

**ENTERED**

December 04, 2015

David J. Bradley, Clerk

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
GALVESTON DIVISION

GULF COAST ROD REEL AND GUN  
CLUB, INC., *et al*,

Plaintiffs,

VS.

JERRY PATTERSON, *et al*,

Defendants.

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CIVIL ACTION NO. 3:13-CV-126

**MEMORANDUM AND ORDER**

Rollover Pass is a man-made channel connecting the Gulf of Mexico and East Bay (the eastern extension of Galveston Bay) through the Bolivar Peninsula. Created in 1955 to increase the salinity and fishery of the eastern part of the Galveston Bay system, Rollover Pass has become a “nationally-recognized fishing destination.” But through the years studies have found that the Pass was increasing erosion along the peninsula. Those concerns came to a head after Hurricane Ike devastated the Bolivar Peninsula in 2008 and highlighted the vulnerability of the Texas Gulf Coast. The State of Texas, through its General Land Office (GLO), sought to close the pass “to reduce coastal erosion by eliminating the sediment transport into Rollover Pass” and to “return Rollover Bay and East Bay to their historical salinity regimes.” In August 2012, the U.S. Army Corps of Engineers approved the GLO’s request for a Clean Water Act (CWA) permit to close Rollover Pass.

Two groups challenge the Corps' issuance of the permit: Gulf Coast Rod, Reel and Gun Club, Inc., a recreational organization that owns the land through which Rollover Pass cuts, and Gilchrist Community Association, a local group (the nearest town is Gilchrist) that delivers maintenance and management services such as providing dumpsters and toilets. They contend that the Corps' decision was arbitrary and capricious in violation of the National Environmental Policy Act (NEPA) and CWA by failing to fully consider ecological and socioeconomic impacts or to sufficiently weigh alternatives. Both sides agree that the Court can decide these administrative law issues through the cross motions for summary judgment that they have filed.

## **I. BACKGROUND**

Even by the standards of the narrow Bolivar Peninsula, the land where Rollover Pass was built is a thin sliver. It is only about 200 feet wide. Dating back to the time of Spanish control of the area through Prohibition, ship captains would roll barrels of liquor and other imports over the strip of land to avoid customs officials in nearby Galveston. Texas State Historical Association, *Rollover Pass*, <https://www.tshaonline.org/handbook/online/articles/rkr05> (June 15, 2010). Thus the name "Rollover Pass" for the channel that the Texas Game and Fish Commission built in 1954. At that time, the Corps authorized the building as a "fish pass" from the Gulf, intended to improve fishing in Galveston Bay system by increasing inflows

of Gulf saltwater. AR COE000004–06. The part of the bay nearest the Pass has been termed Rollover Bay.



AR COE00003<sup>1</sup>



Rollover Pass, <http://www.rolloverpasstexas.com/> (last visited Dec. 1, 2015)

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<sup>1</sup> The Court will cite to the administrative record by using the “AR COE” bates numbers.  
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Although the Pass did create a beloved fishing spot, studies conducted as early as 1958 indicated that the Pass was contributing to erosion. AR COE000495. According to these studies, sand and sediment from the Gulf is pulled into the Pass with the current. *Id.* This prevents the sand from getting to beaches along the Gulf side of the Peninsula where it would otherwise settle. *Id.* The Corps also found that this increases the amount of dredging needed to remove sediment that accumulates in the Pass and throughout the Gulf Intracoastal Waterways. AR COE001682–83.

In 2008, Hurricane Ike caused serious damage to the Bolivar Peninsula, with the area around the Pass being among the hardest hit. “The Category 2 hurricane decimated the Gilchrist community and leveled nearly all of the residential and commercial structures.” AR COE001677. Following the devastation, the Texas Legislature appropriated \$5.85 million to the GLO “for the closure of any man-made pass that is causing negative effects, both environmental and/or erosional, to the adjacent land.” AR COE000024. The GLO planned to use this funding to close Rollover Pass and applied to the Corps for a CWA Permit allowing it to fill in the Pass. *Id.* The application included extensive analysis by the GLO’s hired experts, Taylor Engineering, analyzing the potential effects of the closure. *See, e.g.*, AR COE000025, COE000217–288. Taylor Engineering and the GLO determined that the closure would help reduce sediment transfer and resulting beach erosion,

improve salinity conditions in the East Bay, and would not cause adverse environmental impacts.

The Corps commenced its review process, which included holding a public notice and comment period. AR COE001690. Numerous federal, state, and local agencies, as well as private groups, including the challengers here, responded. AR COE001690–94. The Corps’ final Environmental Assessment responded to the submitted concerns. AR COE001694–1703. Of particular relevance to this case, the Texas Parks and Wildlife Department raised concerns about the salinity model, questioning whether its modeling would accurately predict salinity changes in Rollover Bay and East Bay during extremely dry periods. AR COE001691. The Department suggested certain changes, including extending the geographic and historical range of data used in the modeling and using multiple agencies’ databases to determine inflows from both the Gulf and freshwater sources into East Bay and Rollover Bay. AR COE001691–92. In response, Taylor Engineering expanded the size of its study area to include more inputs. AR COE001695. The Corps also noted that the model did include data from over seven decades (1936–2008) and defended use of seasonal (as opposed to daily) inflow data as both fully effective for the purpose of long-term relative salinity comparisons and more cost efficient. *Id.*

Following public comment and evaluation from other federal agencies, the Corps completed its own Environmental Assessment. The Assessment concluded

that closure is appropriate because it is the only option that provides a long-term solution for beach erosion in the area and downdrift on the peninsula; eliminates sediment transfer into surrounding bays; and effectively returns the bays to more natural salinity levels. AR COE001676–77. All this can be achieved, it concluded, while causing only minimal impacts on water quality and existing bridge and utility infrastructure. AR COE001676. The Corps granted the Section 404 Permit allowing the Texas GLO to fill Rollover Pass. AR COE001717–20. Plaintiffs then filed this suit.

Plaintiffs originally brought five causes of action against the Corps and its officers in their official capacity: violations of NEPA and CWA for failing to fully disclose cumulative impacts and socioeconomic and environmental justice impacts, and for failing to sufficiently consider alternatives; violation of its own regulations requiring a public interest review; and violation of the Rehabilitation Act of 1973 because of the impact of the closure on disabled people who fish at the Pass. Docket Entry No. 1. Plaintiffs subsequently stipulated to dismissal of the Rehabilitation claim (Docket Entry No. 30), after the GLO announced that plans for replacing the Pass with a fishing pier would make the pier wheelchair accessible. Docket Entry No. 56 at 7.<sup>2</sup>

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<sup>2</sup> Plaintiffs also originally brought claims against the GLO and its Commissioner under the Americans with Disabilities Act, the Rehabilitation Act, and the Fifth and Fourteenth Amendments

In pursuing its remaining claims against the Corps, Plaintiffs moved to supplement the administrative record and introduce extra-record evidence. Specifically, Plaintiffs asked the Court to consider (1) a scientific article about sand transport by Bales and Holley that they contend the Corps relied upon but erroneously left out of the record; (2) three studies by the Bureau of Economic Geology that were available prior to the Corps' decision but that the Corps did not rely upon; and (3) three reports about salinity and sedimentation created after the Corps' decision by experts the Plaintiffs hired. *See* Docket Entry No. 51.

The Court admitted the Bales and Holley article because doing so was an appropriate supplementation of the original record. Docket Entry No. 76 at 11. The Court deferred ruling on the other categories of documents, noting it would consider admitting them based on how Plaintiffs sought to use them in their merits briefing.<sup>3</sup>

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of the U.S. Constitution. Docket Entry No. 1. They later dismissed these federal claims but asserted a claim against the state defendants under the public trust doctrine. Docket Entry No. 43. The state defendants brought a motion to dismiss on immunity grounds, arguing that *Ex parte Young* can only be used to vindicate federal rights, not state common law rights. Docket Entry No. 56. Plaintiffs did not file a response and agreed to dismiss the state defendants. Docket Entry No. 64.

<sup>3</sup> In its Motion for Summary Judgment, Plaintiffs cited and attached a map purporting to show the amount of erosion across the Peninsula. Docket Entry No. 73-1 at 2. Defendants object that this was not included in the prior Motion to Supplement and is not a part of the administrative or court record. The Court agrees that it will not be considered independently for this reason. Several very similar maps, however, are included within the 2012 Jeffrey Paine article that Plaintiffs did previously seek to admit.

## II. LEGAL STANDARDS

### A. Section 404 CWA Permits and Environmental Assessments

The CWA prohibits discharge of pollutants into navigable waters without an authorizing permit. 33 U.S.C. § 1311(a). The Secretary of the Army, through the Corps, is authorized to regulate discharges of dredge and fill materials through Section 404 permits. *Id.* § 1344. The EPA’s 404(b)(1) Guidelines provide that the Corps may issue a permit only if it finds that: (1) there will not be “significantly adverse effects” to human health or welfare, or aquatic life or ecosystems; (2) there are no “practicable alternatives” that would be less environmentally harmful; and (3) there are steps taken to “minimize potential adverse impacts of the discharge on the aquatic ecosystem.” 40 C.F.R. § 230.10. The Corps must also undertake a public interest review: “an evaluation of the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest” that balances the benefits and “reasonably foreseeable detriments” of the proposed action. 33 C.F.R. § 320.4.

In addition to CWA regulations, the permitting approval process must also satisfy NEPA. NEPA establishes a number of “action-forcing procedures,” which mandate that agencies seriously consider the environmental impacts of proposed actions. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). “Although these procedures are almost certain to affect the agency’s substantive

decision, it is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process. . . . Other statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed—rather than unwise—agency action.” *Id.* at 350–51.

The Council on Environmental Quality establishes regulations to guide agencies on NEPA compliance. 40 C.F.R. §§ 1500–1508. The first step is the development of an Environmental Assessment. The Assessment is a “concise public document” developed by the federal agency to “[b]riefly provide sufficient evidence and analysis” showing either that a more complete environmental impact statement is needed, or that there is a “finding of no significant impact.” 40 C.F.R. § 1508.9(a). In this case, the Corps determined that there was no significant environmental impact in closing Rollover Pass, and therefore a more in-depth Environmental Impact Statement was never completed.

### **B. Summary Judgment in Administrative Procedure Act Cases**

The Corps’ Environmental Assessment and permitting decision are reviewed according to section 706 of the Administrative Procedure Act, which requires the Plaintiffs to show that the Corps’ actions were “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” or “without observance of procedure required by law.” 5 U.S.C. § 706(2)(A) and (D); *see also Sierra Club v.*

*Sigler*, 695 F.2d 957, 964 (5th Cir. 1983) (applying the standard to a NEPA challenge). This is a deferential standard, but is not without limits:

To make [a finding on whether the agency abused its discretion] the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. . . . Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.

*Sierra Club*, 695 F.2d at 964 (quoting *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)). “Substantial weight” is afforded to the Corps’ interpretation of its permit granting authority because agencies are entitled to deference in construing statutes that they are charged with enforcing. *City of Shoreacres v. Waterworth*, 420 F.3d 440, 445 (5th Cir. 2005) (citation and internal quotation omitted) (noting deference given to the Corps’ decision to grant dredging and filling permits, provided the decision is reasonable and not in conflict with Congress’s express intent). This standard is the same whether the court is reviewing the Corps’ decision under NEPA or the CWA. *Id.*

As other courts have noted, “[w]hen reviewing the decision of an administrative agency, a motion for summary judgment stands in a somewhat unusual light, in that the administrative record provides the complete factual predicate for the court’s review.” *City of Shoreacres v. Waterworth*, 332 F. Supp. 2d 992, 1004 (S.D. Tex. 2004) (internal citation and quotation omitted) *aff’d*, 420 F.3d 440 (5th Cir. 2005). The Court’s task is to consider the administrative record

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as a whole, without reweighing evidence, and determine whether the Corps acted arbitrarily, capriciously, or in violation of legally required procedure in its decision to issue a permit to close Rollover Pass.

### **III. ANALYSIS**

Plaintiffs' argue that the Corps' conduct was arbitrary and capricious because the Environmental Assessment failed to fully or fairly evaluate: (1) cumulative impacts from the closure of Rollover Pass on East Bay, and most notably the impact on salinity levels; (2) socioeconomic impacts of the closure on disabled persons and the local economy; and (3) alternatives to closing Rollover Pass. Although their complaint alleges violations of both NEPA and the CWA, Plaintiffs' summary judgment briefing focuses on NEPA so that is the focus of the Court's discussion.

#### **A. Cumulative Impacts under NEPA**

The core issue of the claim that the Corps failed to consider cumulative impacts relates to salinity levels and "whether or not the computer model used by the GLO and relied upon by the Corps included all of the inputs required for a legally and technically defensive cumulative impact analysis." Docket Entry 73 at 30. Plaintiffs argue that the model should have considered daily freshwater inflows into Galveston Bay—as the State of Texas Water Development Board's preexisting TxBLEND model does—rather than multiseasonal averages, and that the model failed to consider all of the freshwater inflows into the East Bay, including the

Needmore Diversion that occasionally diverts floodwater from the Taylor Bayou into the East Bay. They contend that these shortcomings led to findings that significantly overestimate the post-closure salinity levels in the Bay.

Salinity level is important because it impacts aquatic life; certain fish and oysters cannot flourish or survive in water that is either too fresh or too salty. The Plaintiffs contend that Pass closure will result in water that is too fresh, hurting fisheries and particularly the large oyster population. The GLO acknowledged that the salinity change “may have both positive and negative effects on fish and wild life resources,” but both the GLO and the Corps ultimately concluded that the closure will not significantly impact wildlife and may improve the fish habitat, particularly for oysters and juvenile fish in East Bay. *See* AR COE000776–78; AR COE001679.

An Environmental Assessment must include “brief discussions” of the need, practicable alternatives, and environmental impacts of a proposed action. 40 C.F.R. § 1508.9(b). Cumulative impacts are part of the environmental impacts analysis.

Under NEPA, cumulative impact is defined as:

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

*Id.* § 1508.7.

The Corps satisfied these requirements. Although Plaintiffs object to the model used and propose a different one that may well be better, the Corps has provided reasoned justifications for why it chose its model and it did consider the impact of freshwater inflows.

As for the modeling, the Corps used over seventy years of seasonal data; in defending its use of seasonal rather than daily inflow data, the Corps explained that the seasonal data “provided results not subject to local anomalies and episodic events which would obscure the more relevant trends with transient excursions. Given the good model validation results, modeling the actual long-term hydrodynamic conditions would require several months of computations with no appreciable benefit.” AR COE.001695. This reasoned decision to use seasonal data is not arbitrary or capricious.

Freshwater inflows into the Bay were also considered. Taylor Engineering’s report, which the Corps relied on, utilizes a study area derived from the TxBLEND model that includes several freshwater flows into the bay system, including the Trinity River, Cedar Bayou, San Jacinto River, and Buffalo Bayou. AR COE000069, AR COE000075. The report acknowledges that the model does not include all freshwater inputs—Oyster Bayou, for one, is omitted, as is the previously mentioned Needmore Diversion—but concludes that this would not have a significant impact on determining the difference in salinity levels between the Pass

being opened or closed, particularly because the Trinity River contributes 60-70% of the freshwater to the system. AR COE000075, AR COE000099. The Corps also explained that the Needmore Diversion “is not expected to have any appreciable impact on the salinity of the East Bay/Rollover Bay system” because it will only flow intermittently when the potential for flooding requires emptying the Diversion into the Bay. AR COE001699. Because such an event would take place at a time of regionally heavy rainfall when all freshwater inflows are increased, the model would already account for a temporarily fresher regime regardless of the Needmore Diversion. *Id.*

Finally, the Corps did make adjustments and respond to questions on this issue during the public comment period. In response to the Texas Parks and Wildlife Department’s comments regarding the salinity model, “the applicant acknowledged the limitations of the existing model” and expanded the study area, which the GLO believes—and the Corps agrees—still indicates resulting salinity levels will be within an acceptable range. AR COE001695. The model concluded that closing the Pass would have the greatest impact nearest the Pass in Rollover Bay, where salinity could drop as much as 9–10 parts per thousand (ppt) during certain seasons. AR COE000133. In testing locations as little as two miles from Rollover Bay, the seasonal drop was only up to 2–4 ppt. *Id.* The lowest salinity estimate calculated for any tested location was 14.8 ppt. AR COE000118–19. And the majority of the

model's tests resulted in salinity levels between the 17–24 ppt ideal range for oyster production reported in the GLO's Draft Environmental Assessment. AR COE000777.

Even if the Plaintiffs are right that there are preferable models or that the salinity levels post-closure could dip below ideal salinity, NEPA does not give this court authority to pick a battle-of-the-experts winner. As the Fifth Circuit has explained:

Where conflicting evidence is before the agency, the agency and not the reviewing court has the discretion to accept or reject from the several sources of evidence. The agency may even rely on the opinions of its own experts, so long as the experts are qualified and express a reasonable opinion. The reviewing court may be inclined to raise an eyebrow under such circumstances, but it must show the proper respect for an agency's reasoned conclusion even if the reviewing court finds the opinions of other experts equally or more persuasive.

*Sabine River Auth. v. U.S. Dep't of Interior*, 951 F.2d 669, 678 (5th Cir. 1992) (citing *Marsh v. Ore. Nat. Res. Council*, 490 U.S. 360, 376–77 (1989)). The Plaintiffs have not claimed that Taylor Engineering is unqualified; their disagreement is over specific inputs and modeling methods. The Corps considered similar objections raised by the Texas Parks and Wildlife Department during public comment, required Taylor Engineering to make adjustments to their model, and explained why it found the model sufficient and appropriate. The Corps was not arbitrary, capricious, or in violation of procedural requirements in its reliance on the salinity modeling.

## **B. Socioeconomic Impacts under NEPA**

Plaintiffs also allege that the Corps violated NEPA by failing to sufficiently consider the socioeconomic effects of closing Rollover Pass, primarily the effect of decreased fishing on the local economy and on disabled fishers. The Council on Environmental Quality regulations require that the Corps consider the reasonably foreseeable effects of a proposal; effects are defined broadly to include “ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health” effects. 40 C.F.R. § 1508.8. This can include socioeconomic effects. “[E]conomic or social effects are not intended by themselves to require preparation of an environmental impact statement.” 40 C.F.R. § 1508.14. But when environmental effects are being considered and “economic or social and natural or physical environmental effects are interrelated,” then they should be considered as well. *Id.*

The Corps considered economic and social impacts that closure of Rollover Pass could cause. It acknowledged that fishing tourism is an important part of the local economy and that “Rollover Pass has become a nationally-recognized fishing location with thousands of anglers visiting the Rollover Pass each year.” AR COE001683; *see also* AR COE001687 (“The loss of Rollover [P]ass will have adverse impacts upon local businesses that historically were supported by revenue

from fishermen using the [P]ass.”). The Corps noted that it is “difficult to quantify the economic loss associated with the loss of Rollover Pass” because Texas was—and still is—working on a plan to create alternate recreation and fishing opportunities in the area. AR COE001683. The Corps also noted that tourism had already decreased because of Hurricane Ike, and that a federal program to buy out certain at-risk coastal land, including in Gilchrist, would decrease the local population. *Id.* These developments would minimize the impact of any decrease in fishing tourism. *Id.* The Corps’ assessment also noted a countervailing benefit to the local community: that decreasing erosion could reduce the risk of significant property loss such as that experienced during Hurricane Ike. The Corps thus did acknowledge the likely decrease in fishing tourism, but also cited reasons why the impacts are likely lessened given concurrent developments. And, of course, the mere fact that there may be costs to an agency actions—what agency decision doesn’t adversely affect someone?—does not mean that NEPA is violated. NEPA only requires that the agency adequately consider impacts, it does not dictate the agency’s overall assessment of how to balance the action’s benefits and costs.

In its environmental justice subsection, the Corps considered the demographics of the local community, noting that Gilchrist’s population is 96.1% Caucasian, .65% African-American, .045% Native American and .8% Asian heritage. AR COE001684. The population of Gilchrist living below the poverty

line (16.4%) is just under the state average (16.8%). *Id.* The Plaintiffs protest that this does not consider the people who frequently travel to and fish at the Pass. But they provide no legal authority requiring the Corps to perform the difficult task of identifying the socioeconomic background of this transient population nor have they identified any such evidence that the Corps ignored.<sup>4</sup>

The Plaintiffs' final socioeconomic concern is that closing the Pass will be particularly hard on physically disabled fishers, as there are limited handicap accessible fishing spots in the area. The Corps acknowledged that "[e]asy access and handicapped accessibility attract numerous fishermen to the area." AR COE001673. But as the Corps notes, the Executive Order requiring consideration of environmental justice—an order the Plaintiffs did not cite in their briefing—requires consideration of impacts only on "minority populations and low-income populations." Exec. Order No. 12898, 59 Fed. Reg. 7629 (1994). The order discusses collecting data about and prohibiting discriminating on the basis of income, race, color, or national origin, but does not refer to disability. *Id.* The vehicle for asserting the interests of the disabled would be the Rehabilitation Act or the ADA. As discussed, however, those claims were dismissed after the GLO

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<sup>4</sup> Moreover, this is not the type of project like a new landfill or power plant that one typically considers the kind of "not in my backyard" project that could trigger particular concern about targeting communities that lack political power. Rollover Pass is in a fixed location. Assuming no discriminatory motive in the GLO's desire to close the Pass—and the Plaintiffs have suggested none—there is no discretion concerning where to accomplish that goal.

agreed to make the planned pier replacing Rollover Pass accessible to the disabled. Because Plaintiffs have cited no legal authority requiring the Corps to analyze impacts on the disabled under NEPA, there is no grounds for relief on this basis.

Plaintiffs therefore have not established that the Corps violated NEPA in its consideration of socioeconomic impacts.

### **C. Alternatives Analysis under NEPA**

Plaintiffs' final NEPA contention is that the "alternatives" analysis within the Environmental Assessment was flawed because the stated goal of the proposal was too narrow and the Assessment did not sufficiently consider alternatives to closing the Pass.

#### **1) Purpose Definition**

NEPA requires agencies to consider practicable alternatives to a proposed action. 42 U.S.C. § 4332(2)(C)(iii) (requiring under NEPA that for "every recommendation or report on proposals" affecting the human environment, there be a "detailed statement" on "alternatives to the proposed action"). Similarly, Council on Environmental Quality regulations require that alternatives be considered as part of an Environmental Assessment. 40 C.F.R. § 1508.9(b). Defining the purpose of a proposed project is critical because the purpose drives what alternatives may be practicable. An agency cannot "define the objectives of its action in terms so unreasonably narrow that only one alternative from among the environmentally

benign ones in the agency's power would accomplish the goals of the agency's action." *Sierra Club v. Fed. Highway Admin.*, 435 F. App'x 368, 374 (5th Cir. 2011) (per curiam) (quoting *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir.1991)).

The overall purpose of the proposed project is "to restore the Rollover Pass area to historic natural conditions, to prevent shoreline erosion that occurs from the diversion of sand into East Bay and sedimentation of the [Gulf Intracoastal Waterway], and to undo adverse impacts to water quality, especially increased salinity in East Bay." AR COE001672. The GLO's stated purpose also included "reduc[ing] Corps maintenance costs associated with keeping the [Gulf Intracoastal Waterway] navigable." AR COE1671. Based on these goals, the Corps determined that a "practicable alternative" to Pass closure must:

- (1) Present a viable long-term solution for beach erosion in the area of Rollover Pass and downdrift areas of the Bolivar peninsula.
- (2) Eliminate sediment transport into Rollover Bay and East Bay.
- (3) Be effective in returning Rollover Bay and East Bay to their more natural salinity regimes.
- (4) Effectively stabilize the fill material, minimize water quality impacts, minimize impacts to the existing bridge and utilities, and use compatible fill materials.

AR COE001676. Plaintiffs object to this framing because they argue that it presumed the need to close the Pass and assumed it was preferable to reduce salinity in the East Bay.

The Corps' beach erosion and sediment transfer goals are supported by research and record evidence, and are not unreasonably narrow or overly broad. Erosion is a serious problem on the Bolivar Peninsula, accelerated by Hurricane Ike and other storms. A desire to decrease erosion appears to be the driving motivator behind the GLO proposal. Although Plaintiffs disagree with the amount of erosion attributable to Rollover Pass, the Corps cites numerous studies from over a fifty-year period that have found some degree of erosion attributable to Rollover Pass. AR COE000495–503. Even if Plaintiffs are correct that there are similar erosion levels along other portions of the peninsula, the Corps' analysis indicates that closing the Pass would decrease erosion downdrift from the Pass. The fact that Pass closure will not completely fix the problem does not mean that the Corps' purpose or efforts in closing the Pass are impermissible.

The Plaintiffs' stronger argument is that the goal of returning Rollover Bay and East Bay to natural salinity levels is so narrowly focused that closure of the Pass is the only solution that would be effective. But the Court is ultimately unpersuaded that the Corps acted in an arbitrary and capricious manner in framing this objective. A permit applicant's stated objective for a proposed project is a starting point for the

Corps' analysis, and from the outset the GLO sought to return salinity levels to their more natural conditions. Additionally, during the public comment period, the National Marine Fisheries Service stated "closure of Rollover Pass would have positive impacts on [Essential Fish Habitats] and ecosystems benefits[,] which include restoring natural hydrology, improving salinity conditions for oyster reef re-establishment and health[,] and reducing the very concentrated fishing pressure on adult finfish populations, such as flounder[,] as these fish migrate through an artificial cut." AR COE1681. Thus at least one other federal agency agrees that returning more natural salinity levels is environmentally preferable.

With this background, the goal does not appear to be "contrived" for the purpose of defeating reasonable alternatives. *See Simmons v. U.S. Army Corps of Eng'rs*, 120 F.3d 664, 666–67 (7th Cir. 1997) (noting that federal courts cannot "condone an agency's frustration of Congressional will" by allowing artificially narrowed goals designed to rule-out reasonable alternatives, and finding that the Corps' assuming that one common water source must be created to supply two different areas unreasonably limited the alternatives analysis). The Plaintiffs may disagree with the National Marine Fisheries Service's comments and the Corps' assessment of the benefits resulting from a return to natural salinity levels. But as in the analysis of cumulative impacts, this court "must show the proper respect for an agency's reasoned conclusion even if the reviewing court finds the opinions of

other experts equally or more persuasive.” *Sabine River Auth.*, 951 F.2d at 678. Nothing in the record suggests that this goal was artificially narrowed in order to defeat potential alternatives.<sup>5</sup>

## 2) Comparative Analysis of Alternatives

The Court also rejects Plaintiffs’ argument that the comparative analysis of the proposed alternatives was insufficient. Much of their argument is again based on expert disagreement over salinity levels, erosion, and sediment transfer, as well as repeated concerns that the Corps failed to fully consider socioeconomic impacts. For the reasons discussed above, these challenges to the persuasiveness of the Corps’ analysis do not establish the clear error of judgment needed to vacate the Corps’ decision.

Plaintiffs also assert that because they believe the amount of sediment transfer and erosion directly attributable to Rollover Pass is overstated, the resulting increased cost of dredging the Gulf Intracoastal Waterway is greatly overstated. Their expert estimates that closing the Pass would result in under \$100,000 of decreased dredging costs rather than the \$1,000,000 estimated in the Environmental Assessment. Plaintiffs suggest that, if this lower cost had been acknowledged, other

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<sup>5</sup> It is also worth noting that of the six alternatives considered in the Environmental Assessment, none were determined to be impracticable based solely on the fact that the alternative would not restore historic salinity levels. AR COE001676–77. Therefore, even if this goal were not considered, the Corps could still determine that there are no practicable alternatives to closing Rollover Pass.

alternatives to closure, including taking no action, may have been viable. The Court has already said that it will not consider the Plaintiffs' litigation expert reports as substantive evidence. Docket Entry No. 76 at 13–15. However, even if the cost estimates were correct and could be considered, the fact that the costs of dredging may be less than the Corps estimated does not indicate that its alternative analysis was procedurally insufficient or an abuse of discretion. Putting aside that \$100,000 would still be a reduction in dredging costs, nothing in the Environmental Assessment suggests that any alternative was eliminated solely because it would not reduce dredging costs. There is no clear error in the Corps' alternatives analysis based on its consideration of estimated dredging costs.

The Corps listed six potential alternatives to closing the Pass, including a no action alternative. For each, it determined that at least one of the four requirements for a practicable alternative was not met. AR COE001675–1677. The Corps is not required to consider all potential alternatives, nor is it precluded from eliminating alternatives that could work. *La. Crawfish Producers Ass'n-W. v. Rowan*, 463 F.3d 352, 356–57 (5th Cir. 2006) (the Corps need not consider all possible alternatives; the “range of alternatives” that must be considered “decreases as the environmental impact of the proposed actions becomes less and less substantial”); *Miss. River Basin All. v. Westphal*, 230 F.3d 170, 177 (5th Cir. 2000) (agencies can reject alternatives, “even those that could be considered to be viable and reasonable alternatives, after

an appropriate evaluation,” without being arbitrary or capricious). Particularly given this wide discretion, the Corps’ alternative analysis was not arbitrary, capricious, or procedurally insufficient.

#### **D. CWA Claims**

The Plaintiffs also challenge the “failure of the Corps to follow the procedural mandates of . . . CWA.” Docket Entry No. 73 at 2. The Corps argues that Plaintiffs have waived (the more appropriate term in this context is forfeited) all CWA claims because they do not detail any CWA arguments in their summary judgment briefing. *DIRECTV, Inc. v. Budden*, 420 F.3d 521, 525 (5th Cir. 2005) (noting that when a party only addresses certain claims in a summary judgment motion, it “suggests that the other claims were abandoned”); *see also, Utahns for Better Transp. v. U.S. Dep’t of Transp.*, 305 F.3d 1152, 1190 (10th Cir. 2002) (finding appellants forfeited certain CWA claims when they only argued and cited to NEPA regulations). The Court need not address the forfeiture issue, however, because Plaintiffs’ CWA claims parallel their NEPA claims and thus fail for the same reasons already given.

#### **IV. MOTION TO SUPPLEMENT**

As noted, the Court had reserved ruling on some of the new materials Plaintiffs sought to add to the record. Review of all of the parties’ merits arguments has confirmed the Court’s inclination that the Dunbar and Trungale Engineering Science expert reports should not be admitted as substantive evidence to demonstrate

that the Corps did not consider certain impacts.<sup>6</sup> Nor does the Court find it necessary to rely on those expert reports for background information. The record itself, including the challenges to the modeling raised during the notice and comment period, are sufficient to explain the Plaintiff's challenges to the modeling and their other arguments in this case. But even if the Court were to supplement the record with these reports, as noted above they would not alter the Court's conclusion that the Corps' decision to issue the permit was not arbitrary or capricious. The Court therefore **GRANTS IN PART** Plaintiffs Motion to Supplement with regards to the Bureau of Economic Geology articles, and **DENIES IN PART** the Motion with regards to the Dunbar and Trungale Engineering and Science reports (Docket Entry No. 51).

### CONCLUSION

No one likes seeing the elimination of a great fishing spot. But it is also true that no one likes the erosion that is plaguing the Texas Gulf Coast. Whether or not closing Rollover Pass will improve the erosion situation is not for the Court to say. To the extent Plaintiffs have identified flaws in the Corps' findings, the Court's task is only to decide if the Corps' decision was so problematic as to amount to a clear error of judgment. The Corps' reasoned consideration of this issue, even if its

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<sup>6</sup> The Bureau of Economic Geology studies are admitted to supplement the record to the extent they provided background on the type of information available to the Corps regarding erosion that it arguably did not consider.

predictions turn out to be wrong, easily passes muster under that deferential standard. The Court **GRANTS** the U.S. Army Corps of Engineers' Motion for Summary Judgment (Docket Entry Nos. 77 & 78) and **DENIES** Plaintiffs' Motion for Summary Judgment (Docket Entry No. 73). A final judgment will enter

SIGNED this 4th day of December, 2015.

A handwritten signature in cursive script that reads "Gregg Costa". The signature is written in black ink and is positioned above a horizontal line.

Gregg Costa  
United States Circuit Judge\*

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\* Sitting by designation  
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