

EXHIBIT A

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CENTER FOR BIOLOGICAL DIVERSITY,
et al.,

Plaintiffs,

v.

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

Defendants,

and

FG LA LLC,

Defendant-Intervenor.

Case No.: 1:20-cv-00103-RDM

**AMICI CURIAE BRIEF OF CONCERNED CITIZENS OF ST. JOHN AND JUSTICE
AND BEYOND IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY
JUDGMENT**

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CORPORATE DISCLOSURE STATEMENT

In accordance with LCvR 7(o)(5) and Rules 26.1 and 29(a)(4) of the Federal Rules of Appellate Procedure, Concerned Citizens of St. John and Justice and Beyond represent that they are non-profit organizations with no parent corporation and no outstanding stock shares or other securities in the hands of the public. No publicly held corporation owns any stock in amici curiae.

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Alaska v. Andrus, 580 F.2d 465 (D.C. Cir. 1978).....24

Dickerson v. Axiall Corp., No. 2019 CA 0813, 2020 WL 3840434 (La. Ct. App. July 8, 2020).....7

Earth Island Inst. v. U.S. Forest Serv., 697 F.3d 1010 (9th Cir. 2012)23

Grand Canyon Trust v. Fed. Aviation Admin., 290 F.3d 339 (D.C. Cir. 2002).....22, 23

Hatmaker v. Ga. Dep’t of Transp., 973 F. Supp. 1058 (M.D. Ga. 1997)13

Metro. Edison Co. v. People Against Nuclear Energy, 460 U.S. 766 (1983).....21

Myersville Citizens for a Rural Cmty., Inc. v. FERC, 783 F.3d 1301 (D.C. Cir. 2015)23, 25

N. Idaho Cmty. Action Network v. U.S. Dep’t of Transp., 545 F.3d 1147 (9th Cir. 2008).....15

Nat. Res. Def. Council, Inc. v. Hodel, 865 F.2d 288 (D.C. Cir. 1988)24

Pres. Coal., Inc. v. Pierce, 667 F.2d 851 (9th Cir. 1982).....13, 14

Pub. Employees for Envtl. Responsibility v. U.S. Fish & Wildlife Serv., 177 F. Supp. 3d 146 (D.D.C. 2016)23

S. Utah Wilderness Alliance v. Norton, 237 F. Supp. 2d 48 (D.D.C. 2002).....24

Sierra Club v. Van Antwerp, 661 F.3d 1147 (D.C. Cir. 2011)14

Sierra Club v. Watkins, 808 F. Supp. 852 (D.D.C. 1991).....23, 24

Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers, 255 F. Supp. 3d 101 (D.D.C. 2017)14

Te-Moak Tribe of Western Shoshone of Nevada v. U.S. Department of the Interior, 608 F.3d 592 (9th Cir. 2010)15

TOMAC, Taxpayers of Mich. Against Casinos v. Norton, 433 F.3d 852 (D.C. Cir. 2006)22, 23

STATUTES

54 U.S.C. § 300308.....9

54 U.S.C. § 306108.....9

42 U.S.C. § 432121
 42 U.S.C. § 4331(c)21
 42 U.S.C. § 4332(2)(C).....13
 St. James Ordinance 14-035
 St. James Ordinance 18-025

REGULATIONS

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 40 C.F.R. § 1508.89, 11, 13, 15, 16, 21
 85 Fed. Reg. 43304 (July 16, 2020).....9

OTHER AUTHORITIES

Final Consent Decree, *San Antonio Bay Estuarine Waterkeeper v. Formosa Plastics Corp., Tex.*,
 No. 6:17-cv-0047 (S.D. Tex. Nov. 27, 2019)19

 Jace W. Tunnell et al., *Measuring Plastic Pellet (Nurdle) Abundance on Shorelines
 Throughout the Gulf of Mexico Using Citizen Scientists: Establishing a Platform for
 Policy-Relevant Research*, 151 Marine Pollution Bull. 110794 (2020),
<https://www.sciencedirect.com/science/article/pii/S0025326X19309506>18

La. Dep’t of Env’tl. Quality, Air Permit Approval for Ergon Moda St. James, LLC, Permit No. 2560-00302-V0 (Jan. 28, 2020), <https://edms.deq.louisiana.gov/app/doc/view.aspx?doc=12042762&ob=yes&child=yes>.....21

La. Dep’t of Env’tl. Quality, Public Notice of Proposed Permit for South Louisiana Methanol, LP, Permit No. 2560-00292-V3 (Oct. 16, 2020), <https://edms.deq.louisiana.gov/app/doc/view.aspx?doc=12385833&ob=yes&child=yes>.....21

Marilena Kampa and Elias Castanas, *Human Health Effects of Air Pollution*, 151 *Env’tl. Pollution* 362 (2008), <https://www.sciencedirect.com/science/article/abs/pii/S0269749107002849>.....17

Memorandum on Appropriate Use of Mitigation, from Nancy H. Sutley, Chair of Council on Env’tl. Quality, to Heads of Dep’ts and Agencies (Jan. 14, 2011)9, 14, 15

Nat’l Park Serv., National Register Bulletin 41, Guidelines for Evaluating and Registering Cemeteries and Burial Places (1992)12

Office of the Governor, Louisiana, Formosa Selects St. James Parish for \$9.4 Billion Louisiana Project, April 23, 2018, <https://gov.louisiana.gov/news/sunshine-project>.....2

Order Denying a Petition for Objection to Permit, *In the Matter of Yuhuang Chemical Inc. Methanol Plant, St. James Parish, La.* (Env’tl. Prot. Agency Adm’r Apr. 2, 2018), https://www.epa.gov/sites/production/files/2018-04/documents/yuhuang_ii_order_3-19-18.pdf.....21

RISE St. James and Louisiana Bucket Brigade, *A Plan Without People* (2019), https://labucketbrigade.org/wp-content/uploads/2020/08/A-Plan-Without-People-6.2019_0.pdf..5

Sabrina Canfield, *Construction of Plastics Plant Comes as Surprise to Louisianans*, Courthousenews.com, Mar. 25, 2020, <https://www.courthousenews.com/construction-of-plastics-plant-comes-as-surprise-to-louisianans/>3

Sharon Lerner, *New Chemical Complex Would Displace Suspected Slave Burial Ground*, The Intercept, Dec. 18, 2019, <https://theintercept.com/2019/12/18/formosa-plastics-louisiana-slave-burial-ground/>3

Temporary Restraining Order, *RISE St. James & Sharon Lavigne v. FG LA LLC a/k/a Formosa Plastics*, Civ. Action 39963 (23d Judicial Dist. Par. of St. James. Jun. 15, 2020).....10

Tristan Baurick, *With Cleanup Stalled for Weeks, Group of Volunteers Tackles New Orleans Nurdle Spill on Their Own*, The New Orleans Advocate, Aug. 21, 2020, https://www.nola.com/news/environment/article_81011dfa-e3d6-11ea-8739-776cd89891a0.html.....18

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>2

University Network for Human Rights, *“Waiting to Die”: Toxic Emissions and Disease Near the Louisiana Denka/DuPont Plant* (July 2019), <https://drive.google.com/file/d/1Ie93SHF-GrgFfN61PqwXrGh1Ay4lWqMD/view>.....6, 19, 20

U.S. Env'tl. Prot. Agency, 2014 NATA Summary of Results, https://www.epa.gov/sites/production/files/2020-07/documents/nata_2014_summary_of_results.pdf17

Wesley James et al., *Uneven Magnitude of Disparities in Cancer Risks from Air Toxics*, 9 Int. J. Env'tl. Res. & Public Health 4365 (2012), <https://www.mdpi.com/1660-4601/9/12/4365>2, 6, 16, 19

IDENTITY AND INTERESTS OF AMICI

Concerned Citizens of St. John (“Concerned Citizens”) is a community organization dedicated to holding government officials and industry accountable for environmental contamination in St. John the Baptist Parish (“St. John”). Concerned Citizens was founded in 2016 to ensure the health of St. John families for generations to come, and empower the community in the fight against toxic air pollution.

Justice and Beyond is a community coalition dedicated to issues affecting low-income communities. It was founded in 2011 to craft workable solutions for Black communities in New Orleans and neighboring parishes. Justice and Beyond members include faith and neighborhood leaders, union members, social activists, political leaders, and others who feel left out of the top-down leadership of the city, state, and nation.

Both groups are part of the Coalition Against Death Alley, which combats the hyper-concentration of polluting facilities in a region along the lower Mississippi River called Cancer Alley, and, increasingly, Death Alley. The Coalition Against Death Alley opposes the planned construction of Defendant-Intervenor FG LA LLC’s (“Formosa”) petrochemical production complex in Death Alley’s St. James Parish. As neighbors to St. James and residents of Death Alley, the members of Concerned Citizens and Justice and Beyond support Plaintiffs’ Motion for Summary Judgment.

This brief presents the perspectives of Concerned Citizens and Justice and Beyond through their members’ voices. Quotations throughout the brief are drawn from interviews conducted in September and October of 2020. Interviews were conducted with Concerned Citizens members Robert Taylor, Tish Taylor, and Geraldine Watkins; and with Justice and Beyond members Reverend Gregory Manning, Pat Bryant, and Sylvia McKenzie.

STATEMENT OF COUNSEL

This brief was not authored in whole or part by counsel for a party to this litigation. No person other than Amici Curiae or their counsel contributed money to fund preparing or submitting this brief.

INTRODUCTION

Acres of wetlands and agricultural fields, home to several species of birds and the pallid sturgeon fish, cover the shores of the Mississippi River in St. James Parish. AR000105, AR000108–09, AR000148, AR000151 (EA); AR004162 (Formosa’s Public Trust Doctrine Analysis). Members of the community value this land and fondly remember a time before industry moved in, when its idyllic greenery provided an opportunity to connect with nature.¹

St. James Parish is in “Death Alley,”² an area infamous for industrial facilities and complexes clustered densely among low-income, Black communities.³ St. James is already overburdened by factories, refineries, and other facilities.⁴ The community bears heavy burdens of cancer, respiratory illnesses such as asthma, and poverty.⁵ Death Alley’s residents are majority Black, some descending directly from the enslaved people who once toiled on the plantations that have now been replaced by chemical facilities.

Formosa, Death Alley’s latest industrial newcomer, plans to build a 1,500-acre petrochemical complex with at least ten petrochemical factories and numerous other support facilities in St. James.⁶ AR000104 (EA); AR007482–83 (PSD Permit Application). The property is currently an agriculture field adjoining wetlands and waters that are part of the Barataria-Terrebonne National Estuary Program. *See* AR000105, AR000148, AR000151 (EA). On the project site are at least two former sugarcane plantations, the Buena Vista Plantation and the

¹ 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>.

² The terms “Death Alley” and “Cancer Alley” are used interchangeably to refer to the region along the lower Mississippi River from Baton Rouge to New Orleans. This brief will use “Death Alley” because that is the term Amici use most commonly.

³ *See* Baurick et al., *supra* note 1.

⁴ *See* Wesley James et al., *Uneven Magnitude of Disparities in Cancer Risks from Air Toxics*, 9 Int. J. Env’tl. Res. & Public Health 4365 (2012), <https://www.mdpi.com/1660-4601/9/12/4365>; *see also* AR003043 (public comment by Center for Biological Diversity, Louisiana Bucket Brigade, and Gulf Restoration Network).

⁵ *See* Baurick et al., *supra* note 1.

⁶ *See* Office of the Governor, Louisiana, *Formosa Selects St. James Parish for \$9.4 Billion Louisiana Project*, April 23, 2018, <https://gov.louisiana.gov/news/sunshine-project>.

Acadia Plantation,⁷ which contain unmarked slave cemeteries.⁸ See AR000107 (EA); AR000386 (June 2019 archaeological report).

The Army Corps of Engineers (“Corps”) issued an Environmental Assessment (“EA”) and a Finding of No Significant Impact (“FONSI”) for the Formosa complex on September 5, 2019, without properly investigating the site’s historical significance or assessing the cumulative environmental impact of the project. AR000104, AR000184 (EA). Residents of St. James and neighboring parishes have voiced their objections to this facility via extensive public comment. See, e.g., AR002313–45, AR003015–52, AR000952–96. The Corps issued Formosa’s permits to begin construction on September 5, 2019. See AR000001–103.

Amici believe that, by greenlighting this massive project, the Corps is devaluing the lives of residents, both past and present, and allowing Formosa to erase their histories, harm their health, and damage their livelihoods.

First, the Corps has failed to protect the gravesites of enslaved persons, which are of paramount cultural and historical significance. Whether residents are in St. James or adjacent St. John, they experience the loss of burial grounds personally. As one member of Concerned Citizens said, “We are all so closely connected because of how the slave trade worked. That’s the meaning of being ‘sold up the river,’ or down the river. When we share our stories, we find we are all related to each other.”

Second, the Corps has failed to account for Death Alley’s ever-increasing pollution burden and Formosa’s effects on human health. A Concerned Citizens member described the area as a “sacrifice zone” so notorious that the residents were not the first to call it “Cancer

⁷ The Corps refers interchangeably to Buena Vista by its other historic names, Winchester and Minnie (see AR006146), and Acadia by the alternate spelling Arcadia (see AR006150).

⁸ See Sharon Lerner, *New Chemical Complex Would Displace Suspected Slave Burial Ground*, The Intercept, Dec. 18, 2019, <https://theintercept.com/2019/12/18/formosa-plastics-louisiana-slave-burial-ground/>; Sabrina Canfield, *Construction of Plastics Plant Comes as Surprise to Louisianans*, CourthouseNews.com, Mar. 25, 2020, <https://www.courthousenews.com/construction-of-plastics-plant-comes-as-surprise-to-louisianans/>.

Alley”—rather, he first heard the name when visiting California and hearing others describe his home region.

Third, the Corps has failed to adequately evaluate both site and size alternatives to the proposed project. This failure signals a willingness to enable plastics production despite significant costs to human health. As a Justice and Beyond member sees it, the Corps is ensuring people remain “dependent on plastics so that [they] will continue to feed on these industries.”

ARGUMENT

The Corps’ failure to consider Formosa’s significant cultural impacts and cumulative health impacts in an Environmental Impact Statement (“EIS”) violates the National Environmental Policy Act (“NEPA”) and the National Historic Preservation Act (“NHPA”) for three reasons. First, the Corps failed to adequately analyze the project’s effects on historic properties eligible for listing in the National Register of Historic Places (“National Register”). Second, the Corps failed to analyze the cumulative health effects of the project on the surrounding communities. Third, the Corps failed to investigate potential alternatives to the project both in scope and location.

I. By issuing a permit for the Formosa facility, the Corps is writing the next chapter in a centuries-long history of devaluing Black life along the Mississippi River.

Slavery has been central to the experience of river parishes around New Orleans since the 1700s, when the French concession system brought enslaved people to the area and established the region’s foundational social, agricultural, and property structures. AR006142 (March 2018 archaeological report). These foundational structures were directly implicated in the Civil War, as sugarcane plantation owners sought to protect the institution of slavery. AR006152.

Even after emancipation, systemic racism permeated the sugarcane plantations: state publications about Black farm laborers “evinced an unconscionable longing for the days when forced laborers were easily controlled through violent means.” AR006155. These threads in the area’s socioeconomic history “continue to influence social structures, economic patterns, and race relations into the modern day.” AR006146.

Low-income Black communities toiled for generations to gain an ownership stake in the land on which their ancestors were enslaved. As one member of Concerned Citizens explained:

We are the descendants of slaves, then sharecroppers, who, when the plantations went away, were able to buy tracts of land and have it pass down from generation to generation. It was something to take pride in. It was prime real estate. We were along the river.

The communities they built were close-knit:

I lived on a street where we all came together as families and built each other's houses. It was a USDA development program for low-income families. So, everyone in that neighborhood helped build each other's 1,000 square-foot houses. So, we had a connection and a real community.

But then, things changed:

The problem is the plants came in. They're the ones that bought [each] plantation and turned it into a chemical [facility] or whatever they needed, to use the river. It kills our property values. It kills us.

And with that has vanished what "was supposed to be the generation of wealth."

Death Alley has evolved into an industrial zone where the sky is often hazy, the air choking, and the smell putrid, as chemical factories and oil refineries release toxic chemicals into the air. New facilities, encouraged by lenient local land use policies, continue to acquire land and permits. In 2014, St. James adopted a Land Use Plan that zoned two communities as "existing residential/future industrial,"⁹ signaling a long-term plan to push those residents out of the parish altogether.¹⁰ See St. James Ordinance 14-03.

A. Residents are being driven out of their communities by poisonous industries.

Communities near the proposed Formosa complex suffer from high rates of cancer,

⁹ In 2018, St. James Parish re-zoned one community as "residential growth," while maintaining the "existing residential / future industrial" designation for the other. St. James Ordinance 18-02.

¹⁰ See also RISE St. James and Louisiana Bucket Brigade, *A Plan Without People* (2019), https://labucketbrigade.org/wp-content/uploads/2020/08/A-Plan-Without-People-6.2019_0.pdf.

respiratory ailments, and heart problems.¹¹ These health impacts are largely a result of the high air emissions of noxious chemicals from industrial neighbors.¹²

Further, because industrial facilities are also permitted to dump their waste into the Mississippi River, residents downstream now carry persistent traces of that waste in their bodies—an intimate, disquieting bodily fact learned from urine analyses. A Concerned Citizens member explained:

It didn't matter if [we] lived two miles away from the plant, on the other side of the river, ten miles out, fifteen miles out. Every person who tested from different parts of this parish showed that they had chloroprene metabolites in their urine. It's not random. We get it enough to where it's in our bodies continuously.

Nor are these health effects being mitigated. Said one member of Justice and Beyond: “The petrochemical industries are certainly not building new facilities, new hospitals, clinics, or anything of that sort. Why? Because they want the people out. Why would they care for them if it's ultimately the goal to get them to abandon and give up their property?”

The nearby community of Mossville is illustrative. A member of Justice and Beyond recalled: “Mossville was built by freed slaves. They built this community that was just for them. . . . And they've been driven out of their land.” The industries do this by “literally box[ing] [residents] in so they have no escape route if there were a fire or explosion at the factories—box off their streets and give them no access to main roads, and thus keep them in fear so they'll have to sell.” Mossville residents joined a march led by the Coalition last year, telling Death Alley residents: “[W]e don't want anyone in your community to become like ours.”

B. Communities cannot trust local government to police industrial pollution.

Death Alley communities explain that environmental enforcement is negligible to non-existent in their local political context, where government is beholden to polluting industries, and

¹¹ See University Network for Human Rights, “*Waiting to Die*”: *Toxic Emissions and Disease Near the Louisiana Denka/DuPont Plant*, at 43 (July 2019), <https://drive.google.com/file/d/1Ie93SHF-GrgFfN61PqwXrGh1Ay4lWqMD/view>; James et al., *supra* note 4, at 4366, 4371–74.

¹² See University Network for Human Rights, *supra* note 11, at 5–6.

does not stand up for its constituents' right to health. Community members frequently find, for example, that industrial facilities emit harmful substances at strategic times well beyond business hours. A Justice and Beyond member said, "Every night, people in the area are able to see the smokestacks letting off these flares . . . [b]ut they're doing it in the darkness of night to make sure that there are fewer people that will catch it."

A Concerned Citizens member spoke of a night when the wind blew particularly potent emissions from the Denka plant to his home, causing him to fear acutely for his family's health, and to call 911: "When the emergency vehicles came . . . when the fire chief pulled up and got out of his car, he looked around and he said, 'Oh my God, how do they expect you people to live like this?'" In marked contrast, the caller's neighbors—accustomed to noxious chemical odors—came out asking why an emergency call had even been placed. When the caller said, "Well, man, you don't smell this?" one neighbor responded: "Well, that's what we smell every day."

Amici believe that their government representatives have been captured by the oil, gas, and chemical industries on which they rely heavily for revenue. As one Justice and Beyond member explained, "government [is] in sync with the idea that this territory between Baton Rouge and the mouth of the Mississippi River is a zone of national sacrifice." It is therefore vital that the federal government (in the form of Defendant Army Corps) not abandon Death Alley residents, but instead provide the health and environmental protections the law requires.

C. Polluting industries are desecrating and restricting access to ancestral graves.

The region has a history of polluting industries desecrating graves that are culturally and personally significant to local residents. For example, a Concerned Citizens member only recently discovered from the St. James Parish Clerk of Court where his grandfather was buried. But the discovery came too late: an industrial plant "actually built a waste pond on top of the site of this cemetery." And just upriver in Iberville Parish, community residents have been battling with a chemical production plant built on land surrounding a cemetery for former slaves, in a series of cases involving restrictions of public access. *See Dickerson v. Axiall Corp.*, No. 2019

CA 0813, 2020 WL 3840434, at *1-4 (La. Ct. App. July 8, 2020), *cert. denied sub nom. Envtl. Safety & Health Consulting Servs., Inc. v. Fowler*, No. 2020-C-00729, 2020 WL 5904880 (La. Oct. 6, 2020) (citing three related lawsuits and two cease and desist orders from the state Attorney General). As described below, the Formosa complex would greatly magnify this insult by building adjacent to and impairing access to known graves of formerly enslaved persons, and by potentially damaging additional cultural resources that have been inadequately inventoried.

D. Ostensibly job-creating industries have in fact devastated local economies.

Formosa has touted the economic benefit of its proposed petrochemical complex, claiming it will create as many as 12,000 jobs. *See* AR000123, AR000172 (EA). Unfortunately, such rosy promises have repeatedly proven false in Death Alley. Amici are well accustomed to the hiring practices of large facilities like Formosa: they employ mostly white people, typically from afar, who do not spend their money at local Black businesses. A member of Concerned Citizens has observed that jobs are provided to people brought in from out of state, who stay in “an enormous number of new hotels here in St. John Parish . . . and then on the weekend they go back home. Nothing [of economic value] stays here with us.”

For the few locals who do find work, jobs tend to be low-wage, and with sub-contracted companies. According to a member of Concerned Citizens: “You don’t get hired with the company itself. So that means you don’t have the great jobs that can help move your family out of the community.”

Even high-paying jobs would not fully compensate the residents for the harms they have suffered and will suffer. A Justice and Beyond member explained: “It doesn’t matter that [Formosa is] not giving high wages. The problem is that [they’re] not giving royalties for destroying [local residents’] land.” Formosa will never provide “the proper value of [the] blood that’s running through [the] land.” The Corps must therefore treat the Formosa proponents’ claim of local economic benefit more skeptically and perform the objective analysis of project impacts that NEPA requires.

II. The Corps violated NEPA and NHPA by failing to properly consider Formosa’s impacts on cultural resources.

The Corps neglected its legal duties as to gravesites by failing to conduct an adequate analysis of the Formosa project’s impacts on cultural resources. Under NEPA, the Corps must consider the effects of a project on cultural and historic resources, and must mitigate significant adverse effects in order to avoid preparing an EIS. *See* 40 C.F.R. § 1508.8;¹³ Memorandum on Appropriate Use of Mitigation, from Nancy H. Sutley, Chair of Council on Env’tl. Quality, to Heads of Dep’ts and Agencies (Jan. 14, 2011), at 7. Under NHPA, an agency must “take into account the effect of the undertaking on any historic property,” which is broadly defined to include properties *eligible* for inclusion on the National Register. 54 U.S.C. §§ 306108, 300308.

The project site contains at least two gravesites with the remains of enslaved persons, and the Corps’ analysis of these gravesites was legally deficient. The Corps violated NHPA because it failed to analyze the effects of the project on a historic property eligible for the National Register. Moreover, the Corps violated NEPA because its brief evaluation of the gravesites was analytically superficial and did not propose adequate mitigation measures.

A. The project site contains at least two gravesites that are profoundly important to the community.

The Corps’ EA relies on archaeological reports by Formosa’s consultants that demonstrate a repeated inability to accurately assess the locations of former plantations onsite,¹⁴ including at least two gravesites of profound community importance.

In 2017, Formosa had to correct its consultants’ initial erroneous plotting of the Buena

¹³ The Council on Environmental Quality promulgated amendments to NEPA’s implementing regulations that went into effect on September 14, 2020. 85 Fed. Reg. 43304 (July 16, 2020). This brief cites to the implementing regulations in effect when the Corps issued Formosa’s permit.

¹⁴ What is worse, the EA haphazardly contradicts the reports at times. *Compare* AR000349 (June 2019 archaeological report) (concluding from burial records that “none of the previous owners are buried at the [Buena Vista] plantation” and are buried in “various locations in St. James, Assumption, and Orleans Parishes”), *with* AR000107, AR000165 (EA) (concluding without any support that the “Buena Vista cemetery onsite that will be avoided contains the individuals who were part of the family associated with the plantation” and “includes the plantation owner’s family”).

Vista Plantation, which had been plotted outside the project area; it similarly expanded the original plotting of the Acadia Plantation. AR006131, AR006169, AR006184 (March 2018 archaeological report). Then, in July 2018, a third party informed Formosa of another error: historic maps indicated the cemeteries of both plantations were inside the project area, contrary to earlier findings. AR005382 (email from Formosa consultants to Corps). In October 2018, after excavations yielding no evidence of burials, Formosa again corrected course with more historic map research: “After fieldwork, it was realized that the proposed location was actually misplotted.” AR000355 (June 2019 archaeological report). Finally, in May 2019, Formosa uncovered burials and potential grave shafts at the Buena Vista Cemetery. AR000362, AR000368–69, AR000376 (June 2019 archaeological report). Yet the same report expressed skepticism that “the [Acadia] cemetery ever existed and was ever actually used” and did not recommend further testing or excavation. AR000385–86.

Formosa has fenced off what it believes to be the boundaries of the Buena Vista Cemetery, where it asserts that “the public will have access to it.” AR000110 (EA). But a fence is insufficient to protect and honor the enslaved people buried there, not least where site access will likely be dependent on Formosa’s ongoing cooperation. On Juneteenth of this year, members of the public were allowed access to the Buena Vista Cemetery for a re-consecration ceremony, but only for one hour—and even that concession was the result of a drawn-out legal battle with Formosa that culminated in a court order mandating site access. *See* Temporary Restraining Order, *RISE St. James & Sharon Lavigne v. FG LA LLC a/k/a Formosa Plastics*, Civ. Action 39963 (23d Judicial Dist. Par. of St. James Jun. 15, 2020). As a Justice and Beyond member explained, Formosa challenged the order to the very end:

We really rallied to say, “Formosa, you’re not getting in the way of this. This is a critical and very special holiday for the African descendants of slaves, and we’re going to take you to task so we’ll be given a way to be able to have the celebration there.” And they fought us all the way up to the eleventh hour, submitting appeals, to prevent us from being able to have that joyous celebration.

Another Justice and Beyond member remembers the Juneteenth event:

That was quite a moving experience and there was a lady there who sang a couple of freedom songs, which really made it appropriate. There were prayers lifted up for the dead and . . . my spirit was buoyant. I felt enriched. I felt in communion with those who had gone before, those who had struggled against racism. I felt in communion with those who had struggled against capitalism, segregation—and when that struggle is generational, it tends to transform you from being powerless to being powerful.

Yet even a special ceremony such as this was marred by the presence of construction materials and other indicia of industry. As a Justice and Beyond member observed:

There was the gravesite, twenty-foot fencing and barbed wire around it. It's hard for me to believe that they're not going to completely just submerge this gravesite around the whole facility. I don't see how access is not going to be encumbered by the facility.

The fenced-off cemetery “didn't have plaques to show who was there,” explained another Justice and Beyond member, “so we put the flowers [for the deceased] in the gate.”

The legal hurdles, barbed-wire fence, and one-hour limitation have led Amici to believe that, even if Formosa were to grant public access to the gravesites in the future, that access would be limited, encumbered, and ungratifying given the sanctity of the site. One Justice and Beyond member expressed it this way:

We must protect those that are in the ground, and those that are above the ground. So, we've got to stand up . . . and say, “You will not erase us. You will not destroy our legacy and pretend like we never existed and erase and nullify the value of those who have fought and given their blood, sweat, and tears that we might live, the strongest of the strongest who endured, working sunup to sundown in these fields.”

B. The gravesites on the project site are entitled to legal protection under NHPA.

When conducting NEPA review, the Corps must consider proximity to historic or cultural resources and the degree to which its action may adversely affect sites eligible for listing in the National Register under NHPA. 40 C.F.R. §§ 1508.27(b)(3), (b)(8), 1508.8. The gravesites on the project site are eligible because they are associated with the conditions of slavery in the region.

Under the NHPA regulatory regime, a historic property is eligible for listing in the National Register if it is “associated with events that have made a significant contribution to the broad patterns of our history,” or alternatively if it “may be likely to yield[] information important in prehistory or history.” 36 C.F.R. § 60.4. Formosa’s consultants assessed the gravesites’ eligibility only at an early stage when they were unable to even locate the cemeteries. *See* AR006121 (March 2018 archaeological report). But Amici believe the newly uncovered gravesites must be analyzed under—and will satisfy—the criteria for eligibility.

The gravesites meet the eligibility criteria because they are associated with the enslavement of Africans and their descendants who were forced to work on sugarcane plantations. These gravesites are similar to the Mass Grave of Mexican Miners, a National Register property in Oklahoma. *See* Nat’l Park Serv, National Register Bulletin 41, Guidelines for Evaluating and Registering Cemeteries and Burial Places (1992), at 10. There, “Mexicans played a major role in the area’s mining industry and made up almost half of the casualties from [a major 1929 mining disaster].” *Id.* The mass grave, marked only by a wooden cross, was “evocative of a time in mining history when terms of employment did not include survivors benefits.” *Id.* In St. James, the cemeteries evoke a socioeconomic structure scarred by the region’s reliance on slavery. The river parishes’ early affluence was “won on the backs of slave laborers” in a sugar industry that would “become a truly globalized market.” AR006145, AR006162 (March 2018 archaeological report). But not only was the “[B]lack American experience . . . typically ignored or disparagingly mentioned,” AR006145, the humanity of the enslaved was so elided that even their burials were unmarked.

The gravesites on the Formosa project site are of historic value eligible for inclusion in the National Register because of their association with the enslaved people who contributed to broad patterns of American history—namely, slavery and plantation life—and because the method of burial evokes their working conditions and rights. The graves’ featurelessness only makes them more culturally significant today as Amici seek to understand and address the persistent indignities of life in Death Alley. Amici seek to honor those enslaved people buried in

Death Alley by memorializing such sites, holding ceremonies, and learning more about the people who once lived and worked there. This commemoration requires access to the property and appropriate demarcation and protection. By refusing to properly delineate and protect these slave cemeteries, the Corps is only replicating the area's ignominious history.

C. The Corps violated NEPA by failing to properly evaluate the gravesites.

In failing to evaluate gravesites adequately, the Corps failed to fulfill their legal duty to conduct a NEPA review that fully discloses all potential environmental impacts of an action, including "historic" and "cultural" effects. *See* 40 C.F.R. § 1508.8; 42 U.S.C. § 4332(2)(C). The determination of whether an action is a "major Federal action significantly affecting the quality of the human environment," and therefore requires preparation of an EIS, must include consideration of the undertaking's likely effects on historic properties. 36 C.F.R. § 800.8(a)(1).

For efficiency, federal agencies are expected to coordinate and integrate compliance of NEPA with section 106 of NHPA. *Id.* Here, the Corps was required to appropriately scope, identify, and assess the effects on historic properties, and resolve any adverse effects in its EA and FONSI. 36 C.F.R. § 800.8(a)(3). The Corps must consider unique characteristics of the geographic area, such as proximity to historic or cultural resources and the degree to which the action may adversely affect sites eligible for listing in the National Register. 40 C.F.R. § 1508.27(b)(3), (b)(8). An EA must consider whether the action "may cause loss or destruction of significant scientific, cultural, or historical resources." *Id.* § 1508.27(b)(8).

Where courts have found a FONSI sufficient, they have required a thorough evaluation of the factors relevant to determining a site's historic value. *See Pres. Coal., Inc. v. Pierce*, 667 F.2d 851, 859–60 (9th Cir. 1982) (finding FONSI thorough and reasonable where agency considered three specific factors: lack of public perception of historic significance, inadequacy of comments supporting a finding of significance, and superior representation of significant features in other preserved buildings); *Hatmaker v. Ga. Dep't of Transp.*, 973 F. Supp. 1058, 1063 (M.D. Ga. 1997) (finding ineligibility determination sufficient where agency thoroughly investigated

eight factors). Further, mitigation measures are integral to FONSIIs where an agency seeks to avoid drafting an EIS. *See* 40 C.F.R. § 1508.25(b)(3); 36 C.F.R. § 800.6. In order to conclude the NEPA process and proceed without preparing an EIS, such measures must be sufficient to reduce significant impacts and the agency must commit to performing them. *See* Memorandum on Appropriate Use of Mitigation at 7.

Here, the Corps' analysis is legally insufficient because it fails to adequately consider cultural resources and identify sufficient mitigation measures.

1. The Corps failed to give the cultural resources on the project site a “hard look” as required by NEPA.

The Corps' environmental analysis was cursory and truncated, lacked in-depth analysis of the impacts and potential mitigation measures, and culminated in a one-paragraph FONSI. NEPA requires agencies to take a hard look at a project's potential consequences. *See Sierra Club v. Van Antwerp*, 661 F.3d 1147, 1154 (D.C. Cir. 2011); 40 C.F.R. § 1500.1(b). Here, the Corps failed to give the effects on gravesites a hard look and thus violated NEPA.

The Corps' analysis regarding historic and cultural resources at the project site was cursory and unreasonable. The Corps' cultural analysis was a single paragraph, and the FONSI contained no description of cultural resources whatsoever. AR000164–65, AR000184 (EA). A similarly cursory EA was struck down in *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 255 F. Supp. 3d 101, 140 (D.D.C. 2017), where the court held that the Corps' “limited analysis” and “bare-bones conclusion” did not amount to the “hard look” required by NEPA. The EA's single paragraph on NHPA compliance claims the Buena Vista Cemetery will be “avoided” and “fenced off” without further explanation of the impacts. AR000165. Further, the Corps claimed that “no intact buried materials were found” at the Acadia Cemetery, without providing further context or explanation. *Id.* In *Preservation Coalition v. Pierce*, the court held that the agency's analysis was thorough and reasonable because of “the careful manner in which the agency considered historic information and the thoroughness of its statement” 667 F.2d at 859–60. But here, the Corps' analysis failed to thoroughly analyze the fencing around the

Buena Vista Cemetery, lacked consideration of other mitigation measures for Buena Vista or Acadia, included only a single paragraph on cultural resources in the entire EA, and contained no discussion of cultural resources in the FONSI whatsoever. *See* AR000164–65, AR000184. Because the Corps’ analysis was brief, cursory, and lacked discussion of important impacts to gravesites, the Corps violated NEPA.

2. The Corps failed to provide adequate mitigation measures to protect gravesites on the property.

NEPA requires an agency to analyze appropriate mitigation measures to protect cultural and historic resources in a FONSI if the agency seeks to avoid preparing an EIS. *See* 36 C.F.R. § 800.6; 40 C.F.R. § 1508.8; Memorandum on Appropriate Use of Mitigation at 7. The Corps’ single mitigation measure for the Buena Vista Cemetery—fencing—is inadequate to protect this cultural resource. *See supra* at 10–11. The Corps also fails to include mitigation measures or procedures for other potential gravesites should cultural resources be discovered during construction. *See* AR000164–65 (EA).

The Corps considered only one mitigation measure for the Buena Vista Cemetery without explaining why fencing alone is sufficient. AR000164–65 (EA). The Corps’ cursory discussion does not address how fencing would preserve the site’s historic value and importance to the community, nor does it explain how fencing will ensure that the site will be accessible to the public. *See N. Idaho Cmty. Action Network v. U.S. Dep’t of Transp.*, 545 F.3d 1147, 1157 (9th Cir. 2008) (holding that “specific, detailed analysis of the impacts [on historic properties] . . . and mitigation measures to minimize those impacts” was sufficient for an EIS).

In *Te-Moak Tribe of Western Shoshone of Nevada v. U.S. Department of the Interior*, 608 F.3d 592, 599–601 (9th Cir. 2010), the court held that the agency’s EA imposed effective avoidance and mitigation measures when it prohibited the developer from disturbing land in exclusion zones around areas of cultural importance to Western Shoshone tribes, and identified a protocol for the creation of new exclusion zones if additional cultural resources were uncovered. In this case, in contrast, the Corps has not included any mitigation measures should grave shafts

or evidence of human remains be uncovered during construction. Without such mitigation, any other gravesites on the project site will likely be destroyed. The Corps has violated NEPA by failing to properly assess and mitigate impacts on these historic and cultural resources.

III. The Corps violated NEPA by failing to consider Formosa’s cumulative impacts on human health and the environment.

The Corps unlawfully failed to consider the Formosa facility’s cumulative impacts on Death Alley residents’ health and the environment. Under NEPA, agencies must consider all cumulative “ecological . . . aesthetic, historic, cultural, economic, social, or health” impacts in the preparation of an EA. 40 C.F.R. § 1508.8. A “cumulative impact” is defined as an impact on the environment “which results from the incremental impact of the [federal agency] 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.” *Id.* § 1508.7.

Air and water pollution produced by the Formosa complex will have severe human health impacts on residents in neighboring communities. Those impacts will be cumulatively significant because of the current and anticipated polluting facilities throughout Death Alley. The Corps’ failure to consider these cumulative health impacts in its EA violates NEPA.

A. The Formosa project will have significant cumulative health effects on the surrounding communities.

Construction and operation of the Formosa facility in Death Alley will have severe impacts on communities that already suffer from disproportionate exposure to industrial pollutants. The pollution emitted from more than 150 petrochemical facilities, oil refineries, waste dumps, and other industries already operating in Death Alley causes disproportionately high cancer risk and other health problems in communities throughout the area.¹⁵ Further burdening these communities, the Formosa complex is expected to emit hundreds of tons of toxic air pollutants each year. AR000126 (EA); AR007493 (PSD Permit Application). These additional pollutants will severely harm residents of Death Alley.

¹⁵ James et al., *supra* note 4 at 4376.

1. The Formosa project will have a detrimental effect on the health of residents of St. James and other nearby parishes.

Formosa's proposed complex will emit dozens of hazardous pollutants and chemicals into the air and water of nearby parishes. Many of these are known or probable carcinogens, including ethylene oxide, benzene, 1,3-butadiene, formaldehyde, ethylbenzene, and acetaldehyde. *See* AR007493 (PSD Permit Application). The U.S. Environmental Protection Agency's most recent National Air Toxics Assessment recorded all six of these pollutants as either national or regional cancer risk drivers and contributors.¹⁶ Extensive air pollution can also cause or exacerbate an array of other health problems, including asthma, susceptibility to respiratory infections, and heart and lung disease.¹⁷ Amici are justifiably concerned that emission of these pollutants will increase their risk of cancer and other illnesses. As one Justice and Beyond member puts it, his greatest concern with the development of the Formosa complex is the "toxins that will be emitted" and how they "will continue to poison people."

Amici are also deeply concerned about water pollution. The Mississippi River flows downstream from St. James, providing the main source of municipal water for those in St. John and New Orleans. AR000148 (EA). A member of Concerned Citizens expressed her fear of St. John's water quality being impacted by pollution released upriver by the Formosa complex:

So many people have to use this water as drinking water. [W]e already use it for cooking, bathing, washing, and anything else you can think of—and then with gardening, the soil is messed up because whatever goes up must come down. It gets into the water table, and it gets into the vegetables. You think you're growing something healthy, but actually you're consuming more of the toxic products that have been pushed at you. . . . You can't use bottled water for everything—it's too expensive.

Another health threat is plastic nurdle pollution. Nurdles are small plastic pellets used to

¹⁶ U.S. Env'tl. Prot. Agency, 2014 NATA Summary of Results, https://www.epa.gov/sites/production/files/2020-07/documents/nata_2014_summary_of_results.pdf.

¹⁷ Marilena Kampa and Elias Castanas, *Human Health Effects of Air Pollution*, 151 *Env'tl. Pollution* 362, 364 (2008), <https://www.sciencedirect.com/science/article/abs/pii/S0269749107002849>.

manufacture larger plastics that are extremely hard to contain or clean up, and frequently pollute rivers and oceans.¹⁸ Nurdles enter waterways through spills at factories during manufacturing, transportation, and storage, ultimately washing up on shore or being consumed by aquatic wildlife.¹⁹ Once nurdles enter the marine environment, they absorb toxic metals and transfer them up the food chain. AR000963–64 (Texas Rio Grande Legal Aid Notice of Intent to Sue for Clean Water Act Violations by Formosa). EPA has expressed concern over nurdle pollution, and worked with industry to avoid discharge of plastic pellets. AR000956.

Plastic nurdle spills are relatively common, with one occurring in Louisiana just a few months ago. Following a storm in August, a container fell into the Mississippi River near New Orleans, spilling more than 25 tons of nurdles into the river.²⁰ Federal and state agencies, including the U.S. Coast Guard, Louisiana Department of Environmental Quality, and National Transportation Safety Board, failed to organize a clean-up effort for weeks, allowing the nurdles to flow down the Mississippi River.²¹

Following that spill, a Justice and Beyond member expressed the community's concerns:

As I held a plastic pellet in my hand along the Mississippi that I picked up the other day, I thought about our sea life. We love crawfish in New Orleans. Even though they're incredibly spicy, you see children who are three years old that are breaking open the crawfish, breaking off the tail, sucking the head. We try to keep them away from small plastics. But how awful it would be if one of these children was sucking the head of one of these crawfish one day and then sucked in one of these plastic pellets and then choked? That's what we're putting at risk because we're failing to enforce these standards. By failing, we are putting not only children, but all generations to come, at risk of death each and every day.

¹⁸ Jace W. Tunnell et al., *Measuring Plastic Pellet (Nurdle) Abundance on Shorelines Throughout the Gulf of Mexico Using Citizen Scientists: Establishing a Platform for Policy-Relevant Research*, 151 *Marine Pollution Bull.* 110794, 110794 (2020), <https://www.sciencedirect.com/science/article/pii/S0025326X19309506>.

¹⁹ *Id.*

²⁰ Tristan Baurick, *With Cleanup Stalled for Weeks, Group of Volunteers Tackles New Orleans Nurdle Spill on Their Own*, *The New Orleans Advocate*, Aug. 21, 2020, https://www.nola.com/news/environment/article_81011dfa-e3d6-11ea-8739-776cd89891a0.html.

²¹ *Id.*

A similar pollution event could easily occur again if the Formosa complex is built. Should a spill occur, the nurdles will not obey parish boundaries and stay in St. James, but will pollute communities downriver. Formosa stated they have no “intention of dumping or littering plastics in the area,” but this does not address the threat of accidental spills. AR000115 (EA). Additionally, regardless of its intention, Formosa has a history of polluting waterways with plastic nurdles at its facility in Texas, which suggests that a similar situation may arise in Louisiana. *See* Final Consent Decree at 16, *San Antonio Bay Estuarine Waterkeeper v. Formosa Plastics Corp., Tex.*, No. 6:17-cv-0047 (S.D. Tex. Nov. 27, 2019) (approving \$50 million settlement to resolve a Clean Water Act citizen suit over nurdle releases by Formosa’s facility in Texas). The potential air, water, and plastic pollution from the Formosa complex threaten the health of residents in Death Alley.

2. The Formosa project’s health impacts will be cumulatively significant considering the existing and anticipated pollution in the region.

While the anticipated pollution from Formosa alone is problematic, it will compound emissions from current and anticipated facilities. Adding Formosa’s pollution to these sources will have detrimental health effects on the surrounding communities.

Residents of Death Alley already suffer from high incidences of cancer and other illnesses as a result of their disproportionate exposure to toxic pollutants from industrial facilities in the area.²² Exposure to pollutants in Death Alley increases cancer risk in low-income Black-dominant census tracts by twelve to sixteen percent over high-income white-dominant tracts.²³ Additionally, populations throughout Death Alley are more likely to develop cancer during their lifetime than people living throughout the United States or those living in other parts of Louisiana.²⁴ In St. John specifically, a 2019 study found that cancer prevalence among residents is 48 percent higher than the national prevalence rate.²⁵ The same study also found that residents

²² University Network for Human Rights, *supra* note 11, at 5.

²³ James et al., *supra* note 4, at 4371.

²⁴ *Id.* at 4366.

²⁵ University Network for Human Rights, *supra* note 11, at 37.

experience unexpectedly high incidences of tachycardia (rapid heart rate), chest pain, difficulty breathing, skin irritations, and fatigue, among other health problems.²⁶

Stories of friends, neighbors, and family members being diagnosed with rare cancers, autoimmune diseases, and other illnesses are prevalent in St. John. These stories paint a tragic picture of the suffering that pervades every aspect of their lives, and motivates their opposition to the construction of yet another polluting facility in Death Alley.

Illness has drastically changed the lives of community members, sometimes forcing them to relocate for treatment or to remove themselves from the toxic environment. A member of Concerned Citizens shared how illness has forced his family to live thousands of miles apart. His daughter “[has] been breathing this [polluted air] since she was born. She now has an immune system disease that the doctors attribute to a life-long [exposure] to chloroprene.” His wife has “survived breast cancer so far, [but is] suffering from so many other illnesses.” Ultimately, he moved his wife to California so she could be away from the health hazards of Death Alley. He could not move his daughter to California with her mother because she requires specialty care from a doctor in New Orleans.

Similar stories of illnesses abound, with another member of Concerned Citizens pointing to her mother’s diagnosis of Multiple Sclerosis and her neighbor’s diagnosis of a very rare autoimmune disease. Children are also impacted by these pollutants, with Amici observing that many of the children of St. John already suffer from asthma, frequent nosebleeds, and respiratory infections. These pollutants and the diseases they cause hurt families throughout Death Alley. Formosa’s addition of toxic chemicals to local air and water will only exacerbate this pain and suffering.

Formosa’s impact on human health will also be compounded by new or expanded facilities that are planned for St. James. At least three other industrial plants have been permitted for construction or emissions in the parish: the Ergon Expansion, YCI Methanol One, and South

²⁶ *Id.* at 45–57.

Louisiana Methanol. Ergon Moda St. James is permitted to expand its existing crude oil terminal in St. James.²⁷ The combined emissions from this expansion will exceed the federal major source threshold, with estimated emissions including 50 tons of volatile organic compounds each year.²⁸ YCI Methanol One is planning to build a massive methanol facility in St. James that would emit carbon monoxide, volatile organic compounds, particulate matter, and nitrogen oxides.²⁹ Finally, South Louisiana Methanol's anticipated facility in St. James is expected to emit several health-injurious pollutants, including particulate matter, sulfur dioxide, nitrogen oxides, carbon monoxide, and other toxic volatile organic compounds.³⁰

When the existing pollution in St. James is combined with pollution from Formosa and anticipated future facilities, there will be a severe cumulative impact on residents' health throughout Death Alley.

B. The Corps' EA fails to consider any cumulative health impacts, violating NEPA.

The Corps' EA is inadequate under NEPA because it does not consider any cumulative health impacts of the Formosa complex. The very purpose of NEPA is to "stimulate the health and welfare of man" while recognizing the right of all people to "enjoy a healthful environment." 42 U.S.C. §§ 4321, 4331(c). In alignment with this goal, NEPA requires an analysis of cumulative health impacts, and courts have repeatedly emphasized the importance of health within NEPA's statutory scheme. 40 C.F.R. § 1508.8; *see, e.g., Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983) (human health impacts must be considered under NEPA as long as there is "a reasonably close causal relationship between a change in the

²⁷ La. Dep't of Env'tl. Quality, Air Permit Approval for Ergon Moda St. James, LLC, Permit No. 2560-00302-V0 (Jan. 28, 2020),

<https://edms.deq.louisiana.gov/app/doc/view.aspx?doc=12042762&ob=yes&child=yes>.

²⁸ *Id.* at 3.

²⁹ Order Denying a Petition for Objection to Permit, *In the Matter of Yuhuang Chemical Inc. Methanol Plant, St. James Parish, La.* (Env'tl. Prot. Agency Adm'r Apr. 2, 2018),

https://www.epa.gov/sites/production/files/2018-04/documents/yuhuang_ii_order_3-19-18.pdf.

³⁰ La. Dep't of Env'tl. Quality, Public Notice of Proposed Permit for South Louisiana Methanol, LP, Permit No. 2560-00292-V3, at 6 (Oct. 16, 2020),

<https://edms.deq.louisiana.gov/app/doc/view.aspx?doc=12385833&ob=yes&child=yes>.

physical environment and the [human health] effect”).

To fulfill NEPA’s purposes, an agency’s cumulative health impacts analysis must provide sufficient detail to allow the public to participate in the decision-making process and show that the agency made an informed decision. 40 C.F.R. § 1500.1(b). In the D.C. Circuit, five elements must be present in cumulative impact analyses:

- (1) the area in which the effects of the proposed project will be felt;
- (2) the impacts that are expected in that area from the proposed project;
- (3) other actions—past, present, and proposed, and reasonably foreseeable—that have had or are expected to have impacts in the same area;
- (4) the impacts or expected impacts from these other actions; and
- (5) the overall impact that can be expected if the individual impacts are allowed to accumulate.

TOMAC, Taxpayers of Mich. Against Casinos v. Norton, 433 F.3d 852, 864 (D.C. Cir. 2006) (quoting *Grand Canyon Trust v. Fed. Aviation Admin.*, 290 F.3d 339, 345 (D.C. Cir. 2002)).

The Corps’ EA does not discuss any health harms in its consideration of cumulative impacts (AR000162–63) and is invalid on that ground alone. Under NEPA, an agency should consider public health and safety when evaluating the significance of an impact, and even impacts that appear small on their own can be cumulatively significant. 40 C.F.R. § 1508.27(b)(2); *see Grand Canyon Trust*, 290 F.3d at 346 (agency required to analyze cumulative impacts in EA even though a two percent increase in noise pollution appeared insignificant on its own). Given that Death Alley is already plagued by pollution, the Corps’ EA should have contained an analysis of the aggregate health impacts of additional pollution from the Formosa complex. Instead, the EA fails to mention health considerations in the cumulative impacts section. *See* AR000162–63. As in *Grand Canyon Trust*, where even a two percent increase was significant in light of cumulative noise pollution, here, even a minor increase in emissions from operation of the Formosa complex would be cumulatively significant given current pollution levels in Death Alley. *See* 290 F.3d at 346. The Corps’ conclusory statement that the cumulative impacts of Formosa are not significant in relation to past, present, and future activities—without providing meaningful analysis—does not adequately address this concern. *See* AR000163 (EA).

Further, in considering cumulative impacts, an EA or EIS cannot “isolate a proposed project” and “treat the identified environmental concern in a vacuum.” *Grand Canyon Trust*, 290 F.3d at 342, 346. Rather, an agency must consider all the cumulative impacts “*outside* of the project in question.” *TOMAC*, 433 F.3d at 864 (EA must consider known or anticipated projects in an area for a sufficient cumulative impacts analysis). Here, the Corps’ EA fails to mention, let alone analyze, the cumulative impacts of pollution from the Formosa complex when combined with existing and anticipated facilities in St. James, even though public commenters raised this issue repeatedly. *See* AR003043 (public comment by Center for Biological Diversity, Louisiana Bucket Brigade, and Gulf Restoration Network); AR000162–63 (EA). Unlike in *TOMAC*, where no known or anticipated external projects existed (433 F.3d at 864), here there are at least three planned additional polluting facilities in St. James, each of which is at least partially permitted. The Corps’ failure to consider the health impacts from these additional projects is unlawful.

IV. The Corps violated NEPA by failing to adequately consider feasible project alternatives.

The Corps has failed to perform the required alternatives analysis under NEPA, which is “an independent requirement of an EA, separate from its function to provide evidence that there is no significant impact.” *Sierra Club v. Watkins*, 808 F. Supp. 852, 870 (D.D.C. 1991). “[C]ourts in this district have not hesitated to apply the same general standards to their evaluation of EAs” that they apply to EISs. *Pub. Employees for Env’tl. Responsibility v. U.S. Fish & Wildlife Serv.*, 177 F. Supp. 3d 146, 156 (D.D.C. 2016); *but see Earth Island Inst. v. U.S. Forest Serv.*, 697 F.3d 1010, 1021 (9th Cir. 2012) (courts in some circuits have found that the alternatives analysis requirement is “less rigorous” in an EA than an EIS).

When courts apply different standards to the EA and the EIS, the standard is proportional to the significance of the environmental impacts. *See Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1323 (D.C. Cir. 2015) (“[T]he range of alternatives that the [agency] must consider decreases as the environmental impact of the proposed action becomes less and less substantial.”). Courts apply a “rule of reason” when evaluating whether an agency has

satisfied the requirement to consider alternatives. *Nat. Res. Def. Council, Inc. v. Hodel*, 865 F.2d 288, 294 (D.C. Cir. 1988). This “rule of reason necessarily governs both *which* alternatives the agency must discuss and the *extent* to which it must discuss them.” *Id.* (quoting *Alaska v. Andrus*, 580 F.2d 465, 475 (D.C. Cir. 1978), *vacated in part as moot*, 439 U.S. 922 (emphasis in original)). It has been applied to EAs as well as EISs. *S. Utah Wilderness Alliance v. Norton*, 237 F. Supp. 2d 48, 52–54 (D.D.C. 2002).

Here, the Corps has not considered alternatives of a range proportional to the impacts of the proposed project, nor engaged in a reasonable discussion of alternatives in scope or depth. First, it considered alternative sites in an unreasonably small geographic area. Second, it failed to meaningfully evaluate the viability of reduced project size before rejecting this alternative.

Regarding location alternatives, the Corps considered fourteen sites, all located in one of three neighboring parishes. AR000138 (EA). The Corps listed several reasons why Louisiana is convenient for the project applicant, and then considered alternative sites in a stretch of land spanning just three contiguous parishes. AR000110–11, AR000138–39 (EA). The Corps merely parroted Formosa’s reason for quickly dismissing all six sites located in majority-white neighborhoods, while accepting all eight majority-Black sites. AR000171–72 (EA). Taking the applicant’s project objectives at face value without any critical analysis, as the Corps has done here, is unlawful. *S. Utah Wilderness*, 237 F. Supp. 2d at 53 (agency’s obligation to take the applicant’s needs into account does not limit the scope of analysis of those stated needs).

Regarding size alternatives, the Corps recognized that “[a]lternative projects could include” a “smaller plant,” but then promptly dismissed this option with the circular reasoning that “the social and economic benefits created by a facility of this size would not be realized.” AR000122 (EA). In so doing, the Corps engaged in impermissible “post hoc rationalizations of its decisions.” *See Watkins*, 808 F. Supp. at 870 (EA must provide relevant information beyond a mere justification of the agency’s finding of no significant impact).

The Corps explained the social benefit is to “provide materials used to manufacture consumer products used every day.” AR000123 (EA). And yet, as a Justice and Beyond member

noted, this purported benefit ultimately has the deleterious effect of perpetuating “an addiction in our society to plastics.” Indeed, the proposal calls for adding 2.78 million metric tons to current plastics production. AR000110 (EA). The Corps reasons that only the massive 2,319 acre project site will suffice, with eleven different categories of structures—some including multiple facilities—when its own alternatives criteria include parcels as small as 800 acres, or approximately one third this size. AR000104, AR000110, AR000138 (EA). If the benefits truly would not be realized by a smaller project, then the Corps’ reasoning amounts to an admission that its entire alternatives analysis is pretextual. This is an especially egregious failure under NEPA, because the magnitude of the project and its correspondingly substantial environmental impacts warrant a proportionally robust consideration of alternatives. *See Myersville*, 783 F.3d at 1323. The Corps’ alternatives analysis is unreasonable and therefore violates NEPA.

CONCLUSION

The Corps’ EA and FONSI fail to protect the gravesites of enslaved persons; fail to account for Formosa’s adverse effects on human health; and fail to adequately evaluate both site and size alternatives to the project as proposed. Given these legal deficiencies, the Formosa complex should never have been permitted. But the proper application of the law has long been rare in Death Alley. One Concerned Citizens member said, “Had I known more than fifty-five years ago that this was what my area was going to be like, I would have never sunk everything we had into buying property and building a home.”

As another Concerned Citizens member noted:

Knowing the truth, I can’t sleep at night. Knowing the truth, I can’t go out and enjoy my wind chimes and I can’t go out and enjoy my rosebushes and my plants. Sometimes I go, “On this beautiful day, which way is the wind blowing? How much chloroprene is going to be in the air today? How much is this going to kill me?”

By requiring the Corps to comply with NEPA and NHPA in evaluating Formosa’s proposed facility, this Court can take the first step toward ameliorating the hazardous and unjust conditions that Amici and other residents of Death Alley have too long endured.

DATED: October 29, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rules 29(a)(4)(G) and 32(g)(1) of the Federal Rules of Appellate Procedure and LCvR 7(o)(5), I hereby certify that the foregoing complies with LCvR 7(o)(4) because it does not exceed 25 pages.

Respectfully submitted,

/s/ Heather Lewis

Heather Lewis

DC Bar No. CA00066

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of October, 2020, I caused a true and correct copy of the foregoing document to be served on all parties of record via the CM/ECF system.

Respectfully submitted,

/s/ Heather Lewis

Heather Lewis

DC Bar No. CA00066