

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION**

(1) THE CITY OF SHOREACRES, (2) THE CITY OF TAYLOR LAKE VILLAGE, (3) GALVESTON BAY CONSERVATION AND PRESERVATION ASSOCIATION (GBCPA), (4) THE GALVESTON-HOUSTON ASSOCIATION FOR SMOG PREVENTION (GHASP), (5) TEXAS COMMITTEE ON NATURAL RESOURCES (TCONR), (6) GALVESTON BAY FOUNDATION (GBF), (7) HOUSTON AUDUBON SOCIETY (HAS), (8) HOUSTON YACHT CLUB (HYC), (9) PROFESSIONALS INVOLVED IN SEAFOOD CONCERNED ENTERPRISES (PISCES), AND (10) GULF RESTORATION NETWORK (GRN),

Plaintiffs,

v.

(1) COLONEL LEONARD D. WATERWORTH, DISTRICT ENGINEER, GALVESTON DISTRICT - U.S. ARMY CORPS OF ENGINEERS; (2) LIEUTENANT GENERAL ROBERT B. FLOWERS, COMMANDER AND CHIEF OF ENGINEERS, U.S. ARMY CORPS OF ENGINEERS; (3) HONORABLE LES BROWNLEE, ACTING SECRETARY OF THE ARMY; AND (4) U.S. ARMY CORPS OF ENGINEERS

Defendants.

CIVIL ACTION NO _____

**PLAINTIFFS' ORIGINAL COMPLAINT AND
APPLICATION FOR INJUNCTIVE RELIEF**

COME NOW, the Cities of Shoreacres and Taylor Lake Village, the Galveston Bay Conservation and Preservation Association ("GBCPA"), the Galveston-Houston Association for Smog Prevention ("GHASP"), the Texas Committee on Natural Resources ("TCONR"), the

Galveston Bay Foundation ("GBF"), the Houston Audubon Society ("HAS"), the Houston Yacht Club ("HYC"), the Professionals Involved in Seafood Concerned Enterprises ("PISCES"), and the Gulf Restoration Network ("GRN"), and complain of Col. Leonard D. Waterworth, District Engineer, Galveston District - U.S. Army Corps of Engineers; Lieutenant General Robert B. Flowers, Commander and Chief of Engineers, U.S. Army Corps of Engineers; Honorable Les Brownlee, Acting Secretary of the Army; and the U.S. Army Corps of Engineers.

I. INTRODUCTION AND SUMMARY OF THE CASE

1. Plaintiffs claim that the U.S. Army Corps of Engineers for the Galveston District ("Galveston District") has failed to comply with federal law when evaluating the permit application by the Port of Houston Authority ("PHA") to construct the Bayport Container and Cruise Terminal Facility ("Bayport Project") in and along Galveston Bay in Harris and Chambers Counties, Texas.

2. First, Plaintiffs seek a ruling from this Court that the recently released Final Environmental Impact Statement ("FEIS") for the Bayport Project does not comply with the National Environmental Policy Act ("NEPA") by failing to address significant new circumstances and/or information in a Supplemental Draft Environmental Impact Statement ("SDEIS") in accordance with the regulations of the Council on Environmental Quality (CEQ) that are controlling over the actions of the Galveston District in its consideration of the PHA's permit application.

3. Second, Plaintiffs seek to nullify the Galveston District's policy statement regarding its criteria for determining jurisdictional wetlands as an illegal rule-making not in accordance with the Administrative Procedure Act ("APA"), and have the Galveston District's

jurisdictional wetland determination for the Bayport Project location invalidated and re-examined without such a determination being based upon this illegal rule.

4. Third, Plaintiffs seek to have this Court declare that overland flow of surface water that connects wetlands with navigable waters is sufficient to make these wetlands jurisdictional waters of the United States under § 404 of the Clean Water Act due to the water quality nexus.

5. Finally, Plaintiffs seek to have this Court remand the delineation of jurisdictional wetlands back to the Corps for further evaluation in light of new topographic information and in light of the comments filed by the U.S. Environmental Protection Agency ("USEPA") arguing that the extent of jurisdictional wetlands at the site was greater than identified by the U.S. Army Corps of Engineers.

II. JURISDICTION

6. This action arises under the National Environmental Policy Act ("NEPA") of 1969 as amended, 42 U.S.C. § 4321 *et. seq.*, and the implementing regulations of said act. Plaintiffs seek judicial review pursuant to the NEPA and the Administrative Procedure Act ("APA"), 5 U.S.C. § 701-706, as well as the Declaratory Judgment Act, 28 U.S.C. § 2201(a) and § 2202. This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1331 (federal question jurisdiction).

III. VENUE

7. Venue is proper pursuant to 28 U.S.C. § 1391 (b) and (e) because the Galveston District and portions of the Bayport Project are located in this district.

IV. PARTIES

8. The City of Shoreacres is a general law city in Harris County, Texas and its mailing address is 601 Shoreacres, Shoreacres, Texas 77571.

9. The City of Taylor Lake Village is a general law city in Southeast Harris County, Texas and its mailing address is 500 Kirby, Taylor Lake Village, Texas, 77586.

10. GBCPA is a non-profit organization whose purpose is to restore and enhance Galveston Bay and its estuaries, and its mailing address is 2600 Nasa Road One, Suite 103, Seabrook, Texas, 77586.

11. GHASP is a non-profit corporation whose purpose is to protect the health of residents of the Houston-Galveston area from air pollution including ozone and fine particle matter, and its mailing address is 3015 Richmond, Suite 201, Houston, Texas 77098-3013.

12. TCONR is a non-profit organization whose purpose is to study the ecosystem and educate Texans about their natural environment, and its mailing address is 1301 South Interstate 35, Suite 301, Austin, Texas, 78741.

13. GBF is an organization committed to protecting and preserving Galveston Bay and its estuaries, and its mailing address is 17324-A Highway 3, Webster, Texas 77598.

14. HAS is a nonprofit organization that promotes the conservation and appreciation of birds and wildlife habitat, and its mailing address is 440 Wilchester Blvd., Houston, Texas, 77079.

15. HYC is a boating organization, which participates in and organizes regattas, and provides sailing lessons and other recreational water activities in the Galveston Bay, and its mailing address is 3620 Miramar Drive, P.O. Box 1276, La Porte, Texas, 77571.

16. PISCES is an organization of commercial fishermen in Galveston Bay, and its mailing address is Route 3, Box 384, Dickinson, Texas, 77539.

17. GRN is an organization comprised of forty groups throughout the Gulf States whose purpose is to protect the resources of the Gulf Region, and its mailing address is P.O. Box 2245, New Orleans, Louisiana 70176.

18. Col. Leonard D. Waterworth is sued in his official capacity as District Engineer of the Galveston District of the U.S. Army Corps of Engineers and may be served at 2000 Fort Point Road, Galveston, Texas 77550 in person or by mail at P.O. Box 1229, Galveston, Texas 77553-1229.

19. Lieutenant General Robert B. Flowers is sued in his official capacity as Commander and Chief of Engineers of the U.S. Army Corps of Engineers and may be served at 441 G Street, N.W., Washington, D.C. 20314.

20. Honorable Les Brownlee is sued in his official capacity as Acting Secretary of the Army and may be served at 101 Army Pentagon, Washington, D.C. 20310-0101.

21. The United State Army Corps of Engineers is sued as an agency of the United States Government and may be served by serving Lieutenant General Robert B. Flowers Commander and Chief of Engineers of the U.S. Army Corps of Engineers at 441 G Street, N.W., Washington, D.C. 20314.

V. FACTS

A. BACKGROUND

22. The PHA is proposing to construct its Bayport Project on approximately 1100 acres of land in southeastern Harris County.

23. The proposed Bayport Project site is located between the cities of Seabrook (to the south) and Shoreacres/LaPorte (to the north) and is bounded on the south by Pine Gully, on the east by Galveston Bay and the El Jardin subdivision of Pasadena, and on the north by the Bayport deepwater channel.

24. In order to construct docks along the Bayport Channel, to conduct dredging activities in the Bayport Channel and in Galveston Bay, and to discharge dredge and fill material into waters of the United States, all of which are necessary to build the proposed Bayport facility, the PHA was required to obtain permits from the Galveston District of the Corps of Engineers under § 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. § 403) and § 404 of the Clean Water Act (33 U.S.C. § 1344).

25. The proposed Bayport Project permit application #21520 by the PHA was first filed with the Galveston District in 1998.

26. There have been several revisions made by the PHA to its original permit application, as reflected in various public notices.

27. The most recent public notice dated May 16, 2003 announced to the public that the PHA proposes to construct seven container ship berths, three cruise ship berths, associated docks and storage and a large rail yard at the Bayport site.

28. The cost of the proposed Bayport facility is approximately \$1.2 billion, with most if not all of this cost being provided by taxpayers.

29. Since 1998, GBCPA, as well as other environmental groups and many local municipalities, have opposed the PHA's proposed terminal facility being located at Bayport.

30. Other alternative sites have been identified within the Galveston Bay system for locating this terminal facility that are less environmentally damaging and that are acceptable to the plaintiffs.

31. A scoping meeting on the proposed Bayport Project was conducted by the Galveston District in 1999 pursuant to the rules of the CEQ for preparing environmental impact statements (EISs) and about 2,500 people attended.

32. A Draft EIS (DEIS) on the proposed Bayport Project was prepared by the Galveston District and released in November, 2001.

33. Over 6,000 people came to the Galveston District's public hearing regarding the DEIS for the Bayport Project, which was conducted in December, 2001 at the George R. Brown Convention Center in downtown Houston.

34. Numerous issues were raised by the public at the December 2001 hearing about the lack of adequate analysis in the DEIS of the Bayport Project's environmental impacts, including wetlands, air quality, and noise impacts, as well as reasonably foreseeable future impacts to Galveston Bay.

35. The Galveston District has received over 2,000 comments regarding the Bayport Project from not only the public, but also local, state, and federal agencies, as well as elected officials.

36. Included in these comments were requests for a Supplemental DEIS that would address the inadequacies of the Bayport DEIS.

37. On May 2, 2002, GBCPA wrote to the Corps requesting a Supplemental Draft EIS regarding wetlands, noise, and the alternatives analysis as well as requesting a re-examination of jurisdictional wetlands.

38. On July 23, 2002, U.S. Congressman Nick Lampson wrote to Col. Waterworth, requesting a Supplemental DEIS because the analysis of alternatives was not adequate and not balanced.

39. Col. Waterworth wrote back to Congressman Lampson, stating that the FEIS would fully address his concerns and stating that publication of a SDEIS was not warranted.

40. On September 5, 2002, GBCPA again requested a Supplemental Draft EIS be issued after the second revised public notice.

41. On December 30, 2002, GBCPA, the City of Shoreacres, the City of Taylor Lake Village, the El Jardin Subdivision of the City of Pasadena, the City of Pasadena, the City of Seabrook, the City of El Lago, the Galveston Bay Foundation, GHASP, Houston Audubon Society, TCONR, PISCES, GRN, HYC, Sierra Club, Environmental Defense and National Wildlife Federation all wrote Col. Waterworth requesting a SDEIS due to new circumstances or information, including jurisdictional wetlands issues, the USEPA diesel carcinogen study, the PM_{2.5} issue, and the inadequacy of the alternatives analysis.

42. On January 15, 2003, Col. Waterworth responded to the December 30, 2002 letter stating that he disagreed that significant new circumstances or information exist that rise to the level of requiring a SDEIS.

43. Col. Waterworth stated in the January 15, 2003 letter that the FEIS would address the concerns expressed in the December 30, 2003 letter asking for a SDEIS.

44. The Galveston District issued a Final EIS on the Bayport Project on May 16, 2003.

B. NEW INFORMATION

45. There are significant new circumstances and/or information that have either not been included in the recently released FEIS for Bayport or have been included in the FEIS for the very first time, both of which necessitate the issuance of a Supplemental DEIS that addresses these significant issues in a manner that allows for meaningful public review and comment.

46. Many of the so-called new circumstances were known to the Corps of Engineers prior to the release of the FEIS on May 16, 2003 but were not included in the FEIS.

(1). THE NEWLY PERMITTED CONTAINER FACILITY AT SHOAL POINT

47. The Galveston District recently permitted a new container port on Galveston Bay.

48. On April 15, 2003, Col. Waterworth of the Galveston District signed the Record of Decision ("ROD") approving issuance of a permit to the City of Texas City to construct a container terminal facility at Shoal Point near Texas City ("Shoal Point permit").

49. The Shoal Point permit allows construction of a six-berth container terminal facility on a spoil disposal island located behind the Texas City industrial complex in Galveston Bay.

50. The permitted Shoal Point facility will actually move more containers, as measured in TEU's (twenty foot equivalent units), than will the proposed Bayport facility.

51. In the ROD discussing the Shoal Point facility and its EIS, Col. Waterworth determined that the Shoal Point site was the least environmentally damaging practicable alternative site in the Galveston Bay system for a container terminal facility.

52. The proposed Bayport site was evaluated by the Galveston District in its Shoal Point FEIS as one of the alternative sites for locating the Shoal Point container terminal facility, but the Bayport facility was found to be more environmentally damaging and was not selected.

53. The Bayport FEIS was released by the Galveston District about a month after Col. Waterworth signed the Shoal Point ROD.

54. In the Bayport FEIS, the Shoal Point site is still identified as a reasonable and practicable alternative for locating the Bayport Project.

55. In the Bayport FEIS, there is no mention of the fact that the Shoal Point site had been found to be the least environmentally damaging alternative and had already been selected for issuance of a Corps permit to construct a container terminal facility.

56. At this time, the best site as determined by the Corps' Galveston District for constructing a container port in the Galveston Bay system in the least environmentally damaging way – Shoal Point – has been issued a permit by the Galveston District.

57. The movement of containers into and out of the Houston/Galveston region in the near future is secure with the permitting of the Shoal Point facility.

58. The question before the Galveston District now is whether or not a permit should be issued for a second container terminal facility on the Galveston Bay system, e.g., the proposed Bayport facility, given the Shoal Point facility has already been permitted.

59. That question has not been fully or fairly analyzed in any EIS issued to date by the Galveston District.

(2). Co-Location of Cruise and Container Facilities for the Bayport Project No Longer Necessary

60. The permit application submitted by the PHA for the proposed Bayport Project requested a permit allowing the construction of both container berths and cruise berths together (e.g., co-located).

61. In the DEIS and the FEIS, the Galveston District has attempted to identify and evaluate alternative sites that were large enough to allow both the container and the cruise facilities to be located at the same site.

62. However, in the Bayport FEIS, unlike the DEIS, the Galveston District states for the first time that it does not consider cruise and container facilities to be functionally dependent.

63. If these facilities are not functionally dependent, then they do not need to be co-located.

64. Although the Galveston District has established a new circumstance - container and cruise terminals are now considered functionally independent - this conclusion was not carried through the alternatives analysis in the Bayport FEIS.

65. For example, there was no analysis of a container port at Shoal Point and a cruise terminal in Galveston, an alternative that is clearly viable after the issuance of the Shoal Point permit.

66. There are a number of alternative sites to Bayport where only a cruise terminal could be located, but they were never considered by the Galveston District in its evaluation of the Bayport Project.

(3). HARRIS COUNTY'S NEW STUDY OF DEVELOPING SPILMANS ISLAND

67. One of the alternative sites evaluated in the Bayport FEIS is Spilmans Island.

68. Spilmans Island is currently used as a spoil disposal site and is adjacent to the existing Barbers Cut container facility of the Port of Houston Authority.

69. The cost of development of Spilmans Island for a container facility has been a major issue in determining whether Spilmans Island is a practicable alternative to the proposed Bayport site.

70. PHA had determined that developing Spilmans Island would be cost-prohibitive, due to its being a spoil disposal site.

71. Earlier this year, acting independently of the Port of Houston Authority, Harris County commissioned a study of the cost of developing Spilmans Island.

72. This study by Harris County, dated May 2003, concluded that the cost of development of Spilmans Island was substantially lower than had been determined by the Port of Houston Authority.

73. The Galveston District has not considered this new study by Harris County in the DEIS or FEIS for Bayport in evaluating Spilmans Island as an alternative site.

74. This study by Harris County is new information that significantly affects the evaluation of alternatives to the proposed Bayport site.

(4). NEW TOPOGRAPHIC DATA INCREASES ACREAGE OF JURISDICTIONAL WETLANDS

75. Wetlands located in the 100-year floodplain of a navigable water are considered jurisdictional wetlands under the Clean Water Act.

76. Some of the wetlands at the Bayport site were determined to be jurisdictional because they are in the 100-year floodplain.

77. In December, 2002, Harris County and the Federal Emergency Management Agency ("FEMA") released updated topographic information for Harris County as part of a study being conducted of the extent of the 100-year floodplains in Harris County.

78. The Galveston District is fully aware of Harris County's on-going study with FEMA through which the release of this new topographic information occurred.

79. This updated topographic information is based on LIDAR (Light Detection and Ranging) data and is the best available information for determining the ground elevations throughout the Bayport site.

80. In accordance with Harris County floodplain regulations, actual ground elevations at a site are used, in conjunction with the 100-year flood level of the adjoining watercourse, to determine the extent of the 100-year floodplain.

81. This new topographic information confirmed that the ground elevations at the Bayport site have changed significantly from the elevations reported in both the Bayport DEIS and FEIS, due primarily to the effects of land surface subsidence.

82. The 100-year floodplain at the Bayport site is determined by the 100-year flood levels along the Bayport Ship Channel and Pine Gully, which have been determined to be at an elevation of 12 feet above mean sea level.

83. According to the new topographic information for the Bayport site, significantly more of the Bayport site is at or below elevation 12 feet than is currently shown in the FEIS.

84. According to the Bayport FEIS, only 7% of the Bayport facility is at or below the elevation of 12 feet and in the 100-year floodplain.

85. When the new topographic information is considered, over 20% of the Bayport facility is below elevation 12 feet and in the 100-year floodplain.

86. The extent of the 100-year floodplain at the Bayport site is critical to the determination of jurisdictional wetlands.

87. The new topographic data can also be used to identify swales, ditches and other watercourses that may connect other wetlands at the Bayport site, outside of the 100-year floodplain, to the adjoining navigable waters, thereby making these wetlands jurisdictional.

88. The USEPA commented on the Bayport DEIS and disagreed with the Galveston District's assertion in its DEIS that most of the wetlands on the Bayport site are isolated and therefore non-jurisdictional.

89. The USEPA believes that most, if not all, of the wetlands located on the Bayport site are hydrologically connected to waters of the U.S. through swales, and therefore should be jurisdictional.

90. This new topographic information is significant and relevant to the determination of jurisdictional wetlands on the Bayport site.

91. This new topographic data from Harris County invalidates the jurisdictional wetland determination for the Bayport site that is presented in the DEIS and FEIS for the Bayport Project.

92. Wetlands are important for water quality in Galveston Bay.

93. Wetlands are important as habitat for fish and wildlife.

94. Wetlands are a vital part of the coastal ecology.

95. The proposed Bayport site is full of wetlands.

96. The wetlands on this Bayport site are unique and important.

97. The importance of the wetlands at the Bayport site is widely recognized based on comments from federal resource agencies.

98. For example, on April 25, 2002 the U.S. Fish and Wildlife Service stated in correspondence to the Galveston District that “[T]he Service believes that the wetland complex involved [at the Bayport site] is of national significance.”

99. The U.S. Fish and Wildlife Service also recommended denial of the proposed Bayport permit.

100. In the Bayport FEIS, the Galveston District has determined that the Bayport project would destroy over 146 acres of wetlands.

101. According to the Galveston District, only 19.7 acres of these important wetlands are jurisdictional under the Clean Water Act, based in part on the extent of the 100-year floodplain depicted in the FEIS.

102. If the extent of the 100-year floodplain at the Bayport site is based on the new topographic information, over 40 acres of these important wetlands would be jurisdictional under the Clean Water Act.

103. If other hydrologic connections exist, most if not all of the over 146 acres of wetlands at the Bayport site are jurisdictional.

104. The Bayport Project's proposed compensatory mitigation plan indicates that only 66 acres of new wetlands would be constructed to mitigate for the loss of over 146 acres of total wetlands, resulting in a net loss of over 80 acres of these unique and important wetlands.

105. We do not have many wetlands left along the west shoreline of Galveston Bay.

106. Every acre is important.

(5). USEPA'S NEW STUDY ON AIR QUALITY IMPACTS FROM DIESEL CARCINOGENS

107. As many as seven diesel-powered container ships and three diesel-powered cruise ships could be docked at the proposed Bayport facility at any time.

108. Over 4,500 diesel-powered trucks will enter and leave the proposed Bayport facility each day.

109. At least two trains between 5,000 and 7,000 feet long and having two diesel-powered locomotives for each train will enter and leave the proposed Bayport facility each day.

110. Diesel-powered cranes and container movers will be used throughout the proposed Bayport facility.

111. The Bayport DEIS failed to address the health effects of diesel emissions associated with the proposed Bayport Project operations.

112. In May, 2002, prior to the issuance of the FEIS, the USEPA issued its *Health Assessment Document of Diesel Exhaust*.

113. In this study, USEPA determined that long-term exposure to diesel exhaust is likely to pose a lung cancer hazard, as well as other types of lung damage, to humans.

114. Over 5,000 people live within one mile of the proposed Bayport facility.

115. Although this USEPA Health Assessment document was delivered to the Corps of Engineers in 2002 by GBCPA, the Galveston District failed to consider this document or include an analysis of the increase in cancer cases that would be caused in the adjacent population by the operation of diesel sources at the proposed Bayport facility in a Supplemental DEIS.

(6). NEW AIR QUALITY IMPACTS FROM FINE PARTICULATE MATTER

116. PM_{2.5} is particulate matter air pollution 2.5 microns and smaller in size.

117. The U.S. Environmental Protection Agency has adopted a National Ambient Air Quality Standard (NAAQS) for PM_{2.5}, including both a 24-hour standard (65 micrograms per cubic meter) and an annual standard (15 micrograms per cubic meter).

118. PM_{2.5} will be emitted from construction activities at the proposed Bayport site and from the operation of diesel equipment at the proposed Bayport site.

119. Although comments regarding PM_{2.5} had been submitted at the scoping meeting by some of the plaintiff organizations, the Bayport DEIS did not analyze the emission of PM_{2.5}

from the proposed Bayport facility construction or operation and did not determine whether or not the PM_{2.5} standard would be violated.

120. As a result of the comments to the Bayport DEIS, the Galveston District included an analysis of PM_{2.5} (fine particle) air pollution impacts that was released to the public for the first time when the Bayport FEIS was released on May 16, 2003.

121. In the Executive Summary of the Bayport FEIS, the Galveston District for the first time states that, in the year 2010, the 24-hour national ambient air quality standard ("NAAQS") for PM_{2.5} will be violated.

122. PM_{2.5} is composed of very small particles that are inhaled deep into human lungs.

123. The scientific literature contains recent articles linking PM_{2.5} to mortality as well as to sickness and hospital admissions.

124. PM_{2.5} can kill you – it is a truly dangerous pollutant.

125. Over 5,000 people live within a mile of the proposed Bayport site.

126. Well over 50,000 people live within three miles of the Bayport site.

127. After five years of evaluating this proposed Bayport Project, people living near this Bayport location have now been told, for the first time on May 16, 2003, by the Galveston District, that Federal air quality standards for this dangerous pollutant will be violated by the Bayport Project.

128. This is not how the NEPA process is supposed to work.

(7). NEW NOISE IMPACTS TO RESIDENTIAL COMMUNITIES

129. Comments concerning the inadequate analysis of significant noise impacts to adjacent residential subdivisions were submitted following the Bayport DEIS release.

130. The Bayport FEIS now presents a new analysis of the noise impacts of the proposed Bayport Project on adjacent neighborhoods.

131. The new analysis reveals significant noise impacts will occur to nearby residential neighborhoods from the Bayport Project as proposed by PHA.

132. The Bayport FEIS states that sound levels may increase in the El Jardin subdivision by over 5 dBA from 10 p.m. to 7 a.m., and in other nearby areas by over 10 dBA during that same time.

133. According to the USEPA, noise increases by more than 10 dBA are potentially startling or sleep disturbing.

134. The City of Pasadena municipal code, which applies to El Jardin, prohibits an instantaneous sound level increase at a residential property greater than 5 dBA from 10 p.m. to 7 a.m..

135. The Bayport FEIS states that the City of Pasadena noise ordinance will be violated by the Bayport Project as proposed by PHA unless the port is closed from 10 p.m. to 7 a.m.

136. The Bayport FEIS also concludes that residential property values will decline because of these significant noise impacts.

137. For the first time, after five years of controversy, the Galveston District now admits that the Bayport facility will create major noise impacts on adjacent neighborhoods.

138. There has been no public hearing or discussion about this significant new noise impact.

(8). New Vibration Impacts to Nearby Residences

139. Noise is generally defined as loud, unpleasant, unexpected, or undesired sound that disrupts or interferes with normal human activities.

140. Noise-induced vibration can occasionally be caused by ship maneuvering.

141. The City of Pasadena Municipal Code prohibits any vibration that can be detected without the aid of instruments at any point within a residential building.

142. The Bayport DEIS failed to address the potential impacts to nearby residential communities due to vibrations caused by construction and operation of the Bayport Project.

143. The Bayport FEIS now includes a new section containing a discussion and analysis of vibration impacts.

144. The Bayport FEIS now states that ship maneuvering may occasionally cause noise-induced vibration at residential structures up to 4,600 feet from the Bayport Ship Channel, the effects of which would be perceived as window rattling or wall vibration.

145. There are over 5,000 people living within one mile of the proposed Bayport facility.

146. The Bayport FEIS now concludes that this noise-induced vibration impact caused by the operations of the proposed Bayport Project is long-term and considered potentially significant depending on the design, condition and orientation of each residential structure.

147. Residences located in Shady Oaks and Bay Colony subdivisions to the north, the El Jardin and Surf Oaks subdivisions to the south, and the subdivisions of the City of Taylor Lake Village to the west are all within the range of this potentially significant noise-induced vibration impact.

148. Prior to the release of the FEIS these residents had been given not a clue that a significant vibrations impact would occur in their neighborhood.

(9). New Information on Post-Panamax Vessels Necessitates Future Deepening of the Bayport and Houston Ship Channels

149. GBCPA and other plaintiffs have been concerned since the inception of the Bayport Project about whether the Houston Ship Channel and the Bayport Channel would need to be deepened sometime in the future to accommodate the larger container ships called post-Panamax vessels that are now used in maritime commerce.

150. The Bayport channel is currently dredged to 40 feet of depth

151. The Houston Ship Channel is now being dredged to 45 feet.

152. The initial public notice describing the proposed Bayport container facility identified that the PHA was seeking permission to construct the docks adjacent to the container wharfs to a depth of 56 feet.

153. In the scoping meeting, concern was raised about the potential deepening of the Houston Ship Channel to 50 feet or greater depths.

154. In the Bayport DEIS, the Corps stated that in order to accommodate existing and projected growth in vessel activity, further deepening/widening of the Houston Ship Channel and its connecting channels would likely be necessary. (DEIS, p.4-15).

155. In the Bayport DEIS in the section entitled “Issues Raised During the Scoping Process”, the Corps identified key topic areas that have been addressed in the DEIS, including “the impacts of the proposed dredging on marine life in Galveston Bay, including the impacts of future deepening of the Houston Ship Channel and Bayport channel to at least 50 feet”. (DEIS, p. 5-4).

156. The Bayport DEIS does not include any evaluation or analysis of impacts from the future deepening of the Houston Ship Channel or Bayport Channel to at least 50 feet.

157. In the Bayport FEIS, the Corps again stated that in order to accommodate existing and projected growth in vessel activity, further deepening/widening of the Houston Ship Channel and its connecting channels would likely be necessary. (FEIS, p. 4-19)

158. In the Bayport FEIS in the section entitled “Issues Raised During the Scoping Process”, the Corps again identified key topic areas that have been addressed in the FEIS, including “the impacts of the proposed dredging on marine life in Galveston Bay, including the impacts of future deepening of the Houston Ship Channel and Bayport Channel to at least 50 feet.” (FEIS, p. 6-3).

159. The Bayport FEIS also does not include any evaluation or analysis of impacts from the future deepening of the Houston Ship Channel and Bayport Channel to at least 50 feet.

160. In the FEIS in the response to comments, the Corps states that it decided to exclude consideration of a 50-foot channel based upon the overriding fact that such a project has not been authorized. (FEIS, p. 453, Response to Comment 35-2).

161. In the FEIS in the response to comments, the Corps further states that in a regulatory EIS, the Corps only reviews the project as proposed by the applicant and the PHA has not proposed to widen or deepen the Houston Ship Channel or the Bayport channel. (p. 10, response to comment 1-47).

162. The Bayport FEIS now includes a diagram where wharf cranes proposed for construction at the Bayport site are specifically labeled as being designed to unload post-Panamax vessels. (Figure 5, Appendix 1.1 containing the PHA permit application).

163. The Bayport FEIS now states that, when fully loaded, Post-Panamax vessels require channel depths between 45 to 53 feet.

164. This new information regarding the required channel depths for fully loaded Post-Panamax vessels explains the necessity for the future widening and deepening of the Houston Ship Channel and its connecting channels to at least 50 feet.

165. The Corps has continued to state that deepening of the Houston Ship Channel and its connecting channels would likely be necessary in the future.

166. The permit application and its various revisions submitted by PHA continue to request permission to construct the docks at the container berths to accommodate a draft of 56 feet.

167. If the public invests \$1.2 billion in Bayport through bonds issued by PHA, it is reasonable to expect that PHA will soon argue that the deeper ship channels are needed to fully accommodate fully loaded post-Panamax vessels in order to be competitive – to protect our \$1.2 billion investment.

168. A deeper Bayport channel means additional dredging and altered circulation and salinity patterns.

169. A deeper Houston Ship Channel to serve Bayport will bring much more salt water from the Gulf of Mexico deep into the Galveston Bay system.

170. An increase in salinity is a serious threat to the ecological health and integrity of the entire Galveston Bay system.

171. The Galveston Bay system is productive because it is an estuary, an area where salt and fresh water come together.

172. Salinity is the enemy of the oyster reefs.

173. Salinity is the enemy of the juvenile fish and shellfish that come to the Galveston Bay nursery.

174. It is now clear that the intent of the Bayport facility is to serve Post-Panamax vessels, which, when fully loaded, are larger than can be accommodated at the current time by either the Bayport or Houston Ship Channels, yet the impacts from the deepening of the channels have never been analyzed in an environmental full disclosure document.

175. Galveston Bay has survived some serious impacts.

176. If we do not have full disclosure and public discourse about the long-term impact of deeper container ships being berthed at Bayport, Galveston Bay may not survive Bayport.

(10). SUMMARY

177. The opposition to Bayport is a fight over truth and full and fair treatment of the impacted public by the regulatory agency.

178. Shoal Point is already permitted and is about to be constructed.

179. Shoal Point will service the shipping needs for containers in the Galveston Bay area.

180. Shoal Point will provide jobs and economic development for the region.

181. The permitting of Shoal Point is not mentioned in the Bayport FEIS.

182. The public is being misled about the status of container terminals in Galveston Bay.

183. Other new information is also not discussed in either the Bayport DEIS or FEIS.

184. The public has a right to be told the truth about the proposed Bayport facility and has a right to a meaningful opportunity to review this information and to comment upon it.

185. Col. Waterworth has refused all requests to prepare a Supplemental Draft Environmental Impact Statement (SDEIS) as required under the rules of the Council on Environmental Quality.

186. The public was given thirty (30) days to comment upon the FEIS, and has been granted an extension of an additional thirty (30) days.

187. The Port of Houston Authority has already advertised for proposals to initiate construction of the Bayport Project, including a clearing contract (advertised February, 2003), wharf construction and dredging contract (advertised February, 2003), a container yard contract (advertised April, 2003), and a Bayport substation (advertised April, 2003), with contract ranges totaling from \$82,142,400.00 to \$114,409,000.00.

VI. CAUSES OF ACTION

A. CAUSE OF ACTION NO. 1 – SUPPLEMENTAL DRAFT EIS REQUIRED UNDER NEPA DUE TO SIGNIFICANT NEW CIRCUMSTANCES AND/OR INFORMATION

188. Under 40 CFR § 1502.9(c)(1)(ii), a supplement to a draft or final EIS shall be prepared when there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

189. Under the regulations of the Council on Environmental Quality, a supplemental draft of appropriate sections shall also be prepared and circulated if the Draft EIS was so inadequate as to preclude meaningful analysis. (40 CFR § 1502.9(a)).

190. Plaintiffs allege that significant new circumstances and new information relevant to environmental concerns and bearing on the proposed action or its impacts have arisen since release of the DEIS regarding the proposed Bayport Project that require the completion of a SDEIS.

191. Plaintiffs allege that the analysis of impacts in the Draft EIS was so inadequate as to preclude meaningful analysis, requiring a supplemental draft of appropriate sections.

192. The issuance of the Shoal Point permit by the Galveston District for a container terminal similar to the proposed Bayport Project represents a significant new circumstance and significant new information that was known to the Galveston District, yet not evaluated in the Bayport FEIS.

193. Neither the Draft EIS nor the Final EIS presented an alternative analysis wherein two permits were proposed to be issued by the Galveston District for new container ports at different locations on Galveston Bay.

194. Numerous comments have been filed by Plaintiffs and others challenging the presentation of alternatives in the DEIS.

195. The conclusion by the Galveston District that the cruise and container terminals are not functionally dependent upon each other is significant new information relevant to environmental concerns and bearing on the proposed action or its impacts, since there is no analysis of alternative sites in the Bayport DEIS or FEIS where the cruise terminal is located at a different site, other than Bayport, from the container terminal (e.g. cruise terminal at Galveston, container terminal at Shoal Point or Bayport).

196. GBCPA submitted comments that included an expert report concluding that cruise and container terminals did not need to be co-located.

197. Harris County's recently released study of the feasibility of developing Spilmans Island as a container facility represents significant information relevant to environmental concerns and bearing on the proposed action or its impacts because it makes Spilmans Island more attractive as an alternative site to the proposed Bayport facility.

198. The new topographic information from Harris County is significant information relevant to environmental concerns and bearing on the proposed action or its impacts because it will increase the extent of jurisdictional wetlands and will increase the mitigation requirements under NEPA and the §404 permit program.

199. USEPA's issuance of a guidance document regarding the classification of diesel emissions as carcinogenic represents significant new information relevant to the environmental impact of the proposed Bayport facility.

200. Although this diesel study was submitted to the Corps in December, 2002, this information was ignored in the FEIS.

201. The new PM_{2.5} analysis contained in the Bayport FEIS, showing that the 24-hour NAAQS for PM_{2.5} will be violated in 2010, is significant new information relevant to the environmental impact of the proposed Bayport facility.

202. New information regarding significant noise and vibration impacts to the residential communities surrounding the Bayport site presented in the Bayport FEIS is significant and relevant to the environmental impact of the proposed Bayport facility and was never presented in the DEIS.

203. Information about the channel depths required by Post-Panamax vessels and wharf design is significant and relevant to the necessity for the future deepening of the Houston Ship Channel and Bayport Channel.

204. The DEIS stated that the marine impacts of widening and deepening the Houston Ship Channel to at least 50 feet would be presented and it was not.

205. Each of the above-mentioned issues represents significant changed conditions or new information relevant to environmental concerns and bearing on the proposed action and its

impacts, and the FEIS must be re-issued as a Supplemental Draft EIS that includes full and fair consideration of this information.

206. The Draft EIS failed to provide sufficient detail about several of these issues and precluded meaningful analysis.

207. A number of comments were filed requesting the preparation of a Supplemental Draft EIS prior to the release of the FEIS on May 16, 2003.

208. The release of the FEIS represented final agency action regarding the request for a Supplemental Draft EIS.

209. All of the above-mentioned issues are also relevant to the analysis of reasonable alternatives under NEPA and practicable alternatives under the § 404(b)(1) guidelines.

210. It is a violation of NEPA to fail to give the public a meaningful opportunity to comment at a meaningful time.

211. It is arbitrary, capricious and otherwise not in accordance with the law in violation of the APA to issue a DEIS or a FEIS that does not include information known to the agency and that does not present meaningful alternatives and meaningful analysis upon which the public may comment.

212. It is arbitrary, capricious and otherwise not in accordance with the law in violation of the APA for the Galveston District to base a decision regarding the issuance of a permit for the PHA's proposed Bayport Project on the FEIS in light of the significant new information discussed above.

213. It is arbitrary, capricious and otherwise not in accordance with the law in violation of the APA for the Galveston District of the Corps to determine not to issue a Supplemental Draft EIS.

B. CAUSE OF ACTION NO. 2: ILLEGAL RULE-MAKING UNDER THE APA BY THE GALVESTON DISTRICT OF THE U.S. ARMY CORPS OF ENGINEERS REGARDING THE EXTENT OF JURISDICTIONAL WETLANDS UNDER §404 OF THE CLEAN WATER ACT

214. On information and belief, plaintiffs assert that there is a significantly greater acreage of jurisdictional wetlands on the Bayport site than has been identified by the Galveston District.

215. Plaintiffs allege that the Galveston District has adopted an illegal rule not promulgated under the APA that prevents certain types of wetlands from being classified as jurisdictional, thereby artificially limiting the acres of wetlands subject to §404 permitting under the Clean Water Act.

216. On January 9, 2001 the United States Supreme Court issued its ruling in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) (SWANCC).

217. This ruling altered the jurisdictional reach of the U.S. Army Corps of Engineers under Section 404 of the Clean Water Act.

218. At its core, the SWANCC decision prevents the Corps from asserting jurisdiction over isolated wetlands on the basis of the movement of migratory waterfowl.

219. In response to the SWANCC decision, the Corps in Washington, D.C. on January 15, 2003 published its Advance Notice of Proposed Rulemaking to address these issues.

220. However, on February 13, 2001, the Galveston District unilaterally issued its own written Policy No. 01-001 regarding wetlands entitled "Subject of Adjacent/Isolated Criteria," which was addressed to all regulatory personnel with the Galveston District.

221. This policy states:

"wetlands are waters that are located within a floodplain or hydrologically interrelated during flood events, which occur during a natural cycle within riverine systems and are driven largely by rainfall and not water of a tidal origin. However, it should be noted that sheet flow over land outside a floodplain is not considered a sufficient hydrologic connection. . . "

222. This policy reveals the Galveston District's unique criteria whereby overland sheet flow of storm water into waters of the United States through wetlands is not a sufficient hydrologic connection between wetlands and navigable waters to confer federal jurisdiction over such wetlands.

223. By issuing this written, conclusory "policy," the Galveston District has engaged in illegal rule making in violation of the APA.

224. The APA requires agencies to undergo formal notice and comment procedure when undergoing rulemaking. 5 U.S.C. § 553.

225. These requirements allow the public an opportunity to comment on rules, which may affect their interests.

226. Policies and guidance, which have the effect of law, should be considered formal rules and follow proper notice and comment requirements.

227. A policy is a rule when it is legislative or substantive in nature.

228. The Galveston District's Policy No. 01-001 is a rule because it is legislative or substantive in nature.

229. No notice of this rule was issued and no opportunity to comment was ever provided to the public.

230. If the jurisdictional wetlands on the Bayport site were to include all of the additional wetlands connected by overland sheet flow to waters of the United States,

substantially more wetland acreage would be under the jurisdiction of the Corps, thus requiring more mitigation than currently proposed.

231. In the Bayport FEIS, the Galveston District found only 19.7 acres of jurisdictional wetlands that would be impacted on the proposed Bayport site, with the remaining 126.7 acres of wetlands being considered non-jurisdictional.

232. The Galveston District has determined that the majority of the wetlands within the Bayport Project location are non-jurisdictional because their only surface water connection to navigable waters is by overland sheet flow.

233. Upon information and belief, the Galveston District is the only district in the United States that does not consider overland flow as sufficient hydrologic connection in determining adjacent/jurisdictional wetlands.

234. Plaintiffs are aware that the U.S. Army Corps of Engineers for the Seattle District considers overland flow to be a sufficient hydrologic connection to establish federal jurisdiction over adjacent wetlands to navigable waters.

235. On information and belief, plaintiffs allege that the Fort Worth District and the New Orleans District each use overland flow as sufficient criteria for determining federal jurisdiction.

236. If the Galveston District's illegal rule pertaining to overland sheet flow were discarded, the majority of the wetlands at the proposed Bayport Project location would be considered to be waters of the United States and classified as jurisdictional under the Clean Water Act.

237. Plaintiffs allege that the Galveston District violated the prohibition against rule-making by failing to follow the procedure set out in 5 U.S.C. § 553 when they issued Policy No. 01-001.

C. CAUSE OF ACTION NO. 3: DECLARATION THAT THE DETERMINATION OF JURISDICTIONAL WETLANDS AT THE BAYPORT SITE IS INVALID AND MUST BE RE-EXAMINED

238. Plaintiffs allege that the Corps of Engineers was in error when it determined that the full extent of jurisdictional wetlands subject to regulation as navigable waters under §404 of the Clean Water Act on the Bayport site was 19.7 acres.

239. Plaintiffs allege that a greater acreage of wetlands would be considered jurisdictional due to their inclusion within the elevation 12 feet flood zone if more accurate topographic information available to the Galveston District from Harris County and FEMA had been incorporated into the wetland jurisdictional analysis (see paragraphs 75-84, *supra*).

240. Plaintiffs allege that a greater acreage of wetlands would be considered jurisdictional as per the comment submitted by the U.S. Environmental Protection Agency (see paragraphs 88-89, *supra*) if the new topographic information available to the Galveston District from Harris County and FEMA had been utilized by the Galveston District to determine the existence of ditches and micro-depressions connecting the bulk of the wetlands on the Bayport site with either Pine Gully, Galveston Bay or the Bayport Deepwater channel, all of which are navigable waters.

241. Plaintiffs allege that overland flow into and through wetlands that enters navigable waters provides a sufficient nexus between the purposes of the Clean Water Act and the wetlands as to make those wetlands jurisdictional navigable waters subject to the permitting requirements of § 404 of the Clean Water Act.

242. Plaintiffs request Declaratory Relief whereby the Court declares that there is sufficient nexus between these wetlands and the purposes of the Clean Water Act as to make the significantly more wetland acreage on the Bayport site jurisdictional navigable waters than has been recognized to date by the Corps.

243. Plaintiffs request that the Court remand this issue to the Corps to reconsider the issue of the acreage of jurisdictional wetlands on the Bayport property as well as requiring that the Corps and USEPA work together to jointly establish the jurisdiction of the Corps over the wetlands at the Bayport site.

244. Plaintiffs allege that the Corps has exhibited arbitrary and capricious action by failing to re-examine the extent of the wetlands at the Bayport site in light of new topographic information and/or in light of the USEPA claim that micro-channels provide sufficient connection to render much more acreage jurisdictional than has been determined by the Corps.

VII. STANDING

245. The City of Shoreacres is located between State Highways 146 and 501 at the northwestern edge of Galveston Bay. Shoreacres is immediately north of the proposed Bayport terminal. Shoreacres is predominantly residential with a population of approximately 1,488. Shoreacres' residents will be directly and severely impacted by the proposed Bayport Project. These residents will be impacted by the additional noise, lights, traffic and air pollution. If the proposed Bayport Project is built, their property values will decline. Shoreacres' zoning ordinance reflects the community's values for a bayside, residential community, which is at odds with the proposed Bayport Project

246. The City of Taylor Lake Village is on Taylor Lake, west of the proposed Bayport Project and has a population of approximately 3,694. The proposed Bayport Project will

adversely affect Taylor Lake Village's residents. Air pollution as well as the additional noise pollution and increased traffic will substantially interfere with the use and enjoyment of their property. The property values in Taylor Lake Village will also decline if the proposed Bayport Project is built.

247. GBPCA is a non-profit organization whose purpose is to restore and enhance Galveston Bay and its estuaries. In this regard, GBPCA monitors activities and proposed activities, which impact the bay shore environment and human community of Galveston Bay, with the intent to modify and/or prevent activities that have an adverse environmental impact. GBPCA's members use Galveston Bay and its estuarine systems-- including the area affected by the actions complained of in this lawsuit-- for bird watching, boating, and general enjoyment of the scenic environment. Mary Beth Maher is a member of GBPCA and lives in Shoreacres. Ms. Maher enjoys boating on Galveston Bay and is an active volunteer with the new wetlands park in Shoreacres. Both of these activities will be negatively impacted by the proposed Bayport facility.

248. GHASP was formed in 1988 to protect the health of residents of the Houston-Galveston area from air pollution, including ozone. GHASP's board of directors, members, consultants, outreach workers, and volunteers are primarily from the Houston-Galveston region and will be affected by the elevated levels of ozone in the Houston-Galveston non-attainment area caused by the proposed Bayport Project, as well as by other pollutants from the project such as fine particulate matter. John Wilson is a member of GHASP. Mr. Wilson enjoys sailing on Galveston Bay, which will be negatively impacted by the proposed Bayport facility.

249. TCONR was formed in 1971, and has approximately 1,000 members. TCONR's purpose includes educating the public by collecting, studying and disseminating information on

environmental problems; protecting native ecosystems; promoting efficient use of natural resources; preserving native forests and other Texas habitat; and influencing public policies and activities that impact the environment. The organization and each of its members has a strong interest in preserving the integrity of the environment in the Bayport area.

250. HAS is a chapter of the National Audubon Society, and subscribes to its mission statement:

Houston Audubon Society promotes the conservation and appreciation of birds and wildlife habitat.

The Bayport Project's proposed location includes extensive wetlands used by local and migratory birds. HAS has a prime interest in preserving these wetlands and the birds that use this area. The Great Texas Birding Trail follows Todville Road alongside the proposed terminal. HAS sponsors many outdoor activities for the community such as bird watching classes and fieldtrips. HAS members participate in these activities, and will be negatively impacted by the proposed Bayport facility.

251. PISCES is an organization made up of commercial fishermen that was formed in the 1970's. PISCES has an economic interest in the proposed Bayport Project. Their livelihood depends on the natural resources that inhabit these waters. The additional dredging that is reasonably foreseeable for the Bayport and Houston Ship Channels will threaten the oysters and shrimp upon which PISCES's members depend. Richard Moore is a member of PISCES whose livelihood will be negatively impacted by the proposed Bayport facility.

252. GRN is an organization comprised of members dedicated to the protection and restoration of the resources of the Gulf of Mexico Region. One of GRN's priorities is to protect the wetlands located in the Gulf states (Texas, Louisiana, Mississippi, Alabama, and Florida). Forty different organizations and forty-five individuals are members of GRN who participate in

activities designed to further its goals. These members span the entire coast of the Gulf, from Texas to Florida. GRN sponsors many events, workshops, and reports that focus on the condition of the natural resources of the Gulf. The proposed Bayport Project will severely impact wetland resources of the Gulf region. GBCPA is a member organization of GRN.

253. HYC is the oldest yacht club in Texas. Its mission is to advance the sport of yachting. HYC organizes regattas and promotes Houston nationally for yacht racing and recreational boating center. HYC members currently enjoy sailing in Galveston Bay; however, the addition of the proposed Bayport Project will substantially interfere with the HYC's mission and purpose. The additional water traffic, lights, noise, and air pollution will severely impact Galveston Bay as a sailing and recreational venue. Charles Buchner is a member of the Houston Yacht Club and was its commodore during 2001-2002. Mr. Buchner is active in sailing and racing on Galveston Bay, which will be negatively impacted by the proposed Bayport facility.

254. GBF is a nonprofit organization whose mission is to preserve, protect and enhance the natural resources of the Galveston Bay estuarine system and its tributaries for present users and for posterity. GBF's members participate in and sponsor recreational activities, educational programs, and research focused on the natural marine environment of Galveston Bay. The proposed Bayport Project will destroy much of the natural environment, which serves as a classroom and recreational location for Galveston Bay Foundation events. Ellyn Roof is a member of GBF and lives in Taylor Lake Village, Texas. Ms. Roof sails on Galveston Bay and has skippered the GBF "Bay Ranger" on education trips on Galveston Bay. These activities will be negatively impacted by the proposed Bayport facility. Additionally, Ms. Roof's property in Taylor Lake Village will be negatively impacted by air pollution, noise pollution and increased traffic and the property value of the home is expected to decline if this facility is constructed.

255. Each of the negative impacts from the proposed Bayport facility on the plaintiffs or the plaintiffs' properties would be redressed by a decision of this Court favorable to the Plaintiffs.

VIII. RELIEF REQUESTED

256. Plaintiffs request that an injunction be issued prohibiting the Defendants from issuing a permit for the Bayport Project until a Supplemental Draft EIS is prepared that incorporates the changed conditions and new information previously discussed, the public is allowed to meaningfully comment, and the NEPA process properly followed.

257. Plaintiffs also request that an injunction be issued preventing Defendants from using the Galveston District's Policy No. 01-001 that overland sheet flow is not a sufficient hydrologic connection, unless and until the rule-making procedures of the APA have been followed.

258. Plaintiffs also request that this Court declare that overland flow of surface waters that connect wetlands with navigable waters is sufficient to make these wetlands jurisdictional water of the United States under § 404 of the Clean Water Act.

259. Finally, Plaintiffs request that this Court remand the delineation of jurisdictional wetlands to the Corps for further evaluation and direct that the extent of jurisdictional wetlands at the proposed Bayport Project location be re-examined using the best available topographic information as well as other factors deemed appropriate by the Court.

IX. PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiffs request that upon a final trial hereof, that a declaratory judgment and permanent injunction be issued as requested above, and for other and further relief to which Plaintiffs may show themselves justly entitled, including attorneys fees.

Respectfully submitted,

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**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION**

THE CITY OF SHOREACRES, ET. AL.
Plaintiffs,

v.

**COLONEL LEONARD D. WATERWORTH,
DISTRICT ENGINEER, GALVESTON
DISTRICT - U.S. ARMY CORPS OF
ENGINEERS; ET. AL.**
Defendants.

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CIVIL ACTION NO _____

ORDER

CAME ON FOR CONSIDERATION, Plaintiffs, The City of Shoreacres, et. al. Original Complaint and Application for Declaratory Relief. After consideration of the evidence and pleadings, this Court is of the opinion that this request should be **GRANTED**; it is therefore

ORDERED that the Final Environmental Impact Statement for the Port of Houston' s proposed Bayport facility be reissued by the Galveston District of the U.S. Corps of Engineers as a Supplemental Draft Environmental Impact Statement including full and fair analysis and disclosure of (1) the impact of the issuance of the Shoal Point permit; (2) the consideration of alternative sites for cruise terminal apart from container terminals, including specifically Galveston and Pelican Island locations; (3) the impact of Harris County's recent study on the Spilmans Island alternative; (4) the impact of the loss of land surface at the Bayport site as documented in the new LIDAR study by Harris County and FEMA, including reanalysis of jurisdictional wetlands; (5) the impact of widening and deepening the Houston and Bayport Channels to 50 or more feet of depth; (6) the increase in cancer risk to adjacent population from exposure to diesel emissions; (7) the violation of the PM_{2.5} standard; (8) the violation of noise standards; and (9) the violation of vibration standards; is it further

ORDERED that Policy No. 01-001 of the Galveston District U.S. Army Corps of Engineers is in violation of 5 U.S.C. § 553; it is further

ORDERED that the issue of jurisdictional wetlands is remanded to the Galveston District U.S. Army Corps of Engineers for reconsideration in light of new topographic information.

Signed on this _____ day of _____, 2003.

Judge Presiding