mitigation measures.” FSEIS, vol. 1 at 23. The Corps has failed to explain why a 22-foot deep lock originally considered would not meet the project's purpose and need and is no longer a practicable alternative. The Corps has also failed to explain why it is recommending a deep draft lock given the changed circumstances. The Corps has failed to comply with NEPA because it failed to consider the practicable alternative of building a shallow draft lock and failed to explain why it is recommending a deep draft lock given the changed circumstances. *See* 40 C.F.R. § 1502.14(a).

The Corps' narrow analysis in its FSEIS illustrates why the Corps needed to complete an entirely new environmental impact statement instead of attempting to “supplement” outdated analysis in its 1997 Environmental Impact Statement. Courts have invalidated past environmental analyses that relied on information that was too old. *See Oregon Natural Resources Council Action v. U.S. Forest Service*, 445 F. Supp. 2d 1211, 1232 (D. Or. 2006) (questioning the validity of environmental assessments over ten years old); *see also Portland Audubon Society v. Espy*, 998 F.2d 699, 70304 (9th Cir. 1993) (overturning decision which “rests on stale scientific evidence”).

B. Congressional Authorization Does Not Absolve the Corps of its NEPA Obligation to take a Hard Look at the Environmental Impacts of the Project.

The Corps notes that “[w]hen Congress authorized the project in Section 844 of WRDA of 1986, it authorized a new lock to replace the existing deep-draft lock.” FSEIS, vol. 1 at 35. However, that authorization does not absolve the Corps of its duty to comply with NEPA's requirement that every environmental impact statement address and evaluate all reasonable alternatives in great detail. 42 U.S.C.A § 4332. As the Fifth Circuit stated in *Sierra Club v. Froehlke*, “absent explicit exemption from NEPA, the agency must still complete an independent good faith hard look at the environmental consequences of the project.” 816 F.2d 205, 215 (5th Cir. 1987). This hard look necessarily includes evaluating reasonable alternatives to the proposed action that would minimize the environmental impacts. *See City of Shoreacres v. Waterworth*, 420 F.3d 440, 450 (5th Cir. 2005) (“The importance of the alternatives analysis is reflected in our three-part test for evaluating an EIS, which requires *inter alia*, determining whether the agency in good faith objectively has taken a hard look at the environmental consequences of a proposed action and alternatives.”) Because the Corps failed to consider a shallow draft lock in its FSEIS, the Corps failed to adequately take a hard look at the environmental consequences of the proposed project and failed to comply with NEPA.

C. The Corps' Failure to Provide Reasons for Eliminating a Shallow Draft Lock as an Alternative Violates NEPA.

NEPA requires the Corps to "discuss the reasons for [alternatives] having been eliminated" from its detailed study. 40 C.F.R. §1502.14 (a). The Corps' failure to explain why it eliminated the alternative of building a smaller lock violates NEPA. *See* 40 C.F.R. §1502.14 (a).

II. THE CORPS' FAILURE TO SELECT A SHALLOW-DRAFT LOCK AS THE PREFERRED ALTERNATIVE VIOLATES THE 404(B)(1) GUIDELINES.

The Corps' failure to select the practicable alternative with the fewest adverse impacts to the aquatic ecosystem and to take all appropriate and practicable steps to minimize potential adverse impacts of the discharge on the ecosystem violates federal regulations.

A. The 404(b)(1) Guidelines Mandate that the Corps Select the Practicable Alternative with the Least Adverse Impacts to the Aquatic Ecosystem.

Federal regulations mandate that the Corps must comply with the 404(b)(1) guidelines when it authorizes its own discharges of dredged or fill material. *See* 33 C.F.R. § 336.1. The 404(b)(1) guidelines prohibit the Corps from discharging dredged or fill material "if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences." 40 C.F.R. 230.10(a).

The guidelines also prohibit the Corps from discharging dredged or fill material "unless appropriate and practicable steps have been taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystem." 40 C.F.R. 230.10(d). Under the regulations, one way to minimize the effects of the discharges is to "limit[] the solid, liquid, and gaseous components of material to be discharged at a particular site." 40 C.F.R. 230.71(b).

B. A Shallow Draft Lock Is a Practicable Alternative that Would Have Fewer Aquatic Impacts than a Deep Draft Lock.

1. A Shallow Draft Lock Would Have Fewer Aquatic Impacts than a Deep Draft Lock.

By the Corps' own estimate, the deep-draft lock proposals will require the Corps to dredge and dispose of approximately 3,400,000 cubic yards of material. *See* FSEIS, vol. 1 at 49. According to the Corps' 1997 Environmental Impact Statement, a shallow-draft lock would only require the Corps to dredge and dispose of 1,533,000 cubic yards of material. *See* 1997 EIS at 85, Tbl 9.

The lock replacement project's major impacts to aquatic ecosystem stem from dredging the canal and destroying wetlands by building the so-called "confined disposal facility." *See* Declaration of Barry Sulkin, M.S., attached as Exhibit A, at ¶ 17. Dredging and discarding 1,533,000 cubic yards of material would have fewer adverse impacts on the aquatic ecosystem than dredging and discarding 3,400,000 cubic yards of material. *See* Sulkin Dec. at ¶ 18. The smaller amount of dredged material would lead to a smaller confined disposal facility that destroys fewer wetlands, and there would be less contaminated material stirred up, exposing aquatic life to fewer contaminants.

The Corps fails to provide evidence to support its conclusion that "the proposed project represents the least environmentally damaging practicable alternative." FSEIS, vol. 6, App. Q at Q-66. *See* Sulkin Dec. at ¶ 22. On the contrary, the evidence shows that a smaller, shallow-draft lock would have fewer aquatic impacts than a deep-draft lock.

2. A Shallow Draft Lock is a Practicable Alternative.

The Corps has failed to show that a shallow draft lock is not a practicable alternative. *See* Sulkin Dec. at ¶ 19. On the contrary, in its 1997 Environmental Impact Statement, the Corps considered both a 22-foot deep lock a practicable alternative. *See* 1997 EIS at EIS-34, EIS-85.

In the FSEIS, the Corps mischaracterizes the conclusions it made in the 1997 Environmental Impact Statement. In the 1997 Environmental Impact Statement, the Corps concluded that the shallow-draft (22-foot deep) lock with a length of 900 feet and width of 100 feet was "designated as the National Economic Development plan because it produces the greatest net benefits over costs of any of the plans considered in detail." *See* 1997 EIS at EIS-34. In the 1997 Environmental Impact Statement, the largest lock size investigated in detail (1200-by 110- by 36 feet) was the Port of New Orleans' preferred plan. *Id.* The Corps in the FSEIS incorrectly states that the largest lock was both the "recommended plan" and the "locally preferred plan." *See* FSEIS, vol. 1 at 35.

C. A Shallow Draft Lock May Make Clamshell Dredging a Practicable Alternative that Would Have Fewer Impacts on the Aquatic Environment Than Hydraulic Dredging.

If the project involves dredging and discarding a smaller amount of material, "clamshell" or "bucket" dredging—techniques that would further reduce the impact on the aquatic environment—may become practicable alternatives to hydraulic dredging. *See* Sulkin Dec. at ¶ 23. The Corps claims that it cannot use the less environmentally-damaging dredging method—clamshell or bucket dredging—because of "the large volumes of material proposed to be dredged over the life of the project." *See* FSEIS, vol. 1 at 48. By dredging less material for a shallow-draft lock, the Corps could realistically use a bucket or clamshell dredge instead of hydraulic dredging.

Further, the Corps failed to explain in the FSEIS why clamshell or bucket dredging is not a practicable alternative for the most contaminated sediments. *See* Sulkin Dec. at ¶ 25. Even if hydraulic dredging is not a practicable alternative for all of the DMMUs, the Corps has failed to explain why bucket dredging is not a practicable alternative for the most contaminated DMMUs—numbers 1, 2, 5, and 7.

D. The Corps Must Dispose of the Most Contaminated Sediments in a Landfill.

The Corps must select the landfill disposal alternative for the most contaminated sediments because it will have fewer impacts on the aquatic ecosystem and the Corps has not demonstrated that it is not practicable to dispose of DMMUs 1, 2, 5, and 7 in a Type I or Type II landfill. *See* Sulkin Dec. at ¶ 26. The Corps has examined the possibility of placing contaminated dredged material in a landfill. *See* FSEIS, vol. 4, App. F. The Corps has not demonstrated that this is not a practicable alternative for disposal. Further, the Corps added in the cost of dewatering the material, but if the Corps uses bucket dredging, the material would not need to be dewatered and the cost would be lower.

E. The Corps Must Examine Alternative Locations for the Confined Disposal Facility.

The Corps failed to explain in the FSEIS why there are no alternative locations for a confined disposal facility. *See* Sulkin Dec. at ¶ 24. It failed to detail other places where it attempted to locate the confined disposal facility and explain why it ruled out those other locations. *See* Sulkin Dec. at ¶ 24. Because the dredged material disposal will lead to significant environmental impacts, the Corps was bound, under both NEPA and the Clean Water Act, to examine alternative locations for the facility and explain why it eliminated each of the alternatives. *See* 40 C.F.R. § 1502.14(a); 40 C.F.R. 230.10.

III. THE CORPS' SELECTION OF THE FLOAT-IN-PLACE, DEEP DRAFT LOCK VIOLATES THE CORPS' OWN GUIDANCE.

The Corps' own guidance recognizes that “[f]or all project purposes except ecosystem restoration, the alternative that reasonably maximizes net economic benefits consistent with protecting the Nation’s environment, the NED plan, *shall be selected.*” *See* Engineering Regulation 1105-2-100, April 22, 2000, at 2-7, *available at* <http://140.194.76.129/publications/eng-regs/er1105-2-100/c-2.pdf>. In this case, the NED plan is a shallow-draft lock 22-feet deep, 110 feet wide and 900 feet long. *See* 1997 EIS at EIS-34.

The Corps' regulations acknowledge that “[t]he Assistant Secretary of the Army for Civil Works... may grant an exception when there are overriding reasons for selecting another plan based upon other Federal, State, local, and international concerns.” *See id.* Specifically, projects may deviate from the NED plan “if requested by the local sponsor.” *Id.* at 2-8. However, “[i]n all cases, the L[ocally] P[referred] P[lan] must have greater net benefits than smaller scale plans, and enough alternatives must be analyzed during the formulation and evaluation process to

insure that net benefits do not maximize at a smaller scale than the sponsor's preferred plan." *Id.* Corps guidance also requires that the Assistant Secretary of the Army for Civil Works "may grant an exception as long as the sponsor pays the difference in cost between [the NED plan] and the locally preferred plan." *Id.*

Here, Assistant Secretary of the Army for Civil Works John Paul Woodley, Jr. has not yet granted an exception for the Corps to select the locally preferred plan over the NED plan. Further, Assistant Secretary of the Army for Civil Works Woodley may not grant such an exception in this case because the locally preferred plan does not have greater net benefits than the smaller plan and the Corps is proposing that the Port of New Orleans only needs to pay "25 percent of the incremental construction costs for the deep-draft portion of the project," FSEIS, vol. 1 at 35, instead of the entire incremental cost, as required by Corps guidance. *See* Engineering Regulation 1105-2-100, April 22, 2000, at 2-8. Further, in the event the Corps chooses the locally preferred plan even though it may not do so according to its guidance, it must fully document its rationale for making that decision and make that documentation available to the public.


The Corps also failed to include all of the required accounts in the EIS and FSEIS: (1) Public Safety (PS): The safety of populations at risk; (2) National Economic Development (NED): The effects on the national economy; (3) Environmental Quality (EQ): The effects on the ecological, cultural, aesthetic and other attributes of natural and cultural resources.; (4) Regional Economic Development (RED): The effects on the regional economy, including income effects, income transfers, and employment effects not addressed in the NED account, and (4) Other Social Effects (OSE): The effects on the urban or communities quality of life and health. *See* Corps' Principles and Guidelines, *available at* http://www.usace.army.mil/CECW/Documents/pg/pg_draft.pdf. By failing to make a full accounting of the costs and benefits of the project, the Corps has made an end-run around its planning process in order to select an alternative that produces no more benefits than a smaller lock and has significantly greater impacts on the aquatic environment and the local community.

CONCLUSION

The Holy Cross Neighborhood Association, the Gulf Restoration Network, and the Louisiana Environmental Action Network respectfully request that the Corps seriously reevaluate its recommended plan for the Inner Harbor Navigation Canal Lock Replacement Project. The Corps has violated (1) the National Environmental Policy Act by not considering all practicable alternatives, (2) federal regulations because it failed to select the practicable alternatives with the least adverse impact to the aquatic environment, and (3) the Corps' own guidance and policies by selecting the plan that was locally preferred back in 1997 despite changed circumstances and by failing to make a full accounting of the project's impacts. Given the serious flaws in the Corps' planning and selection process, the Holy Cross Neighborhood Association, the Gulf Restoration Network, and the Louisiana Environmental Action Network urge the Corps to go back to the drawing board, comply with all applicable laws, and seriously reevaluate its recommendations with regard to the project.


Mr. Richard Boe
Re: Holy Cross Neighborhood Ass'n, GRN, and LEAN Comments on Industrial Canal Lock Replacement Project
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