UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

PRESERVATION SOCIETY OF CHARLESTON, *et al.*, Plaintiffs, v. U.S. ARMY CORPS OF ENGINEERS, *et al.*, Federal Defendants.	Case No. 2:12-cv-02942-RMG

DEFENDANT UNITED STATES' MOTION FOR SUMMARY JUDGMENT
AND
MEMORANDUM IN SUPPORT

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ACHP	Advisory Council on Historic Preservation
ADA	Americans with Disabilities Act of 1990
APA	Administrative Procedure Act
APE	Area of Potential Effects
CEQ	Council on Environmental Quality
CWA	Clean Water Act
CZMA	Coastal Zone Management Act
EIS	Environmental Impact Statement
MFR	Memorandum for Record
NEPA	National Environmental Policy Act
NHPA	National Historic Preservation Act
NWP	Nationwide Permit
PCN	Preconstruction Notice
PSC	Preservation Society of Charleston
RHA	Rivers and Harbors Act of 1899
SPA	South Carolina Ports Authority
CBP	U.S. Customs and Border Protection
WQC	Water Quality Certification

As part of an upgrade to the previously permitted Union Pier terminal in downtown Charleston, South Carolina—a wharf structure that has been used for a variety of commercial maritime activities (*e.g.,* cargo *and* passenger operations) for nearly a half century—the South Carolina State Ports Authority ("the SPA") sought authorization from the U.S. Army Corps of Engineers, Charleston District (the "Corps"),[1] to install five additional clusters of pilings underneath the existing pile-supported footprint of Union Pier pursuant to the Rivers and Harbors Act of 1899 ("RHA"). After verifying that the SPA's proposed activity complied with the terms and conditions of Nationwide Permit 3 ("NWP" 3), the Corps provisionally authorized the SPA's project by letter dated April 20, 2012. Plaintiffs' challenge to the Corps' decision is the subject of this lawsuit. Plaintiffs assert that the Corps' verification decision was made in violation of the Administrative Procedure Act ("APA"), 5 U.S.C. § 701-706, the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq., and the National Historic Preservation Act ("NHPA"), 16 U.S.C. § 470 et seq. The Court should grant summary judgment to Federal Defendants, because Plaintiffs' claims are unsupported by the administrative record or the law.

As explained below, Plaintiffs cannot make the required showing that the Corps' NWP 3 verification decision is arbitrary or capricious. Notwithstanding Plaintiffs' reliance on newspaper articles showing that the expansion of cruise activity in Charleston has generated heated public debate, the policy tradeoffs associated with tourism are decidedly local considerations that fall outside the purview of the Corps' regulatory authority. The Corps reasonably concluded that the SPA's proposed addition of the five clusters of pilings, which

[1] Plaintiffs have sued the Corps; John M. McHugh, in his capacity as the Secretary of the U.S. Army; Thomas P. Bostick, in his capacity as the Chief of Engineers. This brief uses the terms "Federal Defendants" or "Corps" to refer to all named defendants.

would affect only .01 acres of waters of the United States, complied with the terms and conditions of NWP 3, entitled "Maintenance." The Corps also properly declined to initiate any further NEPA analysis because the Corps had already performed the necessary NEPA analysis when it most recently promulgated NWP 3 in 2012. Finally, the Corps fulfilled its duties under the NHPA, as interpreted by the Advisory Council on Historic Preservation ("ACHP"), by determining that the proposed work underneath the pier fell within a category of activities that had no potential to cause effects to historic properties.

In verifying authorization of the SPA activity under NWP 3, the Corps fully complied with the RHA, NEPA, NHPA, and the terms and conditions of the NWP. The Corps' interpretation of its own rules and regulations is entitled to substantial deference, and its actions were reasonable, supported by the evidence, and consistent with all applicable statutes and regulations. The Corps' decision should be upheld under the APA, and summary judgment should be entered in favor of the United States.

I. STATUTORY, LEGAL, AND FACTUAL BACKGROUND

A. Statutory and Regulatory Background

1. Rivers and Harbors Act

The RHA had its genesis over a century ago with the Supreme Court's decision in Willamette Iron Bridge Co. v. Hatch, 125 U.S. 1 (1888), holding that there was no federal common law prohibiting the obstruction of the Nation's navigable rivers. Congress responded by passing a series of laws designed to preserve and protect the Nation's navigable waterways, which were subsequently re-enacted in one package known as the RHA. United States v. Pa. Indus. Chem. Corp., 411 U.S. 655, 663 (1973). The cornerstone is RHA Section 10, which prohibits the obstruction of navigable waters. 33 U.S.C. § 403. Section 10 accomplishes this

task through three distinct statutory clauses. The first two clauses prohibit the creation of obstructions to the navigable capacity of U.S. waters and identify specific structures (including piers) that may not be erected in any waters unless authorized by the Corps. Id. The third clause makes it unlawful to "excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity" of any port, harbor, lake, or channel of any navigable water of the United States unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army. Id. "The instrument of authorization is designated a permit." 33 C.F.R. § 320.2(b).

2. Nationwide Permits

Concerned that requiring individual permits for routine activities would impose unnecessary delay and administrative burdens on the public and the Corps, in 1977 Congress authorized the Corps to issue general permits for similar categories of activities. 33 U.S.C. § 1344(e); see H.R. Conf. Rep. No. 830, 95th Cong., 1st Sess. 98 (1977), reprinted in 1977 U.S.C.C.A.N. 4424. The Corps issues nationwide permits to authorize certain activities that require Department of the Army permits under RHA Section 10, 33 U.S.C. § 403; Section 404 of the Clean Water Act ("CWA"), 33 U.S.C. § 1344. For all purposes relevant to this case, a single regulatory scheme governs the issuance of permits under both the RHA and CWA.[2] General permits are issued for categories of activities that are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment. 33 C.F.R. § 330.1(g). NWPs are general permits, 33 C.F.R. § 330.2(b), and consistent with Congress' goal, "regulate with little, if any, delay or

[2] See generally 33 C.F.R. Parts 320-332; see also 33 C.F.R. §§ 322.2 and 322.3 (requiring permits under RHA Section 10 for "structures and/or Work in or Affecting Navigable Waters of the United States").

paperwork certain activities having minimal impacts." Id. § 330.1(b). The NWPs authorize a variety of activities, such as aids to navigation, utility lines, bank stabilization activities, road crossings, stream and wetland restoration activities, residential developments, mining activities, commercial shellfish aquaculture activities, and agricultural activities.

In issuing NWPs, the Corps conducts an environmental analysis at the national level to determine whether the individual and cumulative adverse environmental impacts of the activities authorized by each NWP are no more than "minimal," as required under the 33 C.F.R. Part 330. As part of this analysis, the Corps prepares appropriate NEPA documentation, and makes this draft documentation available for public comment. See 33 C.F.R. §330.5(b)(3). The Corps conducts a "public interest review" of approximately twenty factors, such as how NWP issuance might affect conservation, wetlands, and energy needs. 33 C.F.R. §§ 320.1(c), 320.4(a)(1). Based on this entire analysis, the Corps imposes "General Conditions" with additional terms applicable to NWPs addressing aquatic and other environmental impacts associated with discharges. The Corps completes the foregoing analysis through notice-and-comment rulemaking. 33 C.F.R. §§330.1(b), 330.5(b)(2)(i). The Corps memorializes its CWA §404(b)(1) (where necessary), NEPA, and other environmental analyses in a Decision Document for each NWP. COE01104-1150.

Corps Division Engineers share "discretionary authority to modify, suspend, or revoke NWP authorizations for any specific geographic area, class of activities, or class of waters within his division . . . by issuing a public notice or notifying the individuals involved." 33 C.F.R. §§330.5(c)(1), 330.4(e)(1). Following public comment, the Division Engineers may prepare Supplemental Decision Documents and impose regional conditions to ensure that NWP activities

have only minimal adverse effects and are in the public interest. 76 Fed. Reg. 9174, 9177 (2011); 33 C.F.R. §§330.5(c)(1)(i), 330.1(d).

District Engineers play a role in ensuring that specific projects do not have more than minimal adverse impacts. A project proponent may ask the District Engineer to verify in writing that the proposed activity complies with the terms and conditions of one or more NWPs. 33 C.F.R. §330.6(a)(1). In defined circumstances prescribed by General Conditions or individual NWPs, a project proponent must submit a pre-construction notification ("PCN") to the District Engineer requesting verification that the activity complies with the NWP. Id. §330.6(a); §330.1(e)(1); see Crutchfield v. Hanover, 325 F.3d 211, 214-15 (4th Cir. 2003) (explaining nationwide permit process). The District Engineer reviews the PCN "and may add activity-specific conditions," such as compensatory mitigation requirements, "to ensure that the activity complies with the terms and conditions of the NWP" and that adverse impacts are no more than minimal. 33 C.F.R. § 330.1(e)(2), (3); § 330.1(a)(3). If the District Engineer determines that "the adverse effects are more than minimal," he "will notify the prospective permittee that an individual permit is required" or that the permittee may propose mitigation measures "to reduce the adverse impacts to minimal." 33 C.F.R. §330.1(e)(3). Following verification, the District Engineer retains discretion to suspend, modify, or revoke the verification if he later determines that there are "concerns … for any factor of public interest." Id. §330.1(d). The Corps' regulations do not require public notice or comment on verifications or evaluations of project-specific impacts. Since 1991, Corps regulations have specifically provided that District Engineers do not take public comment when exercising discretionary authority over project-specific evaluations. See id. §330.5(d)(3); 56 Fed. Reg. 59,110 (Nov. 22, 1991).

In practice, many NWP activities may proceed without the provision of any notice to the Corps, provided that those activities satisfy the terms and conditions of the NWPs. Other NWP activities cannot proceed until the project proponent has submitted a pre-construction notification ("PCN") to the Corps. 33 C.F.R. § 330.1(e); see also Crutchfield, 325 F.3d at 214-15 (explaining nationwide permit process). In cases where a PCN is required, the Corps may verify the applicability of the NWP to the proposed activity. 33 C.F.R. § 330.1(e)(2); see also Crutchfield, 325 F.3d at 214-15. "Since NWPs are 'designed to regulate with little, if any, delay or paperwork certain activities having minimal [environmental] impacts,' NWP verification is much simpler than the individual permit process." Id. at 214-15 (quoting 33 C.F.R. § 330.1(b)). "The purpose of this scheme is to enable the Corps to quickly reach determinations regarding activities that will have minimal environmental impacts, such as those involving the discharge of less than a half an acre of fill. Requiring an elaborate analysis of the applicable regulations and the facts would defeat this purpose." Snoqualmie Valley Pres. Alliance v. United States Army Corps of Eng'rs, 683 F.3d 1155, 1163 (9th Cir. 2012) (citing Orleans Audubon Soc'y v. Lee, 742 F.2d 901, 909-10 (5th Cir. 1984)).

3. Nationwide Permit 3

The NWP at issue here, NWP 3, was issued on February 21, 2012. *Reissuance of Nationwide Permits*, 77 Fed. Reg. 10,184 (Feb. 21, 2012). NWP 3 went into effect on March 19, 2012, and will expire on March 18, 2017. Id. at 10,184. In pertinent part, NWP 3 covers:

> 3. Maintenance. (a) The repair, rehabilitation, or replacement of any previously authorized, currently serviceable structure, or fill, or of any currently serviceable structure or fill authorized by 33 CFR 330.3, provided that the structure or fill is not to be put to uses differing from those uses specified or contemplated for it in the original permit or the most recently authorized modification. Minor deviations in the structure's configuration or filled area, including those due to changes in materials, construction techniques, requirements of other regulatory

> agencies, or current construction codes or safety standards that are necessary to make the repair, rehabilitation, or replacement are authorized.

Id. at 10,270.

Some activities undertaken in coastal areas pursuant to the authority contained in NWPs require both CWA Section 401 water quality certification ("WQC") and Coastal Zone Management Act ("CZMA") consistency determinations to be provided by the affected state(s). Id. at 10,184. If a state does not issue a statewide WQC or CZMA determination, then the use of an NWP to authorize a discharge into waters of the United States is contingent upon obtaining individual WQC or a case-specific WQC waiver and an individual CZMA consistency determination, or a case-specific presumption of CZMA concurrence. Id. at 10,184-85. Nationwide permits are also subject to Regional Conditions imposed by the appropriate Corps Division Engineer. Id. at 10,186; 33 C.F.R. § 330.5

4. National Environmental Policy Act

The purpose of NEPA is to focus the attention of federal agencies and the public on a proposed action so that the environmental consequences of the action can be studied before a decision is made. See 42 U.S.C. § 4321; 40 C.F.R. § 1501.1; Marsh v. Or. Natural Res. Council, 490 U.S. 360, 371 (1989). NEPA, however, is a procedural statute that "does not mandate particular results, but simply prescribes the necessary process." Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989). NEPA requires a federal agency proposing a "major Federal action[ ] significantly affecting the quality of the human environment" to prepare an environmental impact statement ("EIS") analyzing the potential impacts of the proposed action and possible alternatives. 42 U.S.C. § 4332(2)(C). Regulations promulgated by the Council on Environmental Quality ("CEQ"), 40 C.F.R. parts 1500-1508, provide procedures for

implementing NEPA, and the Corps has likewise promulgated regulations governing its implementation of and compliance with NEPA. See 33 C.F.R. pt. 325, app. B.

Both individual and nationwide permits are generally subject to the requirements of NEPA, including public notice. A nationwide permit must undergo the NEPA process at the time the permit is promulgated, rather than at the time an applicant seeks RHA Section 10 authorization for certain structures or work in or affecting navigable waters of the United States. 33 C.F.R. § 330.5(b)(3); 33 C.F.R. § 322.1. Neither NEPA nor the Corps' regulations require additional public comment or additional NEPA analysis for RHA Section 10 activities that comply with the terms and conditions of a NWP. 33 C.F.R. § 330.6(a).

5. National Historic Preservation Act

Section 106 of the NHPA is designed to take into account the impacts of a proposed federal action on properties eligible for or listed on the National Register of Historic Places ("National Register"). 16 U.S.C. § 470f; Narragansett Indian Tribe v. Warwick Sewer Auth., 334 F.3d 161, 166 (1st Cir. 2003). The NHPA is a procedural statute. Nat'l Mining Ass'n v. Fowler, 324 F.3d 752, 755 (D.C. Cir. 2003); United States v. 162.20 Acres of Land, 639 F.2d 299, 302 (5th Cir. 1981). "Section 106 is characterized aptly as a requirement that agency decisionmakers 'stop, look, and listen,' but not that they reach particular outcomes." Narragansett Indian Tribe, 334 F.3d at 166 (internal citations omitted).

The Advisory Council on Historic Preservation ("ACHP"), established under the NHPA, 16 U.S.C. § 470i, is authorized "to promulgate such rules and regulations as it deems necessary to govern the implementation of section 470f of [NHPA]." 16 U.S.C. § 470s. Those regulations are at 36 C.F.R. part 800. The Corps has also promulgated regulations. 33 C.F.R. Part 325 App.

C. The Corps has issued interim guidance on how to synthesize its own regulations with the ACHP regulations to implement the NHPA.[3]

B. Factual Background

1. Historical Permitting of Union Pier

Union Pier is located near the downtown area of Charleston, South Carolina, and has been owned and operated by the SPA for the past 50 years. The SPA is planning to convert Union Pier Building 322, a pile-supported pier facility currently being used for cargo operations, into a pier facility for loading and unloading cruise passengers at Union Pier. The SPA intends to upgrade Union Pier, particularly Building 322, to implement changes in terminal security required by Federal regulations, as well as improvements to provide escalators and elevators that will make the facility comply with the Americans with Disabilities Act. See *Joint Federal and State Application Form* (Jan. 23, 2012) (the "SPA Permit Application"), COE00040-41.

In 1960, nearly five decades prior to this lawsuit, the Corps first authorized the SPA to reconstruct and extend Union Pier under RHA Section 10. COE00355-357. The permit allowed for a 40-foot concrete piling supported extension of the pier into the Cooper River. Id. Several years later, the Corps again authorized SPA to construct a larger concrete dock to extend the Union Pier Dock, known as SPA Pier #2. COE000395-97. A permit issued in 1971 allowed SPA to "rebuild existing dock." COE000531-33. Although passenger operations occurred prior

[3] U.S. Army Corps of Engineers, *Revised Interim Guidance for Implementing Appendix C of 33 CFR Part 325 with the Revised Advisory Council on Historic Preservation Regulations at 36 CFR Part 800* (Apr. 25, 2005) ("2005 Interim Guidance"), available at http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/InterimGuidance_25apr05.pdf; U.S. Army Corps of Engineers, *Clarification of Revised Interim Guidance for Implementing Appendix C of 33 CFR Part 325 with the revised Advisory Council on Historic Preservation (ACHP) Regulations at 36 CFR Part 800 dated 25 April 2005* (Jan. 31, 2007) ("2007 Interim Guidance"), available at http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/inter_guide2007.pdf.

to the construction of Building 325, the Pier's passenger operations were upgraded in 1971, when the Corps issued an RHA Section 10 permit allowing the SPA to "construct a passenger facility on existing dock." COE00441-45, COE00621. The original structure was concrete and built on concrete pilings. COE00621-23. A 1972 revised permit allowed the SPA to "construct a passenger facility on existing dock including necessary dredging to provide flotation for the construction barges and pile-driving equipment." COE00638-42. A subsequent 1972 permit authorized SPA to "construct a dock extension, transit shed, open storage area and to fill shoreward of the bulkhead line . . . at a location between Laurens Street Extension and State Pier #2" [Union Pier]. COE00524-27. That permit was revised in 1975 to address changed conditions, but continued to authorize "construction of a dock extension, transit shed, open storage area and to fill shoreward of the bulkhead line in Town Creek." Id. A 1979 permit authorized SPA to "extend an existing pier, . . . , for the loading and unloading of ocean-going general cargo vessels . . . at Union Pier #2." COE00586-92.

In sum, since it was first permitted by the Corps more than 50 years ago, Union Pier has been used for a variety of commercial maritime activities, including passenger loading and unloading, bulk cargo, Ro-Ro loading and unloading,[4] etc.

2. Recent Permitting Action

On January 23, 2012, the Corps' Charleston District received the SPA Permit Application requesting authorization to install five clusters of pilings underneath Union Pier "to support three elevators and two escalators" for proposed renovations of Building 322. COE00112-14. The drawings associated with SPA's application demonstrated that the new piling clusters would be "within the footprint of the existing pile supported Building #322." Id. On April 20, 2012,

the Corps sent a verification letter ("Provisional Authorization") to the SPA informing the agency that the pile installation in the waters of the United States was provisionally authorized under NWP 3.[5] Id. The Corps considered the PCN[6] and supplemental information submitted by SPA and found that:

> the proposed activity will result in minimal individual and cumulative adverse environmental effects and is not contrary to the public interest. Furthermore, the activity meets the terms and conditions of . . . Nationwide Permit #3.

Id. at 1. The Corps considered the historic and planned use of Union Pier terminal in concluding that the proposed activity was covered by NWP 3:

> The Corps does not consider this a change in use because the [SPA] has operated a passenger terminal at Union Pier Terminal for almost 40 years.
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> Nationwide Permit# 3 also states that "minor deviations in the structure's configuration or filled area, including those due to changes in materials, construction techniques, or current construction codes or safety standards that are necessary to make repair, rehabilitation, or replacement are authorized." The proposed renovations to Building 322 will enable the [SPA] to comply with new Federal regulations and current terminal security requirements that were established after September 11, 2001. Likewise, the additional pilings are required to install elevators and escalators that are necessary to comply with the American Disabilities Act. From the Corps' perspective, the [SPA] is renovating an existing structure and reconfiguring a portion of an existing marine terminal in order to address existing safety and security measures and to improve the efficiency of the existing cruise operation.

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[4] "Ro-Ro" refers to vessels where the wheeled cargo is either rolled on or rolled off *via* ramps connected from the facility to the oceangoing vessel.

[5] The Corps reviews all incoming permit applications for possible eligibility under regional general permits or NWPs. 33 C.F.R. § 330.1(f).

[6] Absent regional conditions, a PCN is not required to conduct maintenance, but SPA and the Corps determined one to be necessary for the proposed work to the pier. 33 C.F.R. § 330.1(e). Special Condition 11 of the Regional Conditions applicable to South Carolina requires that a PCN "be submitted for any activity that would be located adjacent to an authorized Federal Navigation project." U.S. Army Corps of Engineers, *Approved 2012 Nationwide Permit SC Regional Conditions*, http://www.sac.usace.army.mil/Portals/43/docs/regulatory/2012%20Nationwide%20Permit%20Regional%20Conditions.pdf . The Charleston Harbor, including the Cooper River, is a Federal Navigation Area. Id.

Memorandum for the Record Re: Union Pier Terminal-Project Overview (Apr. 18, 2012), at 3-4 (COE00121-22) (emphasis added). The Corps concluded that "the scope of [its] review is limited to the footprint of the new pilings." Id. at 2. Further with regard to the use of the permitted pile structure, the Corps determined that:

> The proposed activities in waters of the United States consist of the installation of additional pilings underneath a portion of a previously permitted pile supported wharf at Union Pier. The existing wharf is 2,470 feet long and includes several buildings that are currently used to support commercial shipping activities (break bulk cargo, Ro-Ro, passengers, etc). As described below, the [SPA] has operated a passenger facility at Union Pier for more than 40 years. Therefore, the renovation of Building 322 to consolidate existing activities at Union Pier and to increase the efficiency of the existing passenger facility is not considered a "change in use."

COE00123 (emphasis added).

The Corps' verification letter states that it is valid until the underlying NWP expires or for two years (until April 21, 2014), whichever comes first, and provides for the revocation or modification of the NWP during that period.[7] COE00114. The verification letter emphasized the provisional nature of the Corps' authorization:

> As of the date of this letter, the Corps has not received Section 401 Water Quality Certification ("WQC") and the Coastal Zone Management Act ("CZMA") consistency determination from the State of South Carolina for the NWPs; therefore, **this NWP verification is provisional**. The permittee must either obtain individual WQC and/or CZMA consistency determinations from the State prior to beginning work or the permittee may elect to postpone beginning work until the State has reached a final position on WQC and CZMA for the NWPs.

COE00112 (emphasis in original).

In issuing the Provisional Authorization, the Corps determined that the SPA's renovations to Union Pier satisfied the terms and conditions (general and regional) of NWP 3.

[7] As of February 27, 2013, 33 C.F.R. Part 330.6(a)(3)(ii) was updated to change the length of time a NWP verification was valid from two years to the expiration date of the NWP. 78 Fed. Reg. at 5726. In this case, NWP 3 is valid until March 18, 2017.

The Corps also determined that the proposed renovations were the "type of activity" that has no potential to cause effects on historic properties. COE00126. Accordingly, in compliance with Section 106 of the National Historic Preservation Act ("NHPA") and its implementing regulations, the Corps had no further obligations under Section 106. 36 C.F.R. § 800.3(a)(1) (entitled "No potential to cause effects"); see also *Reissuance of Nationwide Permits*, 77 Fed. Reg. at 10,284, General Condition 20(d) ("Section 106 consultation is not required when the Corps determines that the activity does not have the potential to cause effects on historic properties (see 36 CFR 800.3(a)).").

3. Post-Decisional Correspondence

After issuance of the Provisional Authorization on June 5, 2012, the Corps received a letter from the ACHP. See Letter from Charlene Dwin Vaughn to Lt. Col. Edward P. Chamberlayne dated Jun. 5, 2012, SUP063-64,[8] (the "ACHP Letter"). The June 5 ACHP letter stated that it was based in large part upon information provided to the ACHP by May 31, 2012 letter from the National Trust for Historic Preservation (NTHP) ("In a letter to the Corps dated May 31, 2012, the NTHP indicated . . .," SUP064). The ACHP stated that if the NTHP's characterization of the Corps' action was accurate ("If this is the case . . .," SUP064), then it would "formally object to the Corps' determination of effect and … [request] that the Corps revoke the letter of verification . . . ." SUP064. However, the ACHP acknowledged that it was relying on stakeholder input, and requested that the Corps provide it with detailed information regarding the current status and the steps and nature of the Corps' compliance with the

[8] This document is one of several documents that were added to the record as a supplement, over Federal Defendants' objection, as a result of a motion to supplement filed by Plaintiffs. See ECF Nos. 40, 48 & 50. Federal Defendants objected to the inclusion of the documents because none were before the decision-maker at the time of the verification decision Plaintiffs challenge. See

requirements of the Section 106 process. The purpose of the ACHP's request for additional information from the Corps was to enable it to "respond to the stakeholders who have contacted us and make an informed decision about further comments on the Corps' Section 106 compliance for this undertaking . . . ." SUP064. The letter also stated that if the Corps did not comply with its request, "the ACHP may need to consider whether the Corps has foreclosed our opportunity to comment as required by the NHPA." SUP064.

The Corps provided a detailed response on June 22, 2012 to the ACHP's request for additional information. It consisted of a four-page letter, a six-page appendix, and attached key decision documents (the letter noted that the ACHP did not appear to have reviewed or considered these documents in its comment letter). The appendix addressed each of the ACHP's specific requests for documentation. Letter from LTC Chamberlayne to the ACHP dated June 22, 2012. SUP065-74. The Corps emphasized that its "actions are in compliance with Section 106 of the NHPA from the perspective of both [the Corps'] Appendix C to 33 C.F.R. Part 325 and the regulations at 36 C.F.R. Part 800." SUP065. Specifically, the letter stated:

> The Charleston District determined, consistent with the ACHP regulations at 36 C.F.R. § 800.3(a)(l), that the SCSPA activities had "no potential to cause effects on historic properties and that no project-specific consultation [was] required under Section 106." Our determination is grounded in the fact that the NWP authorization is limited to the installation of additional pilings underneath an existing (and extensively modified) wharf to comply with Federal regulations and current terminal security requirements at Union Pier. Union Pier is currently used to support commercial shipping activities, including an existing cruise ship passenger facility.
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> We acknowledge that it is the Charleston District's responsibility to determine whether an "undertaking" "is a type of activity that has the potential to cause effects on historic properties." 36 C.F.R. § 800.3(a). Pursuant to ACHP regulations, "[i]f the undertaking is a type of activity that does not have the potential to cause effects on historic properties, assuming such historic properties

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generally ECF No. 40 (describing APA standards for administrative record). The supplemental documents are identified with the prefix "SUP."

> were present, the agency official has no further obligations under section 106 or this part. 36 C.F.R. § 800.3(a)(l).

SUP066 (emphasis added). After explaining the basis and rationale for the its "no potential to cause effects" determination, the Corps requested that the ACHP clarify the nature of any continuing objection to its determination after review of the Corps' response. SUP068. The Corps received no further comments or continued objection from the ACHP in reply to its detailed June 22, 2012 response letter.

4. Related South Carolina Regulatory Actions

On December 18, 2012, DHEC staff approved a permit for SPA's renovation of Building 322 on December 18, 2012 (Permit No. OCRM-12-054-B). Upon approval, the Corps' verification became final and not provisional. A group of neighborhood associations and preservationists then filed a request for final review with the DHEC Board on January 2, 2013, seeking rescission of the DHEC critical area permit. DHEC denied the request and the group filed an appeal with the South Carolina Administrative Law Court ("ALC" on February 11, 2013. The matter remains pending before the ALC.

5. Present Litigation

On July 2, 2012, Plaintiffs filed the present action against the Federal Defendants in the United States District Court for the District of Columbia. Upon a motion to transfer venue by the Federal Defendants, the District Court for the District of Columbia ordered the case transferred to the District of South Carolina on September 27, 2012. Preservation Soc'y of Charleston v. U.S. Army Corps of Eng'rs, 893 F. Supp. 2d 49, 59 (D.D.C. 2012). The Complaint presents four claims. Plaintiffs allege that the Corps' verification is arbitrary and capricious under the APA because the permitted activity does not constitute maintenance under the terms of NWP 3, Compl. ¶ 50-52, and would have more than minimal individual or cumulative net adverse effects

on the environment or would otherwise be contrary to the public interest in violation of Corps' regulations, Compl. ¶ 54-57. Plaintiffs allege that the Corps' verification under NWP 3 is arbitrary and capricious, but do not challenge the reissuance of NWP 3 itself. Plaintiffs allege that the Corps' review of SPA's project required consultation with interested parties regarding potentially affected structures, and that the Corps unduly limited the "Area of Potential Effects" to the footprint of new pilings without considering the impacts on historic properties in Charleston. Compl. ¶ 44-45. Finally, Plaintiffs allege that "the Corps undertook no NEPA analysis for the project." Compl. ¶¶ 58-64.

C. Standard of Review

1. Scope of Review

Under section 706 of the APA, reviewing courts may hold unlawful or set aside agency decisions only when such decisions are found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The scope of the court's "review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983); see also Hughes River Watershed Conservancy v. Johnson, 165 F.3d 283, 288 (4th Cir. 1999) ("Although our inquiry into the facts is to be searching and careful, this court is not empowered to substitute its judgment for that of the agency."). Courts "perform 'only the limited, albeit important, task of reviewing agency action to determine whether the agency conformed with controlling statutes,' and whether the agency has committed 'a clear error of judgment.'" Md. Dep't of Human Res. v. United States Dep't of Agric., 976 F.2d 1462, 1475 (4th Cir. 1992) (quoting Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc., 462 U.S. 87, 97 (1983), and Citizens to Pres. Overton Park v. Volpe, 401 U.S. 402, 416 (1973)). A court

may set aside an agency decision only if has "entirely failed to consider an important aspect of the problem," Butte Envtl. Council v. U.S. Army Corps of Eng'rs, 620 F.3d 936, 945 (9th Cir. 2010), or failed to articulate a "rational connection between the facts found and the conclusions made," Nat'l Wildlife Fed'n v. U.S. Army Corps of Eng'rs, 384 F.3d 1163, 1170 (9th Cir. 2004) (internal quotation marks omitted). Challenges to permitting actions by the Corps on RHA, NEPA and NHPA grounds are all subject to the deferential standard of review set out in the APA. See Marsh, 490 U.S. at 377 n.23 (NEPA); Morongo Band of Mission Indians v. Fed. Aviation Admin., 161 F.3d 569, 573 (9th Cir. 1998) (NHPA); Pres. Endangered Areas of Cobb's History, Inc. v. Corps of Eng'rs, 87 F.3d 1242, 1247 (11th Cir. 1996) (CWA Section 404 permits); Shoreline Assocs. v. Marsh, 555 F. Supp. 169, 173 (D. Md. 1983), aff'd without opinion, 725 F.2d 677 (4th Cir. 1984) (same).

2. Deference to Agency's Interpretation of Its Own Regulations

Moreover, when an agency is interpreting its own regulations, the Court must give "substantial deference" to the agency interpretation. Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994); Lyng v. Payne, 476 U.S. 926, 950-51 (1986) (Stevens, J., dissenting); Md. Gen'l Hosp. v. Thompson, 308 F.3d 340, 343 (4th Cir. 2002); Sigma-Tau Pharms., Inc. v. Schwetz, 288 F.3d 141, 146 (4th Cir. 2002) ("Our review in such cases is more deferential than that afforded under Chevron.") (internal punctuation omitted). Thus, an agency's interpretation of its own regulations is "of controlling weight unless it is plainly erroneous or inconsistent with the regulation." Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945); Auer v. Robbins, 519 U.S. 452, 461 (1997); see also Crutchfield, 325 F.3d at 218. Indeed, "[t]he agency's interpretation 'need not be the best or most natural one by grammatical or other standards.' Rather, it need only be 'a reasonable construction of the regulatory language.'" Dist.

Mem'l Hosp. of Sw. N.C., Inc. v. Thompson, 364 F.3d 513, 518 (4th Cir. 2004) (internal citations omitted) (quoting Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 702 (1991) and Thomas Jefferson Univ., 512 U.S. at 506)).

As with the deference given an agency in interpreting the statute it administers, see Chevron, U.S.A., Inc. v. NRDC, 467 U.S. 837, 842-43 (1984), the underlying basis for deference to an agency's interpretation of its own regulation is a delegation of interpretive authority by Congress to administrative agencies: "Because applying an agency's regulation to complex or changing circumstances calls upon the agency's unique expertise and policymaking prerogatives, we presume that the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers." Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 151 (1991).

3. Judicial Review

In reviewing final agency action under the APA, "the standard [for summary judgment] set forth in Rule 56(c) does not apply because of the limited role of a court in reviewing the administrative record." Ohio Valley Env. Coal. v. Hurst, 604 F. Supp. 2d 860, 879 (S.D.W.Va. 2009) (quoting Sierra Club v. Mainella, 459 F. Supp. 2d 76, 90 (D.D.C.2006)); see also Pub. Emps. for Envtl. Responsibility v. U.S. Dep't of the Interior, 832 F. Supp. 2d 5, 15 (D.D.C. 2011) (citing Nat'l Wilderness Inst. v. U.S. Army Corps of Eng'rs, No. 01-0273, 2005 WL 691775, at *7 (D.D.C. Mar. 23, 2005)). The court "does not resolve factual questions, but instead determines 'whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did.'" Hurst, 604 F. Supp. 2d at 879. In this context, then, summary judgment becomes the "mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent

with the APA standard of review." Hurst, 604 F. Supp. 2d at 879. Given the appellate nature of APA review, if Plaintiffs do not meet their burden on summary judgment, their claims fail and Federal Defendants are entitled to summary judgment.

II. ARGUMENT

Plaintiffs challenge the Corps' final decision verifying that the SPA's plan to add pilings underneath the existing footprint of Union Pier is authorized by NWP 3. As explained below, none of Plaintiffs' arguments have merit and the Court should grant summary judgment to Federal Defendants as to all four of Plaintiffs' claims.

A. The Corps Reasonably Concluded that the Installation of Additional Pilings in the Existing Footprint of Building 322 Satisfied the Requirements for Verification Under Nationwide Permit 3.

Claim 2 alleges that the Corps' determination that the proposed activity constitutes maintenance as defined by the Corps' NWP 3 is arbitrary and capricious. Compl. ¶¶ 50-52. Plaintiffs contend that the Corps' authorization under NWP 3 is improper because they believe that the permitted activity puts the existing permitted pile-supported structure, Building 322, "to uses differing from those uses specified or contemplated for it in the original permit or the most recently authorized modification." Id. ¶ 50. That is incorrect. The SPA's renovation of Building 322 does not change the maritime function of the building or Union Pier or put the permitted structure to a "differing use." Plaintiffs' self-serving and exceedingly narrow interpretation of what constitutes a "differing use" under NWP 3 is due no deference from the Court, but more importantly, the Corps' interpretation of its own rule – including the proper application of NWP 3 – issued after notice and comment is due "substantial deference." Thomas Jefferson Univ., 512 U.S. at 512; Lyng, 476 U.S. at 950-51; Md. Gen'l Hosp., 308 F.3d at 343. The Corps' application of the terms and conditions of NWP 3 to the facts of this case is

inherently reasonable and consistent with the language of NWP 3, regulations, and applicable statutory framework.

The nationwide permit at issue is the "maintenance" nationwide permit. 77 Fed. Reg. at 10,270. In part, NWP 3 covers:

> [t]he repair, rehabilitation, or replacement of any previously authorized, currently serviceable structure, or fill, or of any currently serviceable structure or fill authorized by 33 CFR 330.3, provided that the structure or fill is not to be put to uses differing from those uses specified or contemplated for it in the original permit or the most recently authorized modification. . . . .

Id. (emphasis added). The Corps determined that the permitted activity constitutes the "repair" of a "previously authorized, currently serviceable structure" and does not result in a differing use. COE00121-30; see COE00112-14, COE00112 ("activity meets the terms . . . of [NWP 3]").

In making the determination, the Corps first considered its permitting history with the SPA at Union Pier, reviewing the past Union Pier permits over the past 50 years. COE00123. The Corps reviewed the long history of permitting structures and discharge of fill material associated with the commercial, maritime use of Union Pier, and properly considered that in its evaluation of the PCN, including:

> The 1,040 foot by 40 foot reconstruction and extension of Union Pier, known as State Pier 2, first permitted by the Corps on June 1, 1960 (COE00355-57); see COE00119;
>
> A permit allowing the SPA to remove an existing railroad trestle and construct a small boat pier at the northern end of Union Pier. COE00365-68; see COE00119;
>
> A permit allowing the SPA to "construct a concrete marginal pier to replace and enlarge [the] existing wooden dock at State Pier 3 (Seaboard Dock)." COE00377-79; see COE00119;
>
> A permit allowing the further extension of State Pier 2 by Permit No. SAC-66-06-247 dated June 1, 1966. COE00395-97; see COE00119;
>
> A permit allowing the SPA to "rebuild [the] existing dock" in 1971. COE00529-33;

> A permit, issued the same year, Permit No. SAC-71-05-037, allowing the SPA to "construct a passenger facility on [the] existing dock." COE00440; see COE00119;
>
> Another expansion of Union Pier, Permit No. SAC-72-10-087 in 1972, COE00524-27; see COE00120, that allowed the SPA to "construct a dock extension, transit area, open storage shed, and to fill shoreward of the bulkhead line." COE00524-27, COE00332. That permit was amended in 1974, dividing the authorized work into two phases. COE00580-82; see COE00120. Phase 1 included a 670 foot long by 450 foot wide transit shed, Building 322. COE00582. Phase 2 included removal of the existing Seaboard Dock (known as State Pier 3), State Pier 4, and the small boat pier. Id.;
>
> An expansion in 1974 added "a dolphin with a connecting walk in the Cooper River at a location adjacent to the sound end of the Ports Authority Passenger Terminal dock." COE00493-96; see COE00119;
>
> Again in 1978, the Corps authorized the SPA to extend the "existing pier, previously authorized by [another permit], for the loading and unloading of the ocean-going general cargo vessels." COE00586-93; see COE00120.

In addition to cataloguing the historical permitting actions concerning the Pier, the Corps' evaluation concluded that the "existing wharf is 2,470 feet long and includes several buildings that are currently used to support commercial shipping activities (break bulk cargo, Ro-Ro, passengers, etc) [and] the [SPA] has operated a passenger facility at Union Pier for more than 40 years." COE00123.

In light of the extensive history of permitted maritime uses for Union Pier, including passenger facilities, the Corps reasonably concluded that the SPA's proposed work did not alter the maritime function of the Union Pier and that the continuation of existing maritime activities at Union Pier did not constitute a "change in use." Id. In a similar and instructive case, Vieux Carre Prop. Owners Residents & Ass'ns v. Brown, the district court considered a challenge to the Corps' verification of an application to develop a park atop the existing Bienville Street Wharf, "a general cargo wharf." No. 87-3700, 1993 WL 86222, *1-2 (E.D. La. Mar. 5, 1993), aff'd, 40

F.3d 112 (5th Cir. 1994). The project did not involve any construction under the wharf nor did the dimensions of the wharf change. The development included "demolition of the metal sheds atop the wharf, landscaping, waterproofing, installation of sprinklers and irrigation systems, and construction of a bandstand, security building, and restrooms. Id. at *1. There, the Corps determined that the riverfront park project fell within a prior, but similarly worded, version of NWP 3. Id. at *2. In finding the Corps' determination to be reasonable, the court noted that the Bienville Street Wharf's "maritime purpose as a wharf was preserved." Id. at *1.

Although the court did not directly address the meaning of "differing use" because the earlier permit did not specify the wharf's use, the court did address the reasonable breadth of "use" of the wharf in analyzing compliance with the NHPA and related regulations. Id. at *2-3. Considering "use" in the context of "the project's impacts 'on the RHA concerns,' *i.e.*, the obstruction of navigable waters," the court found, *inter alia*, that the wharf's "ability to berth ships was unchanged," and [c]onsequently, the project did not alter, either positively or negatively, the structure of the wharf or the extent to which it obstructs or aids navigation." Id. at *3. The court also concluded that then-applicable NHPA review provisions were not triggered "[b]ecause the project did not impact navigation, the traditional concern of the Corps." Id.

In affirming the district court's opinion and upholding the Corps' interpretation of its regulations, the Court of Appeals for the Fifth Circuit found the Corps' determination that the wharf's "maritime purpose as a general cargo wharf was preserved" to be critical. Vieux Carre Prop. Owners, Residents & Ass'ns v. Brown, 40 F.3d 112, 116 (5th Cir. 1994). Further emphasizing that the Corps' interpretation in the context of the RHA was reasonable, the court stated:

> Considering that the Corps' jurisdiction emanates from effects on navigable water, evaluating whether the park resulted in a deviation in the original plan or a

> different use for the wharf from the perspective of the wharf's maritime function is perfectly reasonable.

Id. (emphasis added).

The permitted activity at issue here—the addition of five clusters of pilings beneath the existing footprint of the pile-supported structure of Union Pier—will not change the maritime function of Building 322, and, similarly, will not impact navigation. See COE00124 (new pilings to be located underneath existing Building 322). Since its original construction, Building 322 has operated to support the maritime use of Union Pier. Id. The SPA's permitted activity in the waters of the United States will not change this fact. Neither will the SPA's renovations to Building 322. Because the SPA's installation of pilings underneath the existing footprint will allow for continued cruise-passenger operations at Union Pier terminal, the resulting upgrades to Building 322 will continue to support Union Pier in a manner that is consistent with the pier's maritime use. Thus, Plaintiffs' attempt to sub-divide Union Pier's maritime function into hyper-specific categories differentiating between types of maritime operations (*i.e.*, containers versus passengers) fails for the same reasons articulated by the Court in Vieux Carre. The Corps' interpretation of the maritime use of the previously permitted structure must be considered in the context of the RHA's purpose. See, e.g., Vieux Carre, 40 F.3d at 116; Snoqualmie Valley Pres. Alliance, 683 F.3d at 1162. In determining whether the Corps' interpretation is reasonable, the Court must consider that the purpose of the RHA, and therefore the Corps' permitting program,

is the prevention of obstructions to navigation.[9] The effects of the permitted activity are minimal, impacting less than 0.01 acres of navigable waters and confined to the installation of piling clusters within the existing pier structure, and therefore will not create any obstruction to navigation. COE00112. From the perspective of obstructions to navigation, the maritime use of the structure will not change as a result of the renovations. This further supports the Corps' determination that the permitted activity was covered by NWP 3.

The Corps also reasonably concluded that the permitted activity was within NWP 3's allowance for minor deviations in an existing structures configuration:

> Minor deviations in the structure's configuration or filled area, including those due to changes in materials, construction techniques, requirements of other regulatory agencies, or current construction codes or safety standards that are necessary to make the repair, rehabilitation, or replacement are authorized.

77 Fed. Reg. at 10,270 (emphasis added). The SPA Application explained that, in part, the renovations to Building 322 are required to provide "a mezzanine accessed by ADA [Americans with Disabilities Act of 1990, as amended, 42 U.S.C. §§12,100-12,213] compliant elevators and escalators for boarding passengers to cruise ships similar to the stairs and elevators serving the mezzanine of Building #325." COE000040. The Application also provided that as part of an agreement with the U.S. Customs and Border Protection ("CBP"), the SPA was required to upgrade the security of its passenger facilities at Union Pier. COE00040.

[9] See 32 Cong. Rec. 1350-51 (1899) (remarks of Congressman Burton); 21 Cong. Rec. 6352, 9813 (1890); Willamette Iron Bridge Co., 125 U.S. at 8 (such obstructions were not prohibited at common law.); see also Wyandotte Transp. Co. v. United States, 389 U.S. 191, 201 (1967) ("The Rivers and Harbors Act . . . was obviously intended to prevent obstructions in the Nation's waterways."); Wisconsin v. Illinois, 278 U.S. 367, 413 (1929) (finding that "[t]he true intent of the act of Congress was that unreasonable obstructions to navigation and navigable capacity were to be prohibited [by the first clause of Section 10]."); United States v. Perma Paving Co., 332 F.2d 754, 756-57 (2d Cir. 1964).

The purpose of the improvements to Building 322 is to make the Union Pier facility comply with the ADA and CBP security regulations. Because these are "requirements of other regulatory agencies" and/or "safety standards" under NWP 3, the Corps reasonably determined that "the additional pilings and proposed renovations to Building 322 are considered minor deviations in the existing structures configuration that are required to comply with Federal regulations and current terminal security requirements that were established after September 11, 2001." COE00123; see Snoqualmie Valley Pres. Alliance, 683 F.3d at 1162 ("Although the deviations are not precisely meant to bring the project up to date with 'current construction codes or safety standards,' language in the regulatory history suggests that a general 'public safety' rationale suffices to bring a replacement project with minor deviations under … nationwide permit [3]."") (citing 56 Fed. Reg. 59110); Snoqualmie Valley Pres. Alliance v. United States Army Corps of Eng'rs, No. 10-1108, 2011 U.S. Dist. LEXIS 33553, at *17-18 (W.D. Wash. Mar. 30, 2011) ("NWP 3 allows for minor deviations 'to provide the flexibility necessary for this nationwide permit to keep pace with construction technology and public safety.' 56 Fed. Reg. at 59120."). As with the determination that the permitted activity was not a differing use, this determination is due substantial deference from the Court and cannot be overturned unless it is plainly erroneous and inconsistent with the underlying regulation, NWP 3.

Plaintiffs simply have not met their high burden to demonstrate that the Corps' interpretation and application of NWP 3, as endorsed by the Fifth Circuit in Vieux Carre, is "plainly erroneous" or "inconsistent with the regulation." Thomas Jefferson Univ., 512 U.S. at 512; Vieux Carre, 40 F.3d at 116; see also Bowles, 325 U.S. at 414; Auer, 519 U.S. at 461. Plaintiffs do little more than make the self-serving suggestion that the alleged transformation of a Union Pier cargo transfer shed into a new cruise passenger terminal is a "differing use" within

the meaning of NWP 3. Compl. ¶ 51. The fact that the cargo for this specific building will transition from cargo operations to cruise passengers and luggage does not change the inherently commercial, maritime function of the building, nor does it alter the impact of the Union Pier structure on navigation. The Corps' determination that SPA's continued use of the pier structure for cruise operations was consistent with the existing maritime purpose of the pier was reasonable and supported by the record and is due "substantial deference." See Thomas Jefferson Univ., 512 U.S. at 512; Lyng, 476 U.S. at 926; Bowles, 325 U.S. at 414; Auer, 519 U.S. at 461; see also Sigma-Tau Pharm., 288 F.3d at 146; Crutchfield, 325 F.3d at 218.

The Corps' determination that the permitted activity is not a differing use and constitutes a minor deviation is therefore reasonable, consistent with the permit terms of NWP 3, supported by the record, and not arbitrary nor capricious. Accordingly, the Corps' verification of the SPA permit application must be upheld.

B. The Corps of Engineers' Determination that the Proposed Activity Would Cause Minimal Individual and Cumulative Effects on the Environment and Did Not Require Compensatory Mitigation or a Public Interest Analysis Was Not Arbitrary and Capricious

In Claim 3, Plaintiffs allege that the Corps' determinations violated 33 C.F.R. § 330.1(d) because the permitted activity would have more than minimal individual or cumulative net adverse effects on the environment or would be contrary to the public interest; and that the Corps' decision documentation improperly failed to include unspecified compensatory mitigation pursuant to 33 C.F.R. § 330.1(e)(3) and a public interest analysis pursuant to 33 C.F.R. § 320.4(a)(2). All three allegations are without merit, and Plaintiffs' motion for summary judgment must be denied as to this claim as well. The Corps' determination that the permitted activity would not cause more than minimal individual or cumulative adverse effects, would not be contrary to the public interest, and would not require compensatory mitigation was

reasonable, supported by the record, comports with all applicable regulations, and not arbitrary or capricious. Further, the Corps conducted the requisite public interest analysis required by 33 C.F.R. § 320.4(a) for NWP 3 at the time it was promulgated in 2012, and then confirmed in the decision document for the Provisional Authorization that SPA's proposed activity "would not be contrary to the public interest." COE00130. .

As explained infra Section I.A.1, NWPs are issued only after notice and opportunity for public hearing and only for categories of activities that the Corps determines are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effects on the environment. 33 C.F.R. § 322.3(a), Part 330. Here, NWP 3 was issued in 2012 after the Corps determined that all criteria were met. *Proposal To Reissue and Modify Nationwide Permits; Notice*, 76 Fed. Reg. 9,174 (Feb. 16, 2011); 77 Fed. Reg. at 10.

In contrast to individual permits, NWPs are issued when the Corps formally adopts and publishes them in the Federal Register after a hearing and the opportunity for public comment. See, e.g., 77 Fed. Reg. at 10,184. Applicants such as the SPA do not apply for NWPs and the Corps does not issue NWPs to applicants. Rather, the NWPs themselves authorize limited activities within their defined scope. As a result, upon receiving a verification request, the Corps merely determines whether the activity complies with the terms and conditions of the NWP. 33 C.F.R. §§ 320.1, 325.5, 330.1, 330.2, 330.6; see Trout Unlimited v. U.S. Army Corps of Engineers, 187 F.Supp.2d 1334, 1341 (D. Utah 2002) vacating as moot 2003 WL 22220348 (D. Utah Aug. 27, 2003). There is no requirement for public notice when making a verification decision. 33 C.F.R. §330.5(d)(3); 56 Fed. Reg. 59,110 (1991).

Because NWPs are "designed to regulate with little, if any, delay or paperwork certain activities having minimal [environmental] impacts," NWP verification is by design much simpler than the individual permit process. 33 C.F.R. § 330.1(b) (2003); see also 76 Fed. Reg. at 9,174 ("The NWP program also allows the Corps to focus its limited resources on more extensive evaluation of projects that have the potential for causing environmentally damaging adverse effects.").

1. Individual and Cumulative Net Adverse Effects and Compensatory Mitigation Analysis

As explained in the Corps' response to comments accompanying the prior reissuance of NWP 3 in 2007, "[t]he terms and conditions for NWP 3, plus any regional conditions imposed by division engineers, will ensure that this NWP authorizes only those activities with minimal individual and cumulative adverse effects on the aquatic environment." *Reissuance of Nationwide Permits*, 72 Fed. Reg. 11,102, 11,092 (Mar. 12, 2007). In addition to determining that SPA's proposed activity met the terms and conditions of NWP 3, the Corps specifically determined, pursuant to 33 C.F.R. § 330.1(d), that the proposed activity would result in "minimal individual or cumulative net adverse environmental effects on the environment or is not contrary to the public interest." COE00112. This determination was reasonable and supported by the record. The Corps made this determination, in part, because the permitted activity is limited to the installation of the five new piling clusters underneath the existing pile supported wharf (impacting less than 0.01 acres of waters of the United States). Id. The Corps considered impacts to essential fish habitat and found no effect:

> The proposed pilings will be installed using land based equipment and will have a negligible impact on aquatic resources, estuarine waters, or the available habitat that is located underneath the existing wharf. In addition, the actual footprint of the additional pilings represents a very small area among the thousands of pilings that are already located underneath the existing pile supported structure.

> Therefore, the installation of these additional pilings is expect to have "no effect" . . .

Id. Similarly, the Corps determined that "the project site is not considered potential or critical habitat for any of the species [ ] known to occur in Charleston County, South Carolina." COE00124. Because the proposed pilings will be placed using land-based equipment and the actual footprint of the pilings will be negligible among the thousands of pilings already located underneath the existing structure, the addition was determined to have "'no effect' on Federally listed threatened or endangered species." COE00125. Also, as described in more detail in Section III.D, the Corps also determined that the piling installation has no potential to cause effects to historic properties "in or outside of the 'permit area'. . . ." COE00125-126. The Corps' determination that the permitted activity will have minimal individual and cumulative impact is reasonable, is supported by the record, and is not arbitrary and capricious. COE00112, COE00130.

In accordance with NWP 3 and NWP General Condition 23 (COE01188-1189), the Corps also determined that compensatory mitigation was not required. As described in the response to comments accompanying the prior reissuance of NWP 3 in 2007, "[b]ecause of the nature of activities authorized by [NWP 3], as a general rule compensatory mitigation should not be required for these maintenance activities." 72 Fed. Reg. at 11,102. In reviewing the SPA's PCN, the Corps found that "[t]he potential impact to waters of the United States would affect a small area underneath an existing structure, and the additional pilings will be installed among thousands of pilings that are already located underneath this previously permitted structure. Therefore, compensatory mitigation is not required." COE00129. The Corps' determination that no compensatory mitigation is required is reasonable, is supported by the record, and is not arbitrary and capricious.

2. Public Interest Analysis

Plaintiffs allege that the Corps had an obligation to prepare a public interest analysis pursuant to 33 C.F.R. § 320.4(a)(2), which provides in pertinent part that certain policies will apply "to the review of all applications for DA permits," including a public interest review. Id. § 320.4. Plaintiffs specifically allege that the Corps failed to comply with the § 320.4(a)(2) list of general criteria to be evaluated in permit issuance. As discussed above, NWP verifications are different than permit issuance and are not subject to the same requirements. The public interest analysis required by 33 C.F.R. § 320.4(a) was conducted for NWP 3 at the time it was promulgated in 2012. 77 Fed. Reg. at 10,184; COE01130-35 (decision document for NWP 3). As the district court explained in Crutchfield v. U.S. Army Corps of Engineers, "[i]n contrast [to nationwide permits], standard individual permits require compliance with 'public interest review procedures, including public notice and receipt of comments.' 33 C.F.R. § 325.5(b)(1)." 154 F. Supp. 2d 878, 894 (E.D.Va. 2001).[10] That is, the issuance of individual permits and nationwide permits requires a public interest analysis. 33 C.F.R. § 320.4(a). Here, the Corps conducted the requisite public interest analysis required by 33 C.F.R. § 320.4(a) for NWP 3 at the time it was promulgated in 2012, and then confirmed in the decision document for the Provisional Authorization that SPA's proposed activity "would not be contrary to the public interest." COE00130.

Indeed, the decision document for NWP 3 provides a detailed evaluation of the benefits and detriments that may result from activities authorized by NWP 3, including impacts to conservation, economics, aesthetics, general environmental concerns, wetlands, historic

properties, fish and wildlife values, flood hazards and floodplain values, land use, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, and property ownership. COE01130-34. Based on that analysis, the Corps determined "that the issuance of [NWP 3] is not contrary to the public interest." COE01146.

For the foregoing reasons, the Court should grant summary judgment to the Federal Defendants as to Claim 3 in its entirety.

C. NEPA Does Not Require Additional Environmental Analysis At the Verification Stage.

Like Plaintiffs' challenges to the propriety of the NWP, Plaintiffs' NEPA claim (Claim 4) fails to acknowledge the extensive administrative process that accompanied the NWPs' promulgation. Their claim that the Corps violated NEPA flows from the fundamentally flawed premise that the Corps "undertook no NEPA analysis for the project," Compl. ¶¶ 62, 64. The Corps, however, fully discharged its duties under NEPA when it reissued NWP 3 in 2012. Informed by extensive feedback from the public and key stakeholders, the Corps complied with NEPA when it issued its Finding of No Significant Impact for NWP 3, COE01146 (Decision Document for reissuance of NWP 3), subsequently promulgated and reissued NWP 3, and memorialized its consideration of a host of environmental, historical and societal cumulative impacts. See COE01115-46; 77 Fed. Reg. at 10,184.

Contrary to Plaintiffs' view that the Corps must conduct an additional environmental assessment at the project-specific verification stage, "[v]erifying that permittees may properly

[10] See also Crutchfield, 325 F.3d at 214-15 (recognizing the distinction between individual permit issuance and NWP verification); New Hanover Twp. v. U.S. Army Corps of Engineers, 992 F.2d 470, 471-73 (3d Cir. 1993) (same); Lotz Realty Co. v. United States, 757 F. Supp. 692, 695 (E.D. Va. 1990) (same).

proceed under a nationwide permit does not require a full NEPA analysis at the time of the verification." Snoqualmie, 683 F.3d at 1158. Plaintiffs' demand for additional NEPA review of this Project at the time of verification defeats the streamlining purpose of the nationwide permit program for RHA Section 10 (codified at 33 C.F.R. § 330.1(g)), is not required, and rests on a fundamental misconception about the timing of the Corps' NEPA analysis for its nationwide permit program.

When the Corps issues verification letters under a NWP, there is no "major federal action[] significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). As described above, a NEPA review was conducted for this project. Plaintiffs appear to incorrectly assume that all NWP verifications require the additional preparation of an EA or EIS to comply with NEPA, but do not set forth or describe how the Corps' actions here equate to a "major federal action." Again, the Corps discharged its obligations under NEPA when it issued the EA for the reissuance of NWP 3 (COE1104-1147), and Plaintiffs have cited to no statutory or regulatory authority that imposes additional requirements over and above what the Corps accomplished here.

Put differently, reissuance of the NWPs themselves is the major federal action that triggers NEPA, and the Corps accomplishes the required NEPA analysis for the relevant class of activities at the time that it issues the general permit. 77 Fed. Reg. 10,184. A nationwide permit therefore "must undergo [NEPA's] extensive process at the time the permit is promulgated, rather than at the time an applicant seeks to discharge fill material under such a permit." Snoqualmie, 683 F.3d at 1158; (citing § 330.5(b)(3)); see also Kentucky Riverkeeper v. Rowlette, 714 F.3d 402, 405 (6th Cir. 2013) (observing that before reauthorization of challenged NWPs, Corps conducts and completes the required environmental analyses, and discloses its

analyses and findings in each NWP's EA). Accordingly, no further NEPA evaluation is required when a party implements a project under the standing authorization provided for by a NWP or the Corps evaluates a PCN and verifies that the project complies with the terms and conditions of a NWP. See 33 C.F.R. 330.2(c); 33 C.F.R. § 330.6(a); see also Snoqualmie, 683 F.3d at 1164; Defenders of Wildlife v. Ballard, 73 F. Supp. 2d 1094, 1109–11 (D. Ariz. 1999); Utah Council, Trout Unlimited, 187 F.Supp.2d at 1341 (D. Utah 2002); Abenaki Nation of Mississquoi v. Hughes, 805 F. Supp. 234, 247 (D. Vt. 1992), aff'd 990 F.2d 729 (2d Cir. 1993).

While this project did require the Corps' verification that the proposed activities indeed fell within the scope of NWP 3, it again bears emphasis that verification is merely a means by which the Corps confirms that an applicant's activities qualify for authorization under the NWP 3. 33 C.F.R. 330.1(e). Verification is a simpler, far less rigorous process than the evaluation of individual permit applications. See Crutchfield, 325 F.3d at 214; New Hanover Twp. v. U.S. Army Corps of Eng'rs, 992 F.2d 470, 471-73 (3d Cir. 1993); Orleans Audubon Soc'y v. Lee, 742 F.2d 901, 909-10 (5th Cir. 1984).

It also bears emphasis that Plaintiffs do not raise a facial challenge to the reauthorization of NWP 3 itself, the NEPA analysis conducted, or the findings contained in the NWP 3 decision document published in 2012; instead, Plaintiffs raise an as-applied challenge to this particular provisional verification issued by the Corps. Preservation Soc. Of Charleston, 893 F. Supp. 2d at 55 ("The Court further notes that while a facial attack on the statutes and regulations at issue here might have the kind of national impact that would weigh against transfer, Plaintiffs here merely bring an APA challenge to a decision by a local division of the Corps with overwhelmingly local effects") (emphasis included in the original); see also, e.g., Sierra Club v. Bostick, Civ. No. 12-742 20012 WL 3230552 (W.D. Okla. Aug. 5, 2012) (upholding

applicability of NWP both factually and as applied)); Kentucky Riverkeeper, 714 F.3d at 408-13 (deciding a facial challenge to NWP 21 and NWP 50); New Hanover Twp., 992 F.2d at 471-73 (discussing plaintiff's as-applied challenge to the Corps' decision to permit a municipal waste landfill project under NWP). Thus, the evaluation conducted pursuant to NEPA is presumptively valid, and aside from the 2012 reissuance of NWP 3, the Corps has taken no action that requires additional NEPA analysis. Plaintiffs therefore have no valid NEPA claim. See Snoqualmie, 683 F.3d at 1164.

D. The Corps' Decision Complies with Section 106.

Claim 1 alleges that the Corps failed to comply with the requirements of NHPA Section 106. Compl. ¶ 48. Plaintiffs allege that the Corps' review of SPA's project required consultation with interested parties regarding potentially affected structures, and that the Corps unduly limited the "Area of Potential Effects to the footprint of new pilings" without considering the impacts on historic properties in Charleston. Compl. ¶ 44-45. Plaintiffs misunderstand both the Corps' decisionmaking process and the obligations imposed by Section 106. In accordance with the ACHP's regulations,[11] the Corps' "no potential to cause effects" finding terminates the

[11] In Claim 1 (*i.e.*, Plaintiffs' challenge to the Corps' compliance with Section 106), Plaintiffs rely exclusively on ACHP regulations, and therefore have conceded that the Corps' interpretation of its own NHPA regulations was correct. For purposes of the challenged decision, the Corps' and the ACHP's interpretation is the same. 2005 Interim Guidance at §6(h) (citing to Section 800.3(a)(1) of ACHP regulations to clarify that the Section 106 process is fulfilled when "[i]t is determined there is no potential to cause effects on historic properties."). To the extent that the Corps' definition of "permit area" is narrower than the ACHP's definition of "area of potential effects" ("APE"), any possible conflict is immaterial here, given that the Corps considered effects outside the permit area. See McGehee v. U.S. Army Corps of Eng'rs, No. 11-CV-160, 2011 U.S. Dist. LEXIS 56652, at *17 (W.D. Ky. May 23, 2011) (holding that even though "the Corps defines 'permit area' differently than the definition of 'area of potential effects' [. . .], both sets of regulations recognize that effects of an undertaking outside the footprint of a project should be considered); id. ("Even if it could be argued that the agency was required to progress further along in the 106 process, it is not an abuse of discretion for the

Section 106 process, thereby pre-empting the statute's consultation requirements. SUP071; see also 65 Fed. Reg. at 77718 (Dec. 12, 2000) ("There is no consultation requirement for [a no potential to cause effects] decision.")

The Corps properly found that there was no potential for this type of activity to cause effects to historic properties within or even outside the permit area. COE000126; see also COE000112 (project "involves impacts to not more than 0.01 acres of waters of the United States associated with the installation of additional pilings underneath an existing pile supported structure"). The Corps determined that effects such as noise accompanying the installation of additional pilings would be short-term and negligible compared to the existing nearby conditions including "busy city streets, an existing railroad spur, and . . . a commercial shipping facility." COE000126. It concluded that "[t]he installation of additional pilings underneath an existing (and extensively modified) wharf is understood to be the type of activity that is of such limited nature and scope that it has no potential to cause effects to historic properties either inside or outside of the 'permit area.'" Id.

As the Corps explained in its decision document and post-decisional correspondence explaining the decision, its opinion that further notice and consultation regarding the SPA's PCN were not required under Section 106 is fully consistent with ACHP regulations. COE000126 ("[T]he Corps has determined that there is no potential to cause effects on historic properties and that no project-specific consultation is required under Section 106."); SUP065-66, 071; see also 65 Fed. Reg. at 77718. The Corps acknowledged the existence of an undertaking and assumed the presence of historic properties in the permit area, but found it unnecessary to proceed to later

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agency to conclude that the plaintiffs' home was not within the area of potential effects"). Moreover, the APE determination occurs later in the Section 106 process. See infra, note 16.

steps of Section 106's consultation process because the "type of activity"[12] authorized under the verification was one that had no potential to cause effects. This finding terminates the NHPA's consultation requirements under 36 C.F.R. § 800.3(a)(1); Valley Community Pres. Comm'n. v. Mineta, 373 F.3d 1078 (10th Cir. 2004) ("[S]ection 800.3 does not mandate consultation with the public in the instance where it has been determined that the undertaking 'does not have the potential to cause effects on historic properties.'"); Save Our Heritage v. FAA, 269 F.3d 49, 58 (1st Cir. 2001) (under Section 800.3(a)(1), requirements of NHPA Section 106 are "beside the point if there is no potential adverse effect.").

The Corps' position reflects a carefully considered interpretation of the ACHP's regulation. As the Corps explained in its April 18 memorandum for record and its June 22 response letter to the ACHP, it determined, under Section 800.3(a) of the ACHP's regulations, that consultation was not required under the NHPA. Under that provision, the "agency official shall determine whether the proposed Federal action is an undertaking . . . and, if so, whether it is a type of activity that has the potential to cause effects on historic properties." 36 C.F.R. § 800.3(a). "If the undertaking is a type of activity that does not have the potential to cause effects on historic properties, assuming such historic properties were present, the agency official has no further obligations under section 106 or this part." 36 C.F.R. § 800.3(a)(1).

The ACHP has repeatedly stressed that a "potential to cause effects" determination under Section 800.3(a)(1) should be based on the category of activity proposed, not the particulars of the proposal. Id. at 77703 (new language clarifies that agency should be considering the "type and nature" of the undertaking, not "case-specific issues"); see also ACHP Q&As,

[12] Section 800.3(a)(1), which had previously required consideration of an activity's potential to cause effects, was amended in 2000 to require consideration of effects from the "type of activity," rather than the activity itself. 65 Fed. Reg. at 77,728

http://www.achp.gov/106q&a.html#800.3 (cited at SUP00070) ("An agency must look at the nature of the undertaking when judging whether it has the potential to affect historic properties, and not at whether the specific undertaking has effects on specific historic properties."). In its section-by-section comments to the ACHP's final rule, the ACHP explained that "if there is an undertaking, but it is not a type of activity that has the potential to affect a historic property, then the agency is finished with its section 106 obligations. There is no consultation requirement for this decision." 65 Fed. Reg. 77698, at 77718 (emphasis added). In the same context, the ACHP explained that the language of 800.3(a)(1):

> was amended to better state the premise of the rule that only an undertaking that presents a type of activity that has the potential to affect historic properties requires review. The previous language implied that making such a determination related to the circumstances of the particular undertaking, rather than the more generic analysis of whether the type of undertaking had the potential to affect historic properties.

Id. at 77,700. The language of this section makes it clear that, contrary to Plaintiffs' construction of the ACHP's regulations, agencies need only make a "generic" threshold determination, based solely on the "type" of activities at issue, regarding whether the proposed Federal action has the potential to affect historic properties. The Corps' NHPA obligations were therefore satisfied – not avoided – by its reasonable conclusion that the work proposed by the SPA is not the "type of activity" that has the potential to cause effects on historic properties "in or outside of the 'permit area'…," and in recognition of the "limited nature and scope" of the work COE00126.

The relevant cases provide strong support for the Corps' conclusions. In McGehee, the court denied the plaintiffs' motion for a preliminary injunction. 2011 U.S. Dist. LEXIS 56652, at *20. The court found that where a temporary crossing was necessary to build a bridge for **a** county road extension project, the Corps' finding under Section 800.3(a)(1) of "no potential to cause effects" was "correct as a matter of law" given the "limited nature and scope" of federally

authorized activity. Id. at *14-16, 20. The court rejected the plaintiffs' argument that the Corps should have considered the effects of the bridge and necessary egress roadway on properties listed under the National Historic Register. Id. at *15. On the plaintiffs' motion for reconsideration, the court affirmed its opinion and expanded upon the rationale. McGehee v. U.S. Army Corps of Eng'rs, No. 11-CV-160, 2011 U.S. Dist. LEXIS 78496, at *3 (W.D. Ky. July 29, 2011). The court rejected the plaintiffs' argument that where a federal permit is required for some part of a project, the entire project is a federal "undertaking." Id. The court then reiterated that the Army's conclusion—that no further process was required under Section 106—was "clearly dictated by the federal regulations":

> The first step in the Section 106 Process is to determine whether the temporary construction would have "the potential to cause effects on historic properties." 36 CFR § 800.3(a). A "no potential to cause effects" determination terminates the Section 106 Process. 36 C.F.R. § 800.3(a)(1). Here, the temporary construction which NWP No. 33 permitted could not possibly have any impact whatsoever on the historic property. Only if the permitted work had the potential to cause effects must the Section 106 Process continue. Id. Consequently, the Corps of Engineers did not abuse its discretion by making its "no potential to cause effects" determination. Plaintiffs confuse the "no potential to cause effects" determination with a "no effects" determination. A "no effects" determination, like a delineation of the APE happens further along in the Section 106 Process. 36 C.F.R. § 800.4. The Court, therefore, had no need to discuss the APE[13] of the NWP No. 33 construction because no such determination was required.

2011 U.S. Dist. LEXIS 78496, at *9-10 (emphasis added). Similarly, here the Corps reasonably found that no further consultation was required because the "limited nature and scope" of the SPA's proposed work represents a "type of activity" that has no potential to affect historic properties. COE00126; cf. Vieux Carre Property Owners, 875 F.2d at 453 (inconsequential

[13] Plaintiffs' Complaint asserts that the Corps' determination of the APE was incorrect. As explained in McGehee, the APE determination occurs later in the Section 106 process. See 36 C.F.R. 800.4(a)(1). Because the Corps' determination under Section 800.3(a) obviated the need for further consultation, it had no occasion to determine the APE.

activities authorized under NWPs do not trigger NHPA's consultation requirements). Thus, the Corps' decision was reasonable based on the text of the ACHP's regulations and reported cases.

Plaintiffs have claimed that the ACHP opposes the Corps' interpretation, citing portions of the ACHP's June 5, 2012 letter. But that document, in full context, refutes Plaintiffs' claim. The letter was based, in turn, on a letter to the ACHP from the NTHP (and "stakeholder" input by the SELC and others); it did not mention Section 800.3(a)(1) as the basis for the Corps' determination and indicated that the ACHP had not seen or reviewed the Corps' decision documents. The letter acknowledged that the ACHP required additional information from the Corps in order to verify the accuracy of what had been reported to it. The need to revoke the verification was conditioned on whether the NTHP's characterization of the Corps' determination (that there was "no requirement to comply with the requirements of Section 106") was substantiated. SUP064. The Corps provided a substantial and detailed written response to the ACHP explaining the basis and rationale for its "no potential to cause effects" determination consistent with Section 800.3(a)(1) and in full compliance with the requirements of Section 106 of the NHPA. The Corps received no further official comments, inquiry or continued objection from the ACHP in reply to its June 22, 2012 response letter. The Corps' rationale was reasonable, and the Corps is entitled to summary judgment on the administrative record.

III. CONCLUSION

For the reasons set forth above, the Corps is entitled to summary judgment on all claims.

Respectfully submitted,

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July 15, 2013