

**ATTORNEYS GENERAL OF NEW YORK, CONNECTICUT, THE DISTRICT OF
COLUMBIA, MASSACHUSETTS, and NEW JERSEY**

May 24, 2021

Submitted Via Email

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c/o Martin S. Mayer, Chief, Regulatory Branch
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**Re: U.S. Army Corps of Engineers' Reevaluation of FG LA, LLC, Clean Water Act
Section 404 and Rivers and Harbors Act Section 10 Permit Decision (MVN 2018-
00159-CM)**

Dear Colonel Murphy, Chief Mayer, and Mr. Gauthier:

The undersigned Attorneys General of New York, Connecticut, the District of Columbia, Massachusetts, and New Jersey jointly submit these comments on the U.S. Army Corps of Engineers' (Corps') reevaluation of Clean Water Act (CWA) Section 404 and Rivers and Harbors Act (RHA) Section 10 Permit MVN-2018-00159-CM for the Formosa Plastics petrochemical complex in St. James Parish, Louisiana (Plastics Complex). On November 10, 2020, the Corps suspended the permit for the Plastics Complex pursuant to 33 C.F.R. § 325.7(c) to "re-evaluate the alternatives analysis under the Clean Water Act and other aspects of the permit decision if appropriate."¹ While the Attorneys General are encouraged by the Corps' commitment to reevaluating the permit decision, we strongly believe that the reevaluation must be broader in scope, both to protect the residents and natural resources of St. James Parish and to prevent public health and environmental harms across our jurisdictions.

Specifically, the Corps must reevaluate the environmental justice implications of issuing the permit, including the Plastics Complex's disproportionate impacts on low-income African-American communities in St. James Parish that are already overburdened by pollution from existing refineries and petrochemical facilities. Such comprehensive analysis furthers the Biden Administration's important environmental justice policies, which direct federal agencies to address the disproportionate health, environmental, and climate impacts of agency programs and decision-making on disadvantaged communities. Moreover, by meaningfully analyzing and

¹ Col. Stephen F. Murphy, U.S. Army Corps of Engr's, Notice of Suspension of Department of the Army Permit MVN-2018-00159-CM (Nov. 10, 2020).

mitigating these impacts, the Corps will complement and enhance our States' environmental justice initiatives and set a strong national precedent for protecting overburdened communities across the nation and in our jurisdictions.

We also urge the Corps to reevaluate the Plastics Complex's significant greenhouse gas emissions and concomitant contribution to the global climate crisis, as well as the facility's detrimental impacts on migratory birds and other species resulting from water pollution and the destruction of ecologically significant wetlands. These impacts will have damaging effects not only in Louisiana, but also across our jurisdictions, harming our States' residents and natural resources.

Ultimately, the Attorneys General believe that reevaluation of the permit decision will necessitate preparation of an environmental impact statement (EIS) under the National Environmental Policy Act (NEPA) that incorporates a rigorous analysis of the full range of significant environmental and public health impacts from the Plastics Complex. Without such analysis, the Plastics Complex will inevitably produce adverse health, environmental, and climate-related effects that will harm our States.

FACTUAL AND LEGAL BACKGROUND

I. Formosa Plastics Petrochemical Complex

International conglomerate Formosa Plastics plans to build a \$9.4 billion industrial complex in St. James Parish that will turn fracked natural gas into the building blocks for plastic products. The Plastics Complex would include ten chemical plants and numerous support facilities, including a heavy haul road across a major levee on the Mississippi River, three barge and ship docks, a rail complex, power generation facilities, and pipelines.² The Plastics Complex is part of a boom in domestic plastics production resulting from an abundant supply of inexpensive natural gas in the United States.³ According to the American Chemistry Council, \$209 billion of new investments have been announced for hundreds of new and expanded projects by 2025.⁴ The plastics infrastructure expansion is planned primarily for the Gulf Coast of Louisiana and Texas, areas that are already overburdened with pollution from refineries, petrochemical facilities, and other chemical plants.⁵

Indeed, St. James Parish is at the center of "Cancer Alley," which stretches for 85 miles along the Mississippi River from New Orleans to Baton Rouge.⁶ The area is home to primarily low-income and African-American communities, and contains a disproportionate concentration

² U.S. Army Corps of Engr's, Memorandum for Record: Environmental Assessment and Statement of Findings (MVN-2018-00159-CM) 1 (Sept. 5, 2019) (hereinafter Memorandum for Record).

³ See Courtney Bernhardt & Alexandra Shaykevich, *Envtl. Integrity Project, Greenhouse Gases from Oil, Gas, and Petrochemical Production* (2020), <https://www.environmentalintegrity.org/wp-content/uploads/2020/01/Greenhouse-Gases-from-Oil-Gas-and-Petrochemical-Production.pdf>.

⁴ Am. Chemistry Council, *Shale Gas Is Driving New Chemical Industry Development in the U.S.* (2021), https://www.americanchemistry.com/Shale_Gas_Fact_Sheet.aspx.

⁵ Bernhardt & Shaykevich, *supra* note 3, at 21.

⁶ See generally *Polluter's Paradise: Environmental Impact in Louisiana*, ProPublica, <https://www.propublica.org/series/polluters-paradise> (last visited May 21, 2021).

of refineries, petrochemical plants, and other polluting industry compared to the rest of the region and nation.⁷ The Plastics Complex would be built in the 5th District of St. James Parish, where thirteen petrochemical plants are already operating and the population is over 85 percent Black.⁸ People living in this area suffer from an alarming rate of cancer and other health problems, such as asthma and heart disease.⁹ The U.S. Environmental Protection Agency (EPA) estimates that residents of Cancer Alley have a cancer risk from air toxics of 100 in 1 million or higher, while the national average is 30 in 1 million.¹⁰

As planned, the Plastics Complex would be constructed on 2,400 acres of undeveloped fields and wetlands along the Mississippi River.¹¹ Approximately 909 acres of the site consist of forested wetlands, and a significant portion of the site is within the Barataria-Terrebonne National Estuary, established in 1991 in an effort to “win[] the national war to stem the net loss of wetlands.”¹² Due to the placement of fill and construction of detention ponds, the Plastics Complex would permanently impact 61.7 acres of wetlands and 49.7 acres of other waters of the United States.¹³ The impacted wetlands serve important ecological and hydrological functions, such as wildlife habitat and a buffer against flooding, land loss, and storm surges, which are increasing in severity due to climate change.

The wetlands and waterways also serve as feeding and nesting habitat for bald eagles and as many as 25 species of protected migratory birds, along with other wildlife.¹⁴ Over 400 species of migratory and resident birds spend part or all of their lives in the Barataria-Terrebonne National Estuary.¹⁵ The Estuary’s forested wetlands are particularly important to migratory birds such as Yellow-crowned Night-Herons, Acadian Flycatchers, Northern Parulas, and Hooded, Prothonotary, and Yellow-throated Warblers, as well as resident Great Blue Herons, Wood Ducks, Red-shouldered Hawks, Barred Owls, and Pileated Woodpeckers.¹⁶ In the winter, the forested wetlands host Yellow-bellied Sapsuckers, Eastern Phoebes, and Yellow-rumped Warblers.¹⁷ Three federally endangered species also inhabit waterways near the site—the Pallid sturgeon, the Atlantic sturgeon, and the West Indian manatee.¹⁸

⁷ Tristan Baurick et al., *Welcome to “Cancer Alley,” Where Toxic Air Is About to Get Worse*, ProPublica (Oct. 30, 2019), <https://www.propublica.org/article/welcome-to-cancer-alley-where-toxic-air-is-about-to-get-worse>.

⁸ See *id.*; La. Bucket Brigade & RISE St. James, *A Plan Without People: Why the St. James Parish 2014 Land Use Plan Must Be Changed* (2019), https://labucketbrigade.org/wp-content/uploads/2020/08/A-Plan-Without-People-6.2019_0.pdf.

⁹ Baurick et al., *supra* note 7.

¹⁰ See U.S. Env’tl. Prot. Agency, *2014 National Air Toxics Assessment Summary of Results 1–2* (2018), https://www.epa.gov/sites/production/files/2020-07/documents/nata_2014_summary_of_results.pdf.

¹¹ Memorandum for Record, *supra* note 2, at 1.

¹² *Id.* at 1, 45; Barataria-Terrebonne National Estuary Program, U.S. Env’tl. Prot. Agency, https://cfpub.epa.gov/si/si_public_record_Report.cfm?Lab=OWOW&dirEntryId=55510 (last visited May 21, 2021); Richard DeMay et al., *Barataria-Terrebonne Nat’l Estuary Program, The Habitats of Barataria-Terrebonne* (2007).

¹³ Memorandum for Record, *supra* note 2, at 2–3.

¹⁴ *Id.* at 6.

¹⁵ DeMay et al., *supra* note 12, at 26.

¹⁶ *Id.* at 14.

¹⁷ *Id.*

¹⁸ Memorandum for Record, *supra* note 2, at 5–6.

The Plastics Complex would also impact water quality in the Barataria-Terrebonne. The facility would discharge high levels of toxic chemicals into the wetlands and adjacent waters, such as benzene, butadiene, and phthalates, along with plastic pellets, flakes, granules, and powders.¹⁹ These chemicals, in turn, would be eaten by migratory birds, fish, and other wildlife, collect in sediments, and contaminate drinking water sources.²⁰

In addition, the Plastics Complex would emit massive amounts of greenhouse gases and toxic air pollutants. The Plastics Complex would emit more than 13.6 million tons per year of greenhouse gases,²¹ further fueling the climate crisis and locking in a new source of greenhouse gas emissions for decades to come.²² It would also emit close to 3,000 tons per year of carbon monoxide, soot, and smog-forming pollutants, and more than 800 tons per year of hazardous air pollutants, including benzene, ethylene oxide, butadiene, formaldehyde, and acetaldehyde.²³ These pollutants can harm human reproductive, developmental, renal, neurological, and respiratory systems, and many are known or probable carcinogens.²⁴

The Plastics Complex also poses a threat to cultural and historical resources, as the site was formerly home to two 19th century sugar plantations.²⁵ Inspections and excavations have revealed two cemeteries within the permit area that contain the remains of enslaved people.²⁶ As a result, the site has historical significance to the African-American communities of St. James Parish and the many residents who trace their ancestry to enslaved people.²⁷

II. Statutory Framework

The Corps regulates discharges of dredged and fill materials into wetlands and other waters of the United States through the issuance of permits under Section 404 of the CWA.²⁸ For regulated activities in navigable waters, the Corps issues permits under Section 10 of the RHA.²⁹ When evaluating permit applications, the Corps must review the specific proposal and its impacts on jurisdictional waters and the public interest, in accordance with applicable

¹⁹ See Plaintiffs' Motion for Summary Judgment at 26, *Ctr. for Biological Diversity et al. v. U.S. Army Corps of Eng'rs*, 1:20-CV-00103-RDM (D.D.C. Oct. 1, 2020).

²⁰ See Complaint at 19–20, *Ctr. for Biological Diversity et al. v. U.S. Army Corps of Eng'rs*, 1:20-CV-00103-RDM (D.D.C. Jan. 15, 2020).

²¹ La. Dep't of Env'tl. Qual., Basis for Decision, FG LA Complex, AI No. 198351 at 5 (Jan. 6, 2020) (hereinafter LDEQ Basis for Decision); Memorandum for Record, *supra* note 2, at 23.

²² Benjamin Storrow, *Plastic Plants Are Poised to Be the Next Big Carbon Superpolluters*, E&E News (Jan. 24, 2020), <https://www.scientificamerican.com/article/plastics-plants-are-poised-to-be-the-next-big-carbon-superpolluters/>.

²³ LDEQ Basis for Decision, *supra* note 21, at 4–5; Memorandum for Record, *supra* note 2, at 23.

²⁴ See U.S. Env'tl. Prot. Agency, 2014 National Air Toxics Assessment, *supra* note 10.

²⁵ See Sharon Lerner, *New Chemical Complex Would Displace Suspected Slave Burial Ground in Louisiana's "Cancer Alley,"* The Intercept (Dec. 18, 2019), <https://theintercept.com/2019/12/18/formosa-plastics-louisiana-slave-burial-ground/>.

²⁶ See Memorandum Decision and Order, *Ctr. for Biological Diversity et al. v. U.S. Army Corps of Eng'rs*, 1:20-CV-00103-RDM (D.D.C. Sept. 22, 2020).

²⁷ See Lerner, *supra* note 25.

²⁸ 33 U.S.C. § 1344(a).

²⁹ *Id.* § 403. The RHA prohibits the obstruction or alteration of the navigable waters of the U.S. without a permit from the Corps.

regulations.³⁰ Before issuing a permit, the Corps must also comply with the environmental review procedures of NEPA and the historical review procedures of the National Historic Preservation Act (NHPA), if applicable.

Even after the Corps has authorized an activity under CWA Section 404, the Corps may voluntarily reconsider its permit decisions.³¹ The Corps district engineer “may reevaluate the circumstances and conditions of any permit . . . and initiate action to modify, suspend, or revoke a permit as may be made necessary by considerations of the public interest.”³² After a meeting or hearing with the permittee, the Corps district engineer must then reinstate, modify, or revoke the permit within a reasonable time after issuance of the suspension notice.³³

Under NEPA and its implementing regulations,³⁴ an agency must take a “hard look” at the full range of environmental consequences of its actions.³⁵ An agency must prepare an environmental assessment (EA) for a proposed action if the action is “not likely to have significant effects or when the significance of the effects is unknown.”³⁶ If, after preparing an EA, the agency finds that “significant” environmental effects are likely to result, the agency must

³⁰ See 33 C.F.R. parts 320, 325 & 327.

³¹ See *id.* § 325.7.

³² *Id.* § 325.7(a).

³³ *Id.* § 325.7(b).

³⁴ The NEPA regulations cited in this comment letter are the 1978 regulations as opposed to the revised 2020 regulations. Because the Corps conducted its NEPA review and granted the permit for the Plastics Complex before September 14, 2020—the effective date of the revised 2020 NEPA regulations (*see* 85 Fed. Reg. 43,304 (July 16, 2020); 40 C.F.R. § 1506.13 (2020))—the 1978 regulations, which require analysis of direct, indirect, and cumulative impacts, apply to the reevaluation of the permit decision. While agencies “*may* apply the [revised] regulations . . . to ongoing activities and environmental documents begun before September 14, 2020,” *id.* (emphasis added), the Corps should use its discretion to employ the 1978 regulations because, among other things, they are more consistent with the text of NEPA. *See* 42 U.S.C. § 4331(a) (directing agencies “to use all practicable means and measures . . . in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans”); *id.* § 4332(c) (requiring agencies to evaluate any environmental impacts and adverse environmental effects “to the fullest extent possible”).

Moreover, the 1978 NEPA regulations are more consistent with the signaled direction of the Biden Administration and the Council on Environmental Quality (CEQ), making discretionary application of the 1978 regulations reasonable from a policy perspective. On January 20, 2021, President Biden issued Executive Order 13,990 “Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis,” directing CEQ to rescind draft NEPA guidance issued under the previous administration that would limit the extent to which agencies could evaluate the range of effects of greenhouse gas emissions during NEPA review. *See* Exec. Order No. 13,990, § 7(e). CEQ rescinded the draft guidance on February 29, 2021. *See* 86 Fed. Reg. 10,252 (Feb. 19, 2021). In the notice of rescission, CEQ also announced that it is reviewing and revising NEPA guidance and regulations, and, in the interim, it has directed agencies to “consider all available tools and resources in assessing GHG emissions and climate change effects of their proposed actions,” including guidance issued in 2016 in accordance with the 1978 regulations. *Id.* In addition, in a motion for remand without vacatur in *Wild Virginia v. Council on Env'tl. Quality*, 3:20-cv-00045-JPJ-PMS, (W.D. Va. Mar. 17, 2021), CEQ cited its intent to conduct a “comprehensive reconsideration of the 2020 [NEPA regulations] to evaluate its legal basis, policy orientation, and conformance with [Biden] Administration priorities, including the Administration’s commitment to addressing climate change and environmental justice.” *Id.* at 1 (quoting Decl. of Matthew Lee-Ashley, Interim Chief of Staff and Senior Director for Lands at CEQ, sworn to on March 16, 2021).

³⁵ *See* 40 C.F.R. § 1500.1(a)–(b) (1978); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

³⁶ 40 C.F.R. § 1501.5(a) (1978).

prepare a more rigorous environmental impact statement (EIS).³⁷ When preparing an EIS, the agency must consider all direct, indirect, and cumulative environmental effects of the proposed action, along with less harmful alternatives to the action.³⁸

III. Procedural History

On September 5, 2019, the Corps issued a CWA Section 404 permit authorizing Formosa Plastics to construct and operate the Plastics Complex.³⁹ As the lead agency for NEPA review, the Corps declined to prepare an EIS and instead issued an EA in the form of a Memorandum for Record (Memorandum), inexplicably concluding that the Plastics Complex would have no significant environmental impacts and was not contrary to the public interest.⁴⁰ The Memorandum constituted the sum total of the Corps' analysis under the CWA, the RHA, NEPA, and the NHPA.⁴¹

In the Memorandum, the Corps claimed that the Plastics Complex would have “no adverse effect” on surrounding environmental justice communities, in part, because “the facility will meet all [national ambient air quality standards] for criteria pollutants and ambient air standards for toxic air pollutants.”⁴² The Corps added that “the decision to locate the facility [in the 5th District of St. James Parish] is related to its remoteness from all residents and not related to the racial demographics of the general area,” asserting that “there has not been any intentional discrimination” in siting the Plastics Complex.⁴³

Regarding environmental impacts, the Corps claimed that the Plastics Complex “will result in a negligible release of greenhouse gases into the atmosphere when compared to global greenhouse gas emissions.”⁴⁴ The Corps also determined that greenhouse gas emissions from the Plastics Complex are “not contrary to the public interest” when “weighed against national goals of energy independence, national security, and economic development.”⁴⁵ In analyzing impacts to migratory birds and other wildlife, the Corps stated that, even though “migratory birds may be present in the [wetlands],” Formosa Plastics “will comply with the United States Fish and Wildlife Service (USFWS) guidance issued on April 11, 2018 pertaining to the Migratory Bird Treaty Act.”⁴⁶ This guidance reinterpreted the Migratory Bird Treaty Act to prohibit prosecution for incidental takes and was based on a Solicitor's Opinion which has since been vacated by a

³⁷ *Id.* § 1501.3 (1978).

³⁸ *Id.* § 1508.25 (1978). Agencies must also consider these environmental impacts in EAs, although regulations allow “brief discussions” of the impacts, rather than the extended descriptions typical of EISs. *See id.* § 1508.9(b) (1978).

³⁹ *See* Memorandum for Record, *supra* note 2.

⁴⁰ *Id.* at 75 (“Having reviewed the information provided by the applicant and all interested parties and an assessment of the environmental impacts, I find that this permit action will not have a significant impact on the quality of the human environment. Therefore, an environmental impact statement will not be required.”).

⁴¹ *Id.* at 5.

⁴² *Id.* at 70–71.

⁴³ *Id.*

⁴⁴ *Id.* at 55.

⁴⁵ *Id.* at 55–56.

⁴⁶ *Id.* at 6.

federal court.⁴⁷ The Corps' analysis of migratory and resident birds was limited to the requirement that any activity authorized by the permit be at least 660 feet from bald eagle nests.⁴⁸

On January 15, 2020, a coalition of St. James Parish residents and environmental advocacy organizations filed suit in the U.S. District Court for the District of Columbia, alleging that the Corps violated the CWA, NEPA, the NHPA, and the RHA in issuing the CWA Section 404 permit to Formosa Plastics.⁴⁹ On November 4, 2020, following the plaintiffs' motion for summary judgment, the Corps informed the court of its intent to file a motion for voluntary remand without vacatur and dismissal.⁵⁰ The Corps filed the motion on December 2, 2020, maintaining that "reevaluation of the Permit will result in a new administrative record and a new final agency action superseding the agency action challenged here."⁵¹ On January 1, 2021, the Court dismissed the case, noting that, "although a close question, the court agrees with the Corps [and Formosa] that it makes more sense to dismiss the case rather than keep it in court while the Corps reconsiders."⁵²

The Corps also issued a notice to Formosa Plastics on November 10, 2020, stating that the Corps had suspended the permit for reevaluation under 33 C.F.R. § 325.7(c), and, therefore, Formosa Plastics must cease all activities previously authorized under the permit.⁵³ The Notice was accompanied by a statement of findings explaining that the Corps had identified a potential defect in its alternatives analysis under the CWA guidelines related to the elimination of alternative sites in Ascension Parish, Louisiana.⁵⁴ Thus, the Corps suspended the permit in the public interest to "re-evaluate the alternatives analysis under the Clean Water Act and other aspects of the permit decision if appropriate."⁵⁵

⁴⁷ See *Nat. Res. Def. Council et al. v. U.S. Dep't of the Interior et al.*, 1:18-CV-4601-VEC (S.D.N.Y. Aug. 11, 2020). On May 7, 2021, the Department of the Interior formally proposed to withdraw the rule codifying the Opinion. See 86 Fed. Reg. 24,573 (May 7, 2021).

⁴⁸ Memorandum for Record, *supra* note 2, at 6.

⁴⁹ See Complaint, *Ctr. for Biological Diversity et al. v. U.S. Army Corps of Eng'rs et al.*, 1:20-CV-00103-RDM (D.D.C. Jan. 15, 2020).

⁵⁰ See Defendants' Motion to Stay Summary Judgment Briefing Pending Resolution of Motion for Voluntary Remand, *Ctr. for Biological Diversity et al. v. U.S. Army Corps of Eng'rs et al.*, 1:20-CV-00103-RDM (D.D.C. Nov. 4, 2020).

⁵¹ Defendants' Motion for Voluntary Remand Without Vacatur at 2, *Ctr. for Biological Diversity et al. v. U.S. Army Corps of Eng'rs et al.*, 1:20-CV-00103-RDM (D.D.C. Dec. 2, 2020).

⁵² Memorandum Opinion, *Ctr. for Biological Diversity et al. v. U.S. Army Corps of Eng'rs et al.*, 1:20-CV-00103-RDM (D.D.C. Jan. 1, 2021).

⁵³ See Col. Stephen F. Murphy, Notice of Suspension, *supra* note 1.

⁵⁴ Neil T. Gauthier et al., Suspension of Permit (MVN-2018-00159-CM): Findings for Suspension at 1 (Nov. 10, 2020).

⁵⁵ Col. Stephen F. Murphy, Notice of Suspension, *supra* note 1.

COMMENTS ON THE REEVALUATION OF THE PERMIT DECISION

The Attorneys General submit these comments urging the Corps to broaden the scope of its reevaluation of the permit decision for the Plastics Complex through preparation of an EIS. *First*, the Corps must thoroughly reevaluate all environmental justice implications of the Plastics Complex to comply with federal legal obligations, complement our States' initiatives, and set a precedent for the protection of overburdened communities disproportionately impacted by environmental harms. Such a precedent will help to ensure that environmental justice communities in our jurisdictions will also be protected in future environmental reviews and agency decision-making. *Second*, the Corps must reevaluate the Plastics Complex's massive greenhouse gas emissions and contribution to the global climate crisis. Emissions from facilities like the Plastics Complex undermine our States' laws and policies aimed at mitigating greenhouse gas emissions, leaving our residents more vulnerable to climate-related harms. *Third*, the Corps must reevaluate the Plastics Complex's detrimental impact on wetlands, waterways, and migratory birds and other species that cross jurisdictional boundaries and constitute shared natural resources. All of these impacts harm our States' residents and natural resources and must be thoroughly addressed.

I. The Corps Must Reevaluate the Plastics Complex's Impacts on Overburdened Environmental Justice Communities in St. James Parish.

The Corps must take a hard look at the Plastics Complex's disproportionate impact on communities in St. James Parish that are already overburdened by pollution from existing oil refineries and petrochemical plants. Specifically, the Corps must analyze whether authorization of the Plastics Complex would alone or in combination with past, present, and reasonably foreseeable industrial sources, impose a disproportionate impact on the predominantly African-American and low-income surrounding communities.⁵⁶ By thoroughly reevaluating the potential impacts of the Plastics Complex on the residents of St. James Parish, the Corps will not only fulfill its legal responsibilities under the CWA and NEPA, but also set a precedent for protecting environmental justice communities in our States.

In the Memorandum, the Corps largely ignored the disproportionate impacts of petrochemical plants on African-American communities in Cancer Alley, particularly in the 5th District of St. James Parish where the Plastics Complex would be constructed. There are already thirteen petrochemical plants operating in the 5th District, where the population is over 85 percent Black.⁵⁷ According to EPA data, the risk of cancer from toxic air pollution in the 5th District is approximately 105 cases per 1 million, while in other districts with predominantly white populations, the risk ranges from 60 to 75 cases per 1 million.⁵⁸ The Plastics Complex

⁵⁶ See *supra* note 34 (discussing applicable NEPA regulations); *Standing Rock Sioux Tribe v. U.S. Army Corps of Engr's*, 255 F. Supp. 3d 101, 140 (D.D.C. 2017) ("The purpose of an environmental justice analysis is to determine whether a project will have a disproportionately adverse effect on minority and low income populations.") (citations omitted).

⁵⁷ See La. Bucket Brigade & RISE St. James, *supra* note 8; Baurick et al., *supra* note 7.

⁵⁸ See Press Release, U.N. Off. of the High Comm'r for Human Rights, USA: Environmental Racism in "Cancer Alley" Must End—Experts (Mar. 2, 2021), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26824&LangID=E> (citing U.S. Env'tl.

would exacerbate these disproportionate impacts, as it is poised to double the Parish’s overall toxic emissions from 1.6 million pounds (or 800 tons) per year to 3.2 million pounds per year.⁵⁹ Despite these blatant public health disparities, the Corps found no “intentional racial discrimination” and concluded that construction of the Plastics Complex would have “no adverse effect,” based on the flimsy reasoning that the site is “remote” and the facility would comply with relevant air quality standards.⁶⁰

This perfunctory environmental justice analysis conflicts with legal precedent under NEPA. Courts have held that, even if pollution emitted from a facility complies with state and national air quality standards, the agency must still consider the likelihood that those living closest to a project will be affected more than those living in other parts of the same county.⁶¹ Likewise, regardless of an area’s population density, the agency is required to evaluate whether there may be disproportionately high and adverse human health effects on minority or low-income populations.⁶² The Corps’ Memorandum contains no such analysis, making clear that the Corps did not adequately evaluate the effects of the Plastics Complex on the predominantly African-American and low-income communities in the 5th District of St. James Parish, thereby failing to satisfy its obligations under NEPA.⁶³

The Corps’ environmental justice analysis also violates federal policy aimed at protecting overburdened and vulnerable communities. Executive Order 12,898 directs federal agencies to evaluate discriminatory *impact* when conducting environmental justice analysis of proposed projects,⁶⁴ making the Corps’ consideration of discriminatory *intent* both legally deficient and contrary to federal policy. The Corps’ analysis is also inconsistent with President Biden’s recent executive orders formalizing his administration’s commitment to environmental justice and directing federal agencies to develop programs, policies, and activities to address the disproportionate health, environmental, economic, and climate impacts on disadvantaged

Prot. Agency, 2014 National Air Toxics Assessment, *supra* note 10). Notably, both risk levels are significantly higher than the national average. *See id.*

⁵⁹ David J. Mitchell, *For Massive New Plants, Formosa Wants OK to Double Amount of Chemicals Released into St. James Parish Air*, *The Advocate*: Baton Rouge, La. (July 8, 2019), https://www.theadvocate.com/baton_rouge/news/article_c30d4620-a1be-11e9-837c-13f09466bb79.html.

⁶⁰ Memorandum for Record, *supra* note 2, at 70–71.

⁶¹ *See California v. Bernhardt*, 472 F. Supp. 3d 573, 620 (N.D. Cal. 2020) (An agency “must not only disclose . . . that certain communities and localities are at greater risk, but must also fully assess these risks.”). *Cf. Friends of Buckingham v. State Air Pollution Control Bd.*, 947 F.3d 68, 90–92 (4th Cir. 2020) (“Even if all pollutants within the county remain below state and national air quality standards, the Board failed to grapple with the likelihood that those living closest to the Compressor Station—an overwhelmingly minority population according to the Friends of Buckingham Survey—will be affected more than those living in other parts of the same county.”) (applying Virginia state law).

⁶² *See Standing Rock Sioux Tribe*, 255 F. Supp. 3d at 137–40; U.S. Env’tl. Prot. Agency, Final Guidance for Incorporating Environmental Justice Concerns in EPA’s NEPA Compliance Analyses 25 (1998) (noting that “[l]ow population density may lead the NEPA analyst to underestimate the actual environmental harm to the affected population when conducting a risk assessment”).

⁶³ *See Friends of Buckingham*, 947 F.3d at 92 (“[E]nvironmental justice is not merely a box to be checked.”).

⁶⁴ *See* Exec. Order No. 12,898, § 1-101 (Feb. 11, 1994) (“To the greatest extent practicable and permitted by law . . . each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations[.]”).

communities.⁶⁵ These federal policies seek to mitigate and eliminate the myriad environmental and public health harms suffered by overburdened communities like the 5th District of St. James Parish.

Similarly, the Corps' analysis conflicts with our States' laws and policies requiring rigorous environmental justice analysis when evaluating and granting permits. For example, in September 2020, New Jersey became the first state in the nation to empower its environmental regulatory agency to deny or condition permits for certain pollution-generating facilities if it finds that these facilities would cause or contribute to environmental and public health stressors in overburdened communities, and thereby cause or contribute to a disproportionate impact in such communities.⁶⁶ To address the historically disproportionate impact of pollution on already overburdened communities, Massachusetts requires both an assessment of existing unfair or inequitable environmental burdens and related public health consequences for any new project proposed in or near an identified environmental justice population and a cumulative impact analysis as a condition of issuing certain air permits.⁶⁷ In New York, agencies must evaluate significant and adverse disproportionate environmental justice impacts when siting electric generating facilities.⁶⁸ In addition, New York's Climate Leadership and Community Protection Act (CLCPA) acknowledges and seeks to rectify the disproportionate environmental and public health burdens borne by low-income communities of color across the State. The CLCPA therefore prioritizes public investment in such communities, dedicating at least 35 percent of the overall benefits of spending on clean energy and energy efficiency programs.⁶⁹

Accordingly, the Attorneys General urge the Corps to incorporate a robust environmental justice analysis into its reevaluation of the permit decision for the Plastics Complex. This analysis cannot rely on the facility's "remoteness" or compliance with air quality standards, and it will require preparation of an EIS that focuses on discriminatory impact, not just discriminatory intent. Through this analysis, the Corps will fulfill its legal responsibilities, complement our States' efforts to protect disproportionately impacted communities, and establish an important national precedent for protecting vulnerable communities across our jurisdictions under governing authorities.

II. The Corps Must Reevaluate the Impacts of Greenhouse Gas Emissions from the Plastics Complex and the Facility's Contribution to the Climate Crisis.

In reevaluating the permit decision, the Corps must take a hard look at the Plastics Complex's projected greenhouse gas emissions and associated contribution to the climate crisis by preparing an EIS. It is well-established that climate change is the single greatest environmental challenge facing the world today. Even though climate change is a global problem, swift and effective action is needed at the national, state, regional, and local levels to

⁶⁵ See Exec. Order No. 14,008, § 219, 86 Fed. Reg. 7619, 7629 (Jan. 27, 2021); Exec. Order No. 13,990 (Jan. 20, 2021), 86 Fed. Reg. 7037 (Jan. 25, 2021).

⁶⁶ N.J. Stat. Ann. §§ 13:1D-157–13:1D-161.

⁶⁷ Act Creating a Next-Generation Roadmap For Massachusetts Climate Policy, Chapter 8 of the Acts of 2021, §§ 55-60, 102C (Mar. 26, 2021), <https://malegislature.gov/Laws/SessionLaws/Acts/2021/Chapter8>.

⁶⁸ See N.Y. Comp. Codes R. & Regs. tit. 6, Part 487.

⁶⁹ N.Y. Env'tl. Conserv. Law § 75-0117.

achieve necessary reductions in greenhouse gas emissions to lessen the most serious effects of climate change.

The Plastics Complex would be the largest greenhouse gas emitter in the State of Louisiana, and one of the largest in the United States, directly emitting more than 13.6 million tons of carbon pollution every year—equivalent to the annual emissions from 3.5 coal-fired power plants or adding 2.6 million cars to the road annually.⁷⁰ The magnitude of these emissions, coupled with the increasing urgency to tackle the climate crisis, plainly warrants rigorous environmental review under NEPA. But, in the Memorandum, the Corps merely characterized these emissions as “negligible” compared to “global emissions.”⁷¹

The Corps’ conclusory determination is contrary to the goals of NEPA, which requires robust analysis of a project’s potential environmental effects, particularly where a project may contribute to larger environmental harms, including global climate change.⁷² According to guidance issued by the Council on Environmental Quality (CEQ) in 2016, agencies should not limit analysis of a proposed project’s emissions to “a percentage of sector, nationwide, or global emissions.”⁷³ CEQ explained, “a statement that emissions from a proposed Federal action represent only a small fraction of global emissions is essentially a statement about the nature of the climate change challenge itself”—specifically, that individual sources each make a comparatively small contribution to global atmospheric greenhouse gas concentrations, but collectively, have a very large impact.⁷⁴ Thus, in reevaluating the permit decision for the Plastics Complex, the Corps cannot simply write off 13.6 million tons of annual greenhouse gas emissions as a “negligible” contribution to global climate change; rather, the Corps must prepare an EIS that analyzes the facility’s potential greenhouse gas emissions commensurate with their magnitude and significance in the context of a global climate crisis.⁷⁵

⁷⁰ See Storrow, *supra* note 22.

⁷¹ Memorandum for Record, *supra* note 2, at 55.

⁷² See 42 U.S.C. § 4331(a) (“The Congress, recognizing the profound impact of man’s activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man[.]”); see also *Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 538 F.3d 1172 (9th Cir. 2008) (holding that NEPA requires agencies to disclose and consider climate impacts in their reviews); *WildEarth Guardians v. Jewell*, 738 F.3d 298, 301 (D.C. Cir. 2013) (holding that the Bureau of Land Management took the requisite hard look at the effect of its decision to authorize the lease of public lands for coal-mining operations on global climate change); *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983) (“NEPA . . . places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action.”) (internal quotation marks and citations omitted).

⁷³ Christina Goldfuss, Council on Env’tl. Quality, Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews 11 (Aug. 1, 2016) (hereinafter 2016 GHG Guidance), https://ceq.doe.gov/docs/ceq-regulations-and-guidance/nepa_final_ghg_guidance.pdf; 81 Fed. Reg. 51,866 (Aug. 5, 2016). Though it did not reinstate the 2016 GHG guidance, see *supra* note 34, CEQ announced that it is currently reviewing and revising NEPA guidance and regulations, and, in the interim, it has directed agencies to “consider all available tools and resources in assessing GHG emissions and climate change effects of their proposed actions, including, as appropriate and relevant, the 2016 GHG Guidance.” 86 Fed. Reg. at 10,252.

⁷⁴ 2016 GHG Guidance, *supra* note 73, at 11.

⁷⁵ See 40 C.F.R. § 1502.2(b) (1978) (“[EISs] shall discuss impacts in proportion to their significance.”); *id.* § 1502.15 (1978) (“Data and analyses in a statement shall be commensurate with the importance of the impact[.]”).

Similarly, the Corps must evaluate the full range of greenhouse gas emissions resulting from the Plastics Complex, not just direct facility emissions. The Supreme Court has long recognized that NEPA requires agencies to take a “hard look” at *all* potential environmental consequences, whether direct or indirect, of any proposed action on the environment.⁷⁶ Agencies must also consider potential cumulative impacts resulting from individually minor but collectively significant actions occurring over a period of time.⁷⁷ In the Memorandum, however, the Corps accounted *only* for operating emissions from the facility itself. The Corps declined to analyze any reasonably foreseeable indirect or cumulative greenhouse gas emissions, such as emissions from power transmission, infrastructure built to support the facility, the entire life cycle of the Plastics Complex, or other planned petrochemical facilities in the vicinity.⁷⁸ As a result, the Corps’ assessment of greenhouse gas emissions from the Plastics Complex is insufficient under NEPA, requiring detailed and thorough reevaluation through preparation of an EIS.⁷⁹

The Corps’ authorization of the Plastics Complex also conflicts with relevant federal law and policy.⁸⁰ While the Corps concluded in the Memorandum that any climate-related impacts from the Plastics Complex would be outweighed by the “national goals of energy independence, national security, and economic development,”⁸¹ in reality, construction of the Plastics Complex would *increase* the significant risks to national security and the economy caused by global climate change.⁸² (And because it would only consume massive amounts of energy, the Plastics Complex would hardly contribute to energy independence.) Moreover, the Biden

⁷⁶ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

⁷⁷ *See supra* note 34 (discussing applicable NEPA regulations); 40 C.F.R. § 1508.7 (1978).

⁷⁸ *See id.* § 1502.15 (1978) (directing agencies to consider “reasonably foreseeable environmental trends and planned actions in the area(s)”).

⁷⁹ *See* 42 U.S.C. § 4332(2)(C)(ii) (Agencies must disclose “any adverse environmental effects which cannot be avoided should the proposal be implemented.”); *Sierra Club v. FERC*, 867 F.3d 1357, 1374 (D.C. Cir. 2017) (“[G]reenhouse-gas emissions are an indirect effect of authorizing this [pipeline] project, which FERC could reasonably foresee.”); *San Juan Citizens Alliance v. U.S. Bureau of Land Mgmt.*, 326 F. Supp. 3d 1227, 1244 (D.N.M. 2018) (finding that combustion emissions were an indirect effect of agency’s decision to extract those natural resources); *Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 538 F.3d 1172 (9th Cir. 2008) (determining that NEPA requires agencies to disclose and consider climate impacts); *Ctr. for Biological Diversity v. Bernhardt*, 982 F.3d 723, 740 (9th Cir. 2020) (concluding that the Bureau of Ocean Energy Management, in preparing an EIS for an offshore oil drilling and production facility, “did not summarize existing research addressing foreign oil emissions nor attempt to estimate the magnitude of such emissions,” thereby violating NEPA’s requirement to thoroughly evaluate foreseeable effects).

⁸⁰ *See* 40 C.F.R. §§ 1502.16(c), 1506.2(d) (1978) (where an inconsistency exists, agencies should describe the extent to which the agency will reconcile its proposed action with the plan or law); *see also* 2016 GHG Guidance, *supra* note 73, at 28–29; 42 U.S.C. § 4331(a) (declaring the policy of the federal government to work in cooperation with state and local governments using “all practicable means and measures . . . to foster and promote the general welfare”).

⁸¹ Memorandum for Record, *supra* note 2, at 55–56.

⁸² *See, e.g.*, U.S. Dep’t of Defense, National Security Implications of Climate-Related Risks and a Changing Climate (2015), <https://archive.defense.gov/pubs/150724-congressional-report-on-national-implications-of-climate-change.pdf>; David Reidmiller et al., Impacts, Risks, and Adaptation in the United States: Fourth National Climate Assessment, Volume II (2018) (predicting that climate change will reduce the size of the American economy by approximately 10 percent by the century’s end); Coral Davenport & Kendra Pierre-Louis, *U.S. Climate Report Warns of Damaged Environment and Shrinking Economy*, N.Y. Times (Nov. 23, 2018), <https://www.nytimes.com/2018/11/23/climate/us-climate-report.html>.

Administration's national policy agenda emphasizes ambitious and drastic reductions in greenhouse gas emissions. Just days after taking office, President Biden announced a sweeping climate policy to curb greenhouse gas emissions in every sector of the economy,⁸³ and as of February 19, 2021, the U.S. has rejoined the Paris Climate Agreement.⁸⁴ Recently, President Biden announced his \$2.25 trillion American Jobs Plan, which includes investments in clean infrastructure and renewable energy directly aimed at mitigating climate change.⁸⁵ And on Earth Day 2021, President Biden announced that the U.S. will reduce greenhouse gas emissions by at least 50 percent from 2005 levels by 2030.⁸⁶

The Corps' authorization of the Plastics Complex also undermines our States' climate legislation and policy initiatives directly aimed at reducing greenhouse gas emissions to protect our residents from climate-related harms.⁸⁷ For instance, New York's CLCPA requires New York to reduce economy-wide greenhouse gas emissions 40 percent by 2030 and no less than 85 percent by 2050 from 1990 levels.⁸⁸ The CLCPA also creates a Climate Action Council charged with developing a scoping plan of recommendations to meet these targets and place New York on a path toward carbon neutrality. Authorization of facilities like the Plastics Complex undermine efforts by New York to address the climate crisis, potentially requiring New York to implement additional and costly regulatory and policy actions to protect its residents from climate-related harms. Massachusetts has similarly committed extensive resources to assess and meet its nation-leading greenhouse gas-reduction mandates. Any increase in the rate of sea level rise and the frequency, magnitude, and severity of coastal flooding, erosion, storms, and other

⁸³ See Exec. Order No. 14,008, § 201, 86 Fed. Reg. 7,619, 7,622 (Jan. 27, 2021) ("It is the policy of my Administration to organize and deploy the full capacity of its agencies to combat the climate crisis to implement a Government-wide approach that reduces climate pollution in every sector of the economy; increases resilience to the impacts of climate change; protects public health; conserves our lands, waters, and biodiversity; delivers environmental justice; and spurs well-paying union jobs and economic growth, especially through innovation, commercialization, and deployment of clean energy technologies and infrastructure."); Exec. Order No. 13,990, § 5 (Jan. 20, 2021), 86 Fed. Reg. 7037, 7040 (Jan. 25, 2021) ("It is essential that agencies capture the full costs of greenhouse gas emissions as accurately as possible, including by taking global damages into account. Doing so facilitates sound decision-making, recognizes the breadth of climate impacts, and supports the international leadership of the United States on climate issues.").

⁸⁴ See Press Release, Antony J. Blinken, Sec'y of State, The United States Officially Rejoins the Paris Agreement (Feb. 19, 2021), <https://www.state.gov/the-united-states-officially-rejoins-the-paris-agreement/>.

⁸⁵ See Press Release, The White House, Fact Sheet: The American Jobs Plan (Mar. 31, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/31/fact-sheet-the-american-jobs-plan/>.

⁸⁶ See Press Release: The White House, Fact Sheet: President Biden Sets 2030 Greenhouse Gas Pollution Reduction Target Aimed at Creating Good-Paying Union Jobs and Securing U.S. Leadership on Clean Energy Technologies (Apr. 22, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/22/fact-sheet-president-biden-sets-2030-greenhouse-gas-pollution-reduction-target-aimed-at-creating-good-paying-union-jobs-and-securing-u-s-leadership-on-clean-energy-technologies/>.

⁸⁷ States are also taking collective action to help the U.S. reach its emission reduction goals and mitigate the worst effects of climate change. Eleven northeastern and mid-Atlantic states (Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, Vermont, and Virginia) participate in the Regional Greenhouse Gas Initiative (RGGI), a mandatory cap-and-trade program to reduce CO₂ emissions from the power sector. The RGGI states are poised to achieve a 30 percent reduction from 2020 CO₂ levels by the year 2030. See Press Release, RGGI Inc., RGGI States Announce Proposed Program Changes: Additional 30% Emissions Cap Decline by 2030 (Aug. 23, 2017), https://www.rggi.org/sites/default/files/Uploads/Press-Releases/2017_08_23_Announcement_Proposed_Program_Changes.pdf.

⁸⁸ S. 6599, 2019-2020 Sen., Reg. Sess. §§ 2, 7 (N.Y. 2019)

climate impacts related to greenhouse gas emissions, including emissions from the Plastics Complex, will adversely affect Massachusetts and its residents and require the Commonwealth to expend additional resources and incur additional costs.⁸⁹

Indeed, greenhouse gas emissions from the Plastics Complex will contribute to the global climate crisis, exacerbating floods, droughts, and other climate-related extreme weather events across the States. As a coastal state, New Jersey is particularly vulnerable to climate-related harms. Coastal habitats protect approximately 90 percent of New Jersey's coastline from exposure to coastal hazards, like sea-level rise and storm surge.⁹⁰ These natural systems store and filter floodwaters, weaken the force of waves, and absorb some of the most destructive impacts of storm surges before they reach homes and infrastructure. Based on analysis by the Rutgers University Center for Remote Sensing and Spatial Analysis, if sea levels rise one to two feet by 2050, approximately 28 percent of existing tidal marshes in New Jersey could be lost.⁹¹ Just one foot of sea-level rise may cause more than 19,200 acres of New Jersey tidal marshes to convert to mudflats or open water, with an additional 24,800 acres of tidal wetland potentially lost to erosion.⁹² Without a marsh or forest buffer, New Jersey communities in the back bay and elsewhere will be increasingly vulnerable to storm surge exacerbated by climate change.

Consequently, the Corps must fully analyze impacts of greenhouse gas emissions from the Plastics Complex through preparation of an EIS. Specifically, the Corps must consider the facility's direct, indirect, and cumulative greenhouse gas emissions, and analyze those emissions in proportion to their magnitude and significance, recognizing their contribution to global climate change.⁹³ Through such analysis, the Corps will satisfy its legal obligations under NEPA, comport with federal climate policy, and account for the current and potential climate change harms facing our States and residents.

III. The Corps Must Reevaluate the Plastics Complex's Impacts on Wetlands, Waterways, and Migratory Birds and Other Species.

The Attorneys General also urge the Corps to take a hard look at the Plastics Complex's impacts on migratory birds and other species resulting from the destruction of wetlands and degradation of water quality. Because migratory birds, in particular, cross state, regional, and national lines, the management of birds and bird habitats in Louisiana has wide-reaching implications for the conservation of these shared natural resources. Harm to migratory birds resulting from the Plastics Complex will harm our States, many of which hold migratory birds in trust on behalf of our citizens.⁹⁴

⁸⁹ See Mass. Gen. Laws. ch. 21N, §§ 1–11.

⁹⁰ Richard Lathrop, Rutgers Univ. Ctr. for Remote Sensing & Spatial Analysis, *Modeling the Fate of New Jersey's Salt Marshes Under Future Sea Level Rise* (2014).

⁹¹ *Id.*

⁹² *Id.*

⁹³ See *supra* note 34 (discussing applicable NEPA regulations)

⁹⁴ See Migratory Birds Treaty Act, 16 U.S.C. §§ 703–712; *Hughes v. Oklahoma*, 441 U.S. 322, 324 (1979) (“[T]he wild animals and fish within a state's border are, so far as capable of ownership, owned by the state in its sovereign capacity for the common.”).

The Plastics Complex would be sited on 909 acres of forested wetlands and permanently destroy 61.7 acres of wetlands and 49.7 acres of other waters of the United States, including areas of the Barataria-Terrebonne National Estuary. The Estuary already loses approximately 16 square miles of wetlands a year, and the continued loss of Barataria-Terrebonne's marshes and forested wetlands—exacerbated by the Plastics Complex—will endanger the survival of migratory bird species.⁹⁵

Migratory birds and other species in the Barataria-Terrebonne would also be harmed by wastewater and stormwater discharges from the Plastics Complex, which the Corps failed to analyze in the Memorandum. Plastic pellets and PVC powder tend to leave the production areas of petrochemical facilities and enter the wastewater and stormwater systems, polluting adjacent waterways.⁹⁶ Indeed, Formosa Plastics has a history of such pollution; in 2019, the company entered into a \$50 million settlement agreement over the release of billions of plastic pellets into waterways near its Point Comfort, Texas plastics plant.⁹⁷

By damaging wetlands and water quality, the Plastics Complex would imperil birds that pass through or spend part of their lives in our States. For instance, migratory birds that breed in New York State—including Yellow-crowned Night-Herons, Acadian Flycatchers, Northern Parulas, and Hooded, Prothonotary, and Yellow-throated Warblers—migrate south via the Atlantic and Mississippi flyways,⁹⁸ which are north-south geographic corridors that migratory birds follow when navigating.⁹⁹ The Barataria-Terrebonne is a vital stopping point along the Mississippi flyway, and birds that follow the Atlantic flyway are known to migrate along the Gulf Coast, sometimes making it as far west as southeastern Louisiana.¹⁰⁰ Thus, harm to the Barataria-Terrebonne could disrupt the migration of birds important to New York State and its residents.

The Attorneys General therefore urge the Corps to reevaluate the Plastics Complex's impacts on migratory birds and other species through preparation of an EIS. The Corps must analyze harm to ecologically significant forested wetlands, as well as the known and probable impacts of water pollution from the facility. In addition, the Corps can no longer rely on the U.S. Fish and Wildlife Service guidance cited in the Memorandum, because the guidance was based on a Solicitor's Opinion vacated by a federal district court in August 2020,¹⁰¹ and on May 7, 2021, the Department of the Interior formally proposed to withdraw the rule codifying the

⁹⁵ DeMay et al., *supra* note 12, at 34.

⁹⁶ See *San Antonio Bay Estuarine Waterkeeper v. Formosa Plastics Corp.*, No. 17-0047, 2019 WL 2716544, at *7 (S.D. Tex. June 27, 2019).

⁹⁷ See Consent Decree, *San Antonio Bay Estuarine Waterkeeper v. Formosa Plastics Corp.*, No. 17-0047 (S.D. Tex. Nov. 27, 2019).

⁹⁸ Migratory bird flight paths are catalogued comprehensively at eBird, the Cornell Lab of Ornithology's online database. See *eBird*, Cornell Lab of Ornithology, <https://ebird.org/home> (last visited May 21, 2021).

⁹⁹ See DeMay et al., *supra* note 12, at 34; *Mississippi Flyway*, Audubon, <https://www.audubon.org/atlantic-flyway> (last visited May 21, 2021).

¹⁰⁰ *Id.*; see also *Flyways*, U.S. Fish & Wildlife Serv., <https://www.fws.gov/birds/management/flyways.php> (last visited May 21, 2021); *Atlantic Flyway*, Audubon, <https://www.audubon.org/atlantic-flyway> (last visited May 21, 2021).

¹⁰¹ *Nat. Res. Def. Council, Inc. et al. v. U.S. Dep't of the Interior et al.*, No. 1:2018-cv-04596 (S.D.N.Y. Aug. 11, 2020).

Opinion.¹⁰² Thus, the Corps must conduct new, rigorous analysis of the Plastics Complex's impacts on migratory birds and the habitats on which they rely.

CONCLUSION

The undersigned Attorneys General respectfully request that the Corps carefully reevaluate the environmental and public health impacts of the Plastics Complex through preparation of an EIS under NEPA. Specifically, we urge you to conduct a thorough analysis of the environmental justice implications of the Plastics Complex, focusing on the facility's disproportionate public health impacts on low-income African-American communities that are already overburdened by pollution from existing refineries and petrochemical facilities. We also request that you reevaluate the Plastics Complex's greenhouse gas emissions and contribution to the global climate crisis, as well as its impacts on migratory birds and other species resulting from the destruction of forested wetlands and degradation of water quality. By reevaluating these environmental and public health impacts, the Corps will comply with applicable law and prevent harm to our residents and natural resources.

We thank you for considering our views on this important matter.

Respectfully submitted,

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¹⁰² See 86 Fed. Reg. 24,573 (May 7, 2021).

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