



NATIONAL WILDLIFE FEDERATION®

National Advocacy Center
1990 K Street N.W, Suite 430
Washington D.C. 20006
202-797-6800
www.nwf.org

March 2, 2015

Via Email: Mark.H.Lahare@usace.army.mil

U.S. Army Corps of Engineers (PDC-CEC)
New Orleans District
P.O. Box 60267
New Orleans, LA 70160-0267

RE: Scoping Comments for the Draft Supplemental Environmental Impact Statement and General Reevaluation Report for the Mississippi River, Baton Rouge to the Gulf of Mexico Mississippi River-Gulf Outlet, Louisiana New Industrial Canal Lock and Connecting Channels Project

Dear Mr. Lahare:

The National Wildlife Federation appreciates the opportunity to submit these comments on the scope of the Supplemental Environmental Impact Statement and General Reevaluation Report, for the Mississippi River, Baton Rouge to the Gulf of Mexico Mississippi River-Gulf Outlet, Louisiana New Industrial Canal Lock and Connecting Channels Project ("EIS and GRR").

The National Wildlife Federation (NWF) is the nation's largest conservation education and advocacy organization. NWF has almost six million members and supporters and conservation affiliate organizations in forty-nine states and territories. NWF has a long history of working to modernize federal water resources planning to protect the nation's coasts, rivers, wetlands and floodplains, and the fish and wildlife that depend on those vital resources.

General Comments

While NWF recognizes the importance and value of an efficient navigation system, we have consistently opposed earlier proposals for a new lock at the Inner Harbor Navigation Canal due to the significant adverse impacts to local communities, the significant adverse impacts to the environment, and the inability of the proposals to provide a positive return on the taxpayer's investment. NWF believes that the evaluation of improving navigational efficiencies, including for the Gulf Intracoastal Waterway, should first assess (and, if appropriate, adopt) low impact, non-structural approaches and in all instances ensure protection of public safety, community cohesion, and vital fish and wildlife resources. Such studies should also fully assess the very real implications of significant competing water resources priorities and severely limited prospects for obtaining adequate funding, including the many competing priorities for the Inland Waterway Trust Fund.

NWF believes that reinitiating planning for this project is unlikely to achieve these important goals given the long history of problems associated with previous U.S. Army Corps of Engineers (Corps) studies and

the apparent bias for a new lock that is evidenced in the Federal Register Notice announcing the project study. This is particularly problematic given the significant unmet restoration needs for coastal Louisiana, including for the Mississippi River-Gulf Outlet, and the overwhelming community opposition to constructing a new lock. As a result, NWF urges the Corps to reconsider its decision to proceed with this planning process.

However, should this planning process move forward, NWF urges the Corps to ensure that the analyses in the EIS and GRR are not driven by the existing bias for constructing a new lock. This bias is evidenced in the Corps' stated purpose for carrying out these studies: "to determine if construction of a more efficient navigational lock to replace the existing lock is economically justified and environmentally acceptable." 80 Fed. Reg. 4911, 4912 (Jan. 29, 2015).

NWF urges the Corps to utilize a different, more accurate, project purpose for both the GRR and EIS: "to maintain navigation along the Gulf Intracoastal Waterway in the vicinity of the Mississippi River." The GRR should comprehensively examine whether there is a need for a new project for this purpose, and if so, examine the most appropriate and least damaging approaches pursuant to the requirements and priorities established by current law, planning criteria, federal policies, and modern science.

The EIS should comprehensively evaluate the direct, indirect, and cumulative impacts for all reasonable alternatives before the Corps determines whether or how to proceed with a project. The Corps should not rely on the previous environmental impact statements prepared for this project, both of which were rejected by the courts. Instead, a new EIS should be prepared that is untainted by the failings and biases of the earlier reviews.

The independent external peer review that is clearly required for the EIS and GRR pursuant to 33 U.S.C. § 2343, should be conducted by the National Academy of Sciences. This panel should be charged with evaluating the appropriateness of the alternative recommended by the Corps; whether the selected alternative will protect and restore the functions of the affected natural systems; whether the selected alternative includes a detailed mitigation plan that is likely to produce ecologically successful mitigation; and whether the selected alternative will protect the health and safety of the residents in the affected communities and the cohesion of those communities.

Specific Comments

As the Corps is aware, the courts have rejected both the 1998 and 2009 EISs prepared by the Corps for this project. There have also been dramatic changes in the human and natural environment that would be affected by the project since these EISs were prepared (and since the project was originally authorized in 1954). For these reasons, NWF urges the Corps not to rely on the earlier EISs. The Corps should instead comprehensively examine all reasonable alternatives, the project's impacts, and the project's costs and benefits anew.

A. Redefine the Project Purpose and Use the Studies to Determine Need

To comply with the requirements of NEPA and satisfy the purpose of the GRR, the Corps must revise the project purpose and abandon its premature and unsupported statement of project need.

1. The Corps Should Revise the Project Purpose

The stated purpose of the review presupposes that a new lock should be constructed and forecloses a reasonable consideration of alternatives in violation of NEPA. According to the Federal Register Notice, the “purpose of the General Reevaluation Report and SEIS is to determine if construction of a more efficient navigational lock to replace the existing lock is economically justified and environmentally acceptable. 80 Fed. Reg. 4911, 4912 (Jan. 29, 2015).

This improper assumption that a new lock should be constructed violates the very purpose of an EIS which is to ensure that the decision makers and the public understand the environmental consequences of an action before a decision is made on whether or how to proceed. An EIS may “not be used to rationalize or justify decisions already made.” 40 C.F.R. § 1502.5. This fundamental purpose of NEPA is thwarted if the project purpose dictates a specific outcome. In this case, the Corps has established a project purpose that improperly dictates construction of a “more efficient navigational lock.”

This overly narrow project purpose will also thwart the NEPA alternatives analysis, which is “the heart of the environmental impact statement.”¹ The project purpose drives the evaluation of alternatives because an EIS must examine all reasonable alternatives that accomplish the project purpose, but need not examine alternatives that are not reasonably related to the project purpose:²

“One obvious way for an agency to slip past the strictures of NEPA is to contrive a purpose so slender as to define competing “reasonable alternatives” out of consideration (and even out of existence). . . . If the agency constricts the definition of the project’s purpose and thereby excludes what truly are reasonable alternatives, the EIS cannot fulfill its role. Nor can the agency satisfy the Act. 42 U.S.C. § 4332(2)(E).”³

As a result, the courts have made it clear that an agency may not define a project so narrowly that it “forecloses a reasonable consideration of alternatives.”⁴ An agency also may not define the project’s purpose so narrowly that it makes the final EIS “a foreordained formality.”⁵

¹ 40 C.F.R. § 1502.14.

² *Methow Valley Citizens Council v. Regional Forester*, 833 F.2d 810, 815-16 (9th Cir. 1987).

³ *Simmons v. United States Army Corps of Eng’rs*, 120 F.3d 664, 666 (7th Cir. 1997); *City of Carmel-by-the-Sea v. United States Dep’t of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997) (“an agency cannot define its objectives in unreasonably narrow terms”); *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 195-96 (D.C. Cir. 1991), *cert. denied*, 502 U.S. 994 (1991) (“an agency may not define the objectives of its action in terms so unreasonably narrow that only one alternative from among the environmentally benign ones in the agency’s power would accomplish the goals of the agency’s action”); *City of New York v. United States Dep’t of Transp.*, 715 F.2d 732, 743 (2d Cir. 1983), *cert. denied*, 456 U.S. 1005 (1984) (“an agency will not be permitted to narrow the objective of its action artificially and thereby circumvent the requirement that relevant alternatives be considered”).

⁴ *Fuel Safe Washington v. Fed. Energy Regulatory Comm’n*, 389 F.3d 1313, 1324 (10th Cir. 2004) (quoting *Davis v. Mineta*, 302 F.3d 1104, 1119 (10th Cir. 2002); *Citizens’ Comm. To Save Our Canyons v. U.S. Forest Serv.*, 297 F.3d 1012, 1030 (10th Cir. 2002); *Simmons v. United States Army Corps of Eng’rs*, 120 F.3d 664, 666 (7th Cir. 1997); *City of New York v. United States Dep’t of Transp.*, 715 F.2d 732, 743 (2d Cir. 1983), *cert. denied*, 456 U.S. 1005 (1984) ((holding that “an agency may not narrow the objective of its action artificially and thereby circumvent the requirement that relevant alternatives be considered”); *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991), *cert. denied* 502 U.S. 994 (1991).

⁵ *City of Bridgeton v. FAA*, 212 F.3d 448, 458 (8th Cir. 2000) (quoting *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991), *cert. denied* 502 U.S. 994 (1991); citing *Simmons v. U.S. Army Corps of Eng’rs*, 120 F.3d 664, 666 (7th Cir. 1997)).

Similarly, the purpose of a GRR is to determine whether a previously authorized project is appropriate and justified under current law, planning criteria, and policies. ER 1105-2-100 (22 April 2000) at 4-2.⁶ This requires a fundamental reevaluation of the project that should not be initiated with, or based upon, a bias towards constructing the project under review.

It is relevant to the project purpose that the Inland Waterway Trust Fund is the only viable non-federal sponsor, and that the Corps has asserted the regional value of the existing lock as providing “a continuous route for east and west bound vessels to follow the Gulf Intracoastal Waterway and cross the Mississippi River.”⁷ As a result, a more appropriate project purpose would be “to maintain navigation along the Gulf Intracoastal Waterway in the vicinity of the Mississippi River.”

2. The Corps Should Abandon the Premature Statement of Project Need

The Federal Register Notice states: “The need for the Project arises from long navigation delays in passage through the Industrial Canal due to an increase in volume of vessel traffic and the small size and inefficiencies of the current lock.” 80 Fed. Reg. 4911, 4912 (Jan. 29, 2015). The Corps should abandon this premature and unsupported conclusion regarding the need for a new lock and instead use the GRR and EIS process to analyze whether any project is both needed and in the national interest (and thus appropriate for federal investment).

A fundamental purpose of the GRR is to determine whether the project is in fact needed (*i.e.*, in the national interest). The EIS is, of course, equally critical for determining project need and national interest, including assessing the project’s environmental costs and any potential benefits. Both the EIS and GRR should include a comprehensive assessment of whether any project is in fact needed, identify the least environmentally damaging alternative, and ensure that any project that is recommended for construction complies with the National Water Resources Policy and other applicable laws and current planning criteria and policies.

The EIS and GRR must account for the fundamental and significant changes that have taken place since the project was first authorized in making an assessment of project need. These changes include, but are not limited to: (1) the region’s catastrophic and ongoing loss of wetlands and the critical need to restore Louisiana’s coastal wetlands as outlined in *Louisiana’s 2012 Comprehensive Plan for a Sustainable Coast*; (2) the closure of the Mississippi River Gulf Outlet (MRGO) and the Congressional mandate to restore the damage caused by the MRGO; (3) the extensive impacts of Hurricane Katrina on the communities that would be most affected by the project; and (4) significant competing priorities for federal water resources investments nationally and within the region, and significant competing priorities for the Inland Waterway Trust Fund.

⁶ A GRR documents the results of a “General Reevaluation” which “is reanalysis of a previously completed study, using current planning criteria and policies, which is required due to changed conditions and/or assumptions. The results may affirm the previous plan; reformulate and modify it, as appropriate; or find that no plan is currently justified.” ER 1105-2-100 (22 April 2000) at 4-2.

⁷ USACE Public Scoping Presentation, *Inner Harbor Navigation Canal Lock Replacement Project, New Orleans, LA*, dated 1 May 14.

B. Rigorously Evaluate All Reasonable Alternatives and Ensure that Any Selected Alternative Complies with Current Law, Policies, and Planning Criteria

The consideration of alternatives is “the heart of the environmental impact statement,” and to satisfy the requirements of NEPA the EIS must “[r]igorously explore and objectively evaluate all reasonable alternatives.” 40 C.F.R. § 1502.14. “[T]he existence of reasonable but unexamined alternatives renders an EIS inadequate.”⁸ “Reasonable alternatives include those that are practical or feasible from a technical and economic standpoint and using common sense, rather than simply desirable from the standpoint of the applicant.”⁹

Key alternatives that should be examined in depth and given full consideration include:

1. The no action alternative
2. Establishment and implementation of a crew and lock operator training system focused on reducing lockage times
3. Establishment of a lock scheduling system (with or without training to reduce lockage times)
4. Major rehabilitation and/or refurbishing of the existing lock consistent with its original design.

The EIS **must** include mitigation for any unavoidable adverse impacts as required by 33 U.S.C. § 2283(d) and the Clean Water Act. The EIS should also provide the construction and full life cycle maintenance costs of each alternative to assist the public and decision makers in assessing the full impact of each alternative.

Critically, any alternative ultimately recommended by the EIS must comply with the full suite of federal laws and policies designed to protect the environment. These include, the Clean Water Act, the Migratory Bird Treaty Act, the Endangered Species Act, the Resource Conservation and Recovery Act (covering the disposal of hazardous wastes), and the requirements of the various Water Resources Development Acts. Any alternative ultimately selected would also need to obtain a Clean Water Act water quality certification from the state of Louisiana and a Coastal Zone Management Act consistency determination before it could be constructed.

To comply with the National Water Resources Planning Policy, the EIS must select an alternative that protects and restores the functions of the natural systems that would be affected and that mitigates any unavoidable damage. 42 USC 1962–3. The National Water Policy established by Congress in 2007 states that “all water resources projects” shall “protect[] and restor[e] the functions of natural systems and mitigat[e] any unavoidable damage to natural systems.” 33 U.S.C 1962-3 (established by § 2031(a) of the Water Resources Development Act of 2007, and immediately applicable to all water resources projects).¹⁰

⁸ *Ctr. for Biological Diversity v. United States Dep't of the Interior*, 623 F.3d 633, 642 (9th Cir. 2010); *Westlands Water Dist. v. U.S. Dep't of Interior*, 376 F.3d 853, 868 (9th Cir. 2004); *Morongo Band of Mission Indians v. Fed. Aviation Admin.*, 161 F.3d 569, 575 (9th Cir. 1998); *Oregon Natural Desert Ass'n v. Bureau of Land Management*, 531 F.3d 1114, 1121 (9th Cir. 2008).

⁹ *Forty Most asked Questions Concerning CEQ's NEPA Regulations*, 46 Fed. Reg. 18,026 (March 23, 1981).

¹⁰ Enhancement of the environment has been an important federal objective for water resources programs for decades. Corps regulations in place since 1980 state that: “Laws, executive orders, and national policies

To comply with the Corps' civil works mitigation requirements, the EIS must include a specific mitigation plan that complies with the mitigation plan requirements established by 33 U.S.C. § 2283(d) and the mitigation plan requirements of the Clean Water Act, including those established in 33 C.F.R. Part 332. These mitigation requirements were established by § 2036(a) of the Water Resources Development Act of 2007, and are applicable, *inter alia*, whenever the Corps recommends a project alternative in an EIS or supplemental EIS. A summary of these requirements can be found at Attachment A to these comments.

The independent external peer review that is clearly required for the EIS and GRR pursuant to 33 U.S.C. § 2343 should be conducted by the National Academy of Sciences. This panel should be charged with evaluating the appropriateness of the alternative recommended by the Corps; whether the selected alternative will protect and restore the functions of the affected natural systems; whether the selected alternative includes a detailed mitigation plan that is likely to produce ecologically successful mitigation; and whether the selected alternative will protect the health and safety of the residents in the affected communities and the cohesion of those communities.

The EIS and GRR must also account for the new Federal Flood Risk Management Standard, established by the January 30 2015 Executive Order entitled "*Establishing A Federal Flood Risk Management Standard And A Process For Further Soliciting And Considering Stakeholder Input.*" The EIS and GRR should also carefully follow appropriate guidance on planning and accounting for sea level rise.

The EIS and GRR must also include a full and fundamental re-evaluation of project costs and benefits, including a cost effectiveness determination. As noted above, the EIS should also provide the construction and full life cycle maintenance costs of each alternative to assist the public and decision makers in assessing the full impact of each alternative. While NWF recognizes that the new Water Resources Planning Principles and Requirements, and the related Interagency Guidelines (PR&G) are not yet applicable to Corps project planning, we urge the Corps to adhere to the spirit of the PR&G and to account for lost ecosystem services as a project cost as directed by the PR&G.

In developing the GRR and finalizing any project recommendation, NWF also urges the Corps to take account of the many competing priorities for the nation's water resources and the limited federal funding available to address those priorities, including the many competing priorities of the Inland Waterway Trust Fund.

In comparing and analyzing potential alternatives, the SEIS must examine, among other things, the direct, indirect, and cumulative environmental impacts of alternatives, the conservation potential of those alternatives, and the means to mitigate adverse environmental impacts that cannot be avoided. 40 C.F.R. § 1502.16. This assessment is essential for determining whether less environmentally damaging alternatives are available.

promulgated in the past decade require that the quality of the environment be protected and, where possible, enhanced as the nation grows. . . . Enhancement of the environment is an objective of Federal water resource programs to be considered in the planning, design, construction, and **operation and maintenance of projects**. Opportunities for enhancement of the environment are sought through each of the above phases of project development. Specific considerations may include, but are not limited to, **actions to preserve or enhance critical habitat for fish and wildlife; maintain or enhance water quality; improve streamflow**; preservation and restoration of certain cultural resources, **and the preservation or creation of wetlands.**" 33 C.F.R. § 236.4 (emphasis added).

C. Comprehensively Evaluate the Full Suite of Direct, Indirect, and Cumulative Impacts

For each alternative, the EIS should examine the impacts of all aspects of the alternative, including for example: any new construction; any required dredging; any disposal of dredged materials, with careful attention to specific disposal sites; required future maintenance; and any related increased barge or other vessel traffic, and any related increase in truck or train traffic.

When examining any potential for the release, re-suspension, and/or disposal of toxic materials, the EIS should examine the impacts of: direct and indirect short term and long term exposure; the potential for re-exposure resulting from disturbance of disposal sites during floods and storms; and the cumulative impacts of any increased exposure.

The EIS should examine the direct, indirect, and cumulative impacts of all reasonable alternatives on at least the items outlined below:

1. Impacts on wetlands, including lost ecosystem services.
2. Impacts on fish and wildlife, including migratory wildlife.
3. Impacts on Federal and/or state listed endangered or threatened species.
4. Impacts on the ability of human and natural communities to withstand the adverse impacts of climate change (i.e., resiliency to climate change). The EIS should also assess the ability of any new or modified structures to withstand the impacts of sea level rise and increased and more intense storms, with a special emphasis on the safety of nearby communities and the health of the residents in those communities. The EIS must also assess the cumulative impacts of climate change, including: climate-change induced increases in precipitation, extreme weather events, and sea level rise. This cumulative impacts assessment should place a particular focus on wetland losses and threats to the health, safety, and well-being of project area communities.
5. Impacts of the release, re-suspension, and disposal of toxic substances into the air, water, wetlands, and land; including in and near disposal sites. These impacts should be evaluated for people and for fish and wildlife.
6. Impacts on hydrology, including any effects that would amplify or funnel storm surges into developed areas, and any effects on increasing flood heights.
7. Impacts on sedimentation.
8. Impacts on water quality.
9. Impacts of air pollution, including dust.
10. Impacts of noise pollution.
11. Impacts on community disruption and cohesion, including: increased exposure to toxins, construction traffic, effects on structure stability and integrity (through shaking and any other actions that could affect structural integrity), dangers posed by bigger and/or more tows and other vessels; disruption caused by longer bridge wait times, compromised roadways, adverse impacts to levees, loss of oak trees and other vegetation important to community well-being and retaining a "sense of place", and depressed property values due to these types of impacts.
12. Impacts on public health, with a particular focus on increased exposure to toxics, increased exposure to other air and water pollutants, and increased stress due to community disruption.
13. Impacts on public safety from each alternative during hurricanes, floods, and other

- major weather events.
14. Disproportionate impacts on low income and/or minority communities (i.e., environmental justice).
 15. Impacts on restoration and flood damage reduction efforts. The Corps, other federal agencies, states, non-governmental organizations, and members of the public are engaged in significant efforts to restore Louisiana's coastal wetlands. The EIS should carefully assess the impacts of each alternative on these other vital efforts, with a particular focus on the impacts of dredged spoil disposal, potential new lock and channel locations, and hydrologic changes.
 16. Impacts on commercial and recreational fishing, and on other tourism industries.
 17. Mitigation (mitigation plans must meet the strict standards discussed in Section B and Attachment A to these comments).

The EIS must look at the direct, indirect and cumulative impacts of each alternative. Direct impacts are caused by the action and occur at the same time and place as the action. Indirect impacts are also caused by the action, but are later in time or farther removed from the location of the action. 40 C.F.R. § 1508.8. Cumulative impacts are:

“the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.”

40 C.F.R. § 1508.7. The cumulative impacts analysis ensures that the agency will not “treat the identified environmental concern in a vacuum.”¹¹

The cumulative impacts analysis must examine the cumulative effects of federal, state, and private projects and actions.¹² The cumulative impacts analysis must also evaluate the cumulative impacts of climate change.¹³ This evaluation is extremely important as:

“Climate change can increase the vulnerability of a resource, ecosystem, or human community, causing a proposed action to result in consequences that are more damaging than prior experience with environmental impacts analysis might indicate [and] climate change can magnify the damaging strength of certain effects of a proposed action.”

¹¹ *Grand Canyon Trust v. FAA*, 290 F.3d 339, 346 (D.C. Cir. 2002).

¹² The requirement to assess non-Federal actions is not “impossible to implement, unreasonable or oppressive: one does not need control over private land to be able to assess the impact that activities on private land may have” on the project area. *Resources Ltd., Inc. v. Robertson*, 35 F.3d 1300, 1306 (9th Cir. 1993).

¹³ See *Center for Biological Diversity v. Nat'l Hwy Traffic Safety Administration*, 538 F.3d 1172, 1217 (9th Cir. 2008) (holding that analyzing the impacts of climate change is “precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct” and that NEPA requires analysis of the cumulative impact of greenhouse gas emissions when deciding not to set certain CAFE standards); *Center for Biological Diversity v. Kempthorne*, 588 F.3d 701, 711 (9th Cir. 2009) (NEPA analysis properly included analysis of the effects of climate change on polar bears, including “increased use of coastal environments, increased bear/human encounters, changes in polar bear body condition, decline in cub survival, and increased potential for stress and mortality, and energetic needs in hunting for seals, as well as traveling and swimming to denning sites and feeding areas.”).

* * *

“Agencies should consider the specific effects of the proposed action (including the proposed action’s effect on the vulnerability of affected ecosystems), the nexus of those effects with projected climate change effects on the same aspects of our environment, and the implications for the environment to adapt to the projected effects of climate change.”¹⁴

The EIS must provide “quantified or detailed information” on the impacts, including the cumulative impacts, so that the courts and the public can be assured that the Corps has taken the mandated hard look at the environmental consequences of the Project.¹⁵ **If information that is essential for making a reasoned choice among alternatives is not available, the Corps must obtain that information unless the costs of doing so would be “exorbitant.”** 40 C.F.R. § 1502.22 (emphasis added).

Importantly, as CEQ has made clear, in situations like those in the project area where the environment has already been greatly modified by human activities, it is **not** sufficient to compare the impacts of the proposed alternative against the current conditions. Instead, the baseline must include a clear description of how the health of the resource has changed over time to determine whether additional stresses will push it over the edge.¹⁶

D. Evaluate the Full Range of Actions in the Cumulative Impacts Analysis

As noted above, the cumulative impacts analysis must examine the cumulative impacts of past, present, and reasonably foreseeable future actions that affect the project area, including any disposal sites. The actions that must be examined include federal, state, and private projects and actions.¹⁷ In the project area, the impacts of the following actions must be included in the cumulative impacts assessment:

1. Construction, maintenance, and closure of the MRGO, including the role that the MRGO played in funneling storm surge into the project area during Hurricane Katrina. This analysis should also include the ramifications of the unmet Congressional directive to restore the damage caused by the MRGO.
2. Construction, maintenance, and vessel use of the Gulf Intracoastal Waterway and related land based activities.
3. Construction, maintenance, and vessel use of the Mississippi River navigation system and related land based activities.
4. Construction and maintenance of oil and gas pipelines through the area wetlands.

¹⁴ Council on Environmental Quality, *Draft NEPA Guidance on Consideration of the Effects of Climate Change and Greenhouse Gas Emissions* (February 18, 2010). The CEQ guidance makes it clear that analyzing the impacts of climate change is not restricted to evaluating whether a project could itself exacerbate global warming. The magnifying and additive effects of global warming also must be evaluated.

¹⁵ *Neighbors of Cuddy Mountain v. U. S. Forest Service*, 137 F.3d 1372, 1379 (9th Cir. 1998); *Natural Resources Defense Council v. Callaway*, 524 F.2d 79, 87 (2d Cir. 1975).

¹⁶ Council on Environmental Quality, *Considering Cumulative Effects Under the National Environmental Policy Act* at 41 (January 1997).

¹⁷ The requirement to assess non-Federal actions is not “impossible to implement, unreasonable or oppressive: one does not need control over private land to be able to assess the impact that activities on private land may have” on the project area. *Resources Ltd., Inc. v. Robertson*, 35 F.3d 1300, 1306 (9th Cir. 1993).

5. The BP Oil Spill, other oil spills, and potential future spills, including the resulting exposure of people and fish and wildlife to toxins.
6. Construction and maintenance of the extensive structural flood damage reduction measures carried out by the Corps, state and local entities.
7. Issuance of permits allowing construction in wetlands and related coastal development.

Many of these actions are fundamental drivers in the dramatic and unsustainable losses of Louisiana's coastal wetlands, declines in the overall ecological health of the project area, increased risk of flooding including during extreme weather events, and increased and significant exposure to toxic pollution for the people and wildlife in the project area.

In analyzing the cumulative effects of the activities discussed above, the Corps must compare the impacts to the historical, non-disturbed, system and not compare the impacts to the current condition of the project area. This includes both the historic ecological and hydrological conditions. If this information is not currently available, the Corps must obtain this information unless the costs of doing so would be "exorbitant." 40 C.F.R. § 1502.22.

Conclusion

The National Wildlife Federation appreciates the opportunity to provide these comments and looks forward to working with the Corps to ensure that the EIS and GRR fully evaluate environmental impacts and comply with NEPA and the nation's other vitally important environmental laws. Any alternative that is selected should ensure protection of the health, safety, and welfare of the communities in the project area, and the fish and wildlife that rely on a healthy coast.

Sincerely,



Melissa Samet
Senior Water Resources Counsel
415-762-8264
sametm@nwf.org

Attachment A
Scoping Comments of the National Wildlife Federation
New Industrial Canal Lock and Connecting Channels Project

The EIS must comply with the mitigation plan requirements established by the Water Resources Development Act and the Clean Water Act, including those in 33 C.F.R. Part 332. The following is a summary of these requirements.

Water Resources Development Act Mitigation Plan Requirements

As a matter of law, the EIS must include a “specific plan to mitigate fish and wildlife losses created” by the Project. 33 U.S.C. § 2283(d). That plan must include the following:

1. The type, amount, and characteristics of the habitat being restored, a description of the physical actions to be taken to carry out the restoration, and the functions and values that will be achieved;
2. The ecological success criteria, based on replacement of lost functions and values, that will be evaluated and used to determine mitigation success;
3. A description of the lands and interest in lands to be acquired for mitigation, and the basis for determining that those lands will be available;
4. A mitigation monitoring plan that includes the cost and duration of monitoring, and identifies the entities responsible for monitoring if it is practicable to do so (if the responsible entity is not identified in the monitoring plan it must be identified in the project partnership agreement that is required for all Corps projects). Corps mitigation must be monitored until the monitoring demonstrates that the ecological success criteria established in the mitigation plan have been met; and
5. A contingency plan for taking corrective action in cases where monitoring shows that mitigation is not achieving ecological success as defined in the plan. 33 U.S.C. § 2283(d)(3).

Clean Water Act Section 404 Mitigation Plan Requirements

Pursuant to the Clean Water Act regulatory requirements of 33 C.F.R. Part 332, Corps civil works mitigation plans must also provide a level of detail “commensurate with the scale and scope of the impacts” (33 C.F.R. 332.4(c)) and include the following information:

1. “A description of the resource type(s) and amount(s) that will be provided, the method of ecoregion, physiographic province, or other geographic area of interest.” 33 C.F.R. § 332.4(c)(2).
2. “A description of the factors considered during the site selection process. This should include consideration of watershed needs, onsite alternatives where applicable, and the practicability of accomplishing ecologically self-sustaining aquatic resource restoration, establishment, enhancement, and/or preservation at the compensatory mitigation project site.” 33 C.F.R. § 332.4(c)(3).
3. “A description of the legal arrangements and instrument, including site ownership, that will be used to ensure the long-term protection of the compensatory mitigation project site.” 33 C.F.R. § 332.4(c)(4).
4. “A description of the ecological characteristics of the proposed compensatory mitigation project site . . . This may include descriptions of historic and existing plant communities, historic and existing hydrology, soil conditions, a map showing the locations of the impact and mitigation site(s) or the geographic coordinates for those site(s), and other site characteristics appropriate to the type of resource proposed as compensation. The baseline information should also

include a delineation of waters of the United States on the proposed compensatory mitigation project site.” 33 C.F.R. § 332.4(c)(5).

5. “A description of the number of credits to be provided, including a brief explanation of the rationale for this determination,” including “an explanation of how the compensatory mitigation project will provide the required compensation for unavoidable impacts to aquatic resources resulting from the permitted activity.” 33 C.F.R. § 332.4(c)(6).
6. “Detailed written specifications and work descriptions for the compensatory mitigation project, including, but not limited to, the geographic boundaries of the project; construction methods, timing, and sequence; source(s) of water, including connections to existing waters and uplands; methods for establishing the desired plant community; plans to control invasive plant species; the proposed grading plan, including elevations and slopes of the substrate; soil management; and erosion control measures.” 33 C.F.R. § 332.4(c)(7).
7. “A description and schedule of maintenance requirements to ensure the continued viability of the resource once initial construction is completed.” 33 C.F.R. § 332.4(c)(8).
8. “Ecologically-based standards that will be used to determine whether the compensatory mitigation project is achieving its objectives.” 33 C.F.R. § 332.4(c)(9).
9. “A description of parameters to be monitored in order to determine if the compensatory mitigation project is on track to meet performance standards and if adaptive management is needed. A schedule for monitoring and reporting on monitoring results to the district engineer must be included.” 33 C.F.R. § 332.4(c)(10). The mitigation plan must provide for a monitoring period that is sufficient to demonstrate that the compensatory mitigation project has met performance standards, but not less than five years. A longer monitoring period must be required for aquatic resources with slow development rates (e.g., forested wetlands, bogs). 33 C.F.R. § 332.6.
10. “A description of how the compensatory mitigation project will be managed after performance standards have been achieved to ensure the long-term sustainability of the resource, including long-term financing mechanisms and the party responsible for long-term management.” 33 C.F.R. § 332.4(c)(11).
11. “A management strategy to address unforeseen changes in site conditions or other components of the compensatory mitigation project, including the party or parties responsible for implementing adaptive management measures. The adaptive management plan will guide decisions for revising compensatory mitigation plans and implementing measures to address both foreseeable and unforeseen circumstances that adversely affect compensatory mitigation success.” 33 C.F.R. § 332.4(c)(12).
12. “A description of financial assurances that will be provided and how they are sufficient to ensure a high level of confidence that the compensatory mitigation project will be successfully completed, in accordance with its performance standards.” 33 C.F.R. § 332.4(c)(13).
13. The mitigation plan must provide for a monitoring period that is sufficient to demonstrate that the compensatory mitigation project has met performance standards, but not less than five years. A longer monitoring period must be required for aquatic resources with slow development rates (e.g., forested wetlands, bogs). 33 C.F.R. § 332.6.
14. The compensatory mitigation requirements must be clearly stated and include special conditions that “must be enforceable.” The special conditions must: “(i) Identify the party responsible for providing the compensatory mitigation; (ii) Incorporate, by reference, the final mitigation plan approved by the district engineer; (iii) State the objectives, performance standards, and monitoring required for the compensatory mitigation project, unless they are provided in the approved final mitigation plan; and (iv) Describe any required financial assurances or long-term management provisions for the compensatory mitigation project,

unless they are specified in the approved final mitigation plan....” 33 C.F.R. § 332.3(k). “The special conditions must clearly indicate the party or parties responsible for the implementation, performance, and longterm management of the compensatory mitigation project.” 33 C.F.R. § 332.3(l).

15. “The real estate instrument, management plan, or other mechanism providing long-term protection of the compensatory mitigation site must, to the extent appropriate and practicable, prohibit incompatible uses (e.g., clear cutting or mineral extraction) that might otherwise jeopardize the objectives of the compensatory mitigation project.” 33 C.F.R. § 332.7(a).

A key element of a legally adequate mitigation plan is the inclusion of ecological performance standards for assessing whether the mitigation is achieving its objectives:

“Performance standards should relate to the objectives of the compensatory mitigation project, so that the project can be objectively evaluated to determine if it is developing into the desired resource type, providing the expected functions, and attaining any other applicable metrics (e.g., acres). 33 C.F.R. § 332.5(a).

“Performance standards must be based on attributes that are objective and verifiable. Ecological performance standards must be based on the best available science that can be measured or assessed in a practicable manner. Performance standards may be based on variables or measures of functional capacity described in functional assessment methodologies, measurements of hydrology or other aquatic resource characteristics, and/or comparisons to reference aquatic resources of similar type and landscape position. The use of reference aquatic resources to establish performance standards will help ensure that those performance standards are reasonably achievable, by reflecting the range of variability exhibited by the regional class of aquatic resources as a result of natural processes and anthropogenic disturbances. Performance standards based on measurements of hydrology should take into consideration the hydrologic variability exhibited by reference aquatic resources, especially wetlands. Where practicable, performance standards should take into account the expected stages of the aquatic resource development process, in order to allow early identification of potential problems and appropriate adaptive management.” 33 C.F.R. § 332.5(b).