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October 13, 2017

Via Certified Mail
Return Receipt Requested

The Honorable Ryan D. McCarthy
Acting Secretary of the U.S. Army
101 Army Pentagon
Washington, DC 20310-0101

The Honorable E. Scott Pruitt
Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Re: *Notice of Intent to Sue over Violations of the Clean Water Act in Connection with the Corps' and EPA's Approval of the Section 404 Permit for I-73 in South Carolina*

Dear Sirs:

We write on behalf of the South Carolina Coastal Conservation League ("the Conservation League") to notify you of our intent to bring suit against the United States Army Corps of Engineers ("Corps") and the United States Environmental Protection Agency ("EPA") for violations of the Clean Water Act ("CWA" or "Act"), 33 U.S.C. § 1344 *et seq.*, and applicable regulations in connection with (1) the Corps' issuance of the CWA Section 404 Permit for I-73 in South Carolina ("404 Permit," Permit No. SAC 2008-1333), and (2) EPA's concurrence in the approval. The Corps and EPA have violated Section 404 of the CWA, 33 U.S.C. § 1344, by issuing the 404 Permit in contravention of applicable law and regulations.

As discussed in more detail below, the Corps and EPA have failed in their duties under the CWA. Citizens are authorized to remedy these failures through the Act's citizen suit provision. 33 U.S.C. § 1365(a)(2).[1] If the Corps and EPA do not take action within 60 days to remedy these violations of the CWA, the Conservation League will have no choice but to pursue

[1] Section 505(a)(2) of the CWA, 33 U.S.C. § 1365(a)(2), provides that any citizen may commence a civil action "where there is alleged a failure of the Administrator to perform any act or duty under this Chapter which is not discretionary with the Administrator." In *National Wildlife Federation v. Hanson*, 859 F.2d 313, 315 (4th Cir. 1988), the Fourth Circuit ruled that EPA and the Corps have the non-discretionary duty to regulate the discharge of dredged or fill material into wetlands and to "make reasoned wetlands determinations." *Id.* Although Section 505(a)(2) only refers to the Administrator, the Fourth Circuit held that "[i]t is quite clear that both the Corps and the EPA are responsible for the issuance of permits under the CWA and enforcement of their terms." *Id.*

these claims through legal action in the United States District Court for the District of South Carolina.[2]

I. Background

On June 19, 2017, the Corps issued the 404 Permit, authorizing the discharge of fill material into hundreds of acres of jurisdictional wetlands and streams associated with the planned construction of I-73 in South Carolina, which would run about 80 miles from a junction with I-74 in Rockingham, North Carolina to S.C. 22 near Conway, South Carolina. The 404 Permit would allow permanent placement of fill in a total 4,643 linear feet of streams, as well as fill, clearing, and excavation impacts to a total of 324.1 acres of jurisdictional wetlands.

While the original concept for a national I-73 ran from Michigan to South Carolina, the prospects for a national, new-location I-73 have largely collapsed in the intervening years. I-73 remains mostly unbuilt, with less than 100 miles of more than 1,150 miles of planned corridor having been constructed and designated as part of the Interstate Highway System. To date, only twenty miles of new location interstate highway have been opened along the six-state I-73 corridor. The vast majority of states have instead chosen to upgrade existing highways as part of their "I-73" plans, not construct new location interstate segments. Less than two hundred additional miles remain in various planning stages in the different states, with less than 100 miles of additional I-73 roadway still planned outside of South Carolina.

SCDOT and FHWA have been pursuing I-73 as a new-location interstate highway in South Carolina for decades. On August 9, 2004, SCDOT and FHWA issued a Notice of Intent to prepare an EIS for the I-73 project in South Carolina. For purposes of the NEPA analysis, SCDOT and FHWA divided I-73 into two segments: I-73 North from the I-73/I-74 interchange in Rockingham, North Carolina to I-95, and I-73 South from I-95 to the Myrtle Beach area. The agencies conducted separate NEPA analyses for the two segments, I-73 North and I-73 South.

As part of the NEPA alternatives development process, SCDOT and FHWA utilized a Corridor Analysis Tool (CAT) to identify potential highway corridors using GIS data. Wetland impacts of the preliminary alternatives were assessed by the CAT based on a 600 foot-wide I-73 corridor, despite a 300 foot-wide corridor generally being adequate to accommodate the I-73 design. Alternative routes that more closely followed the S.C. 38/U.S. 501 corridor were rejected from further consideration based on a preliminary assessment of wetland impacts along a 600 foot-wide corridor.

On May 30, 2006, the Draft EIS for I-73 South was issued. On November 29, 2007, the FEIS for I-73 South (South FEIS) was issued. On July 19, 2007, the Draft EIS for I-73 North was issued. On August 6, 2008, the FEIS for I-73 North (North FEIS) was issued.

On May 7, 2010, FHWA approved a Reevaluation ("2010 Reevaluation") to address various design changes since the last NEPA documents had been prepared. The 2010

[2] We also provide notice to of our intent to join the South Carolina Department of Transportation ("SCDOT") and Secretary Christy Hall as potential necessary parties to any future litigation.

Reevaluation concluded that the design changes were not significant and did not warrant preparation of a SEIS. No public comment was sought by the agencies on the 2010 Reevaluation.

On May 10, 2017, almost ten years since the original EIS for this project was issued, FHWA again prepared Reevaluations for both the I-73 South and I-73 North segments. These Reevaluations identified numerous changes in project design, circumstances, and information regarding the environmental impacts of I-73, but again concluded that "the changes were not found to be significant." The final 2017 Reevaluations were made available to the public only after completion, and no drafts were made publicly available prior to finalization.

Despite the collapse of I-73 as a national highway corridor and a number of significant changes to this project affecting both the purpose and need for the road and the alternatives considered by the agencies, SCDOT and FHWA have continued to plow ahead in pursuit of a new location interstate highway. Fixated upon the idea of a new "interstate highway," these agencies have refused to consider viable alternatives that would provide equivalent benefits to I-73 in terms of traffic improvements, reduction in hurricane evacuation time, and economic development. For years, the Conservation League has urged the agencies to consider upgrading the S.C. 38/U.S. 501 corridor, an existing highway corridor just a few miles away and parallel to the proposed route of I-73 south of I-95. Upgrading S.C. 38/U.S. 501 into the "Grand Strand Expressway" could be accomplished at a fraction of the fiscal and environmental cost of the proposed I-73; however, the agencies have failed to consider it. Similarly, the agencies have failed to adequately consider the potential for upgrades to S.C. 9 and other existing highway corridors to provide other viable alternatives to I-73; nor have the agencies considered upgrades to S.C. 38, S.C. 9, or other existing highway corridors north of I-95 as potentially viable alternatives to I-73 North.

Unfortunately, the Corps and EPA have now followed in SCDOT's and FHWA's footsteps and approved the 404 Permit for I-73 without adequate consideration of practicable alternatives to the project. The Corps and EPA erred in approving this permit by failing to independently determine the purpose and need for the road or conduct an adequate alternatives analysis, including considering the less damaging practicable alternative of upgrading existing roads to improve traffic conditions and hurricane evacuation times, and facilitate economic development opportunities with far less environmental and fiscal cost. The Corps' and EPA's approval of this project violates the Clean Water Act, and the Section 404(b)(1) Guidelines. This letter serves as formal notice of the Clean Water Act violations. 33 U.S.C. § 1365(b)(2).

II. The Corps' Violation of its Duties under Section 404 of the CWA.

Section 404 of the CWA authorizes the Secretary of the Army to issue permits for the discharge of dredged or fill material into "waters of the United States" when certain conditions are met. 33 U.S.C. § 1344. The term "waters of the United States" includes wetlands. 33 C.F.R. § 328.3(b) (Corps); 40 C.F.R. § 232.2(r) (EPA). Unless exempted by section 404(f)(1), all discharges of dredged or fill material into waters of the United States, including wetlands, must be authorized under a Section 404 permit issued by the Corps.

Issuance of all Section 404 permits is subject to the Section 404(b)(1) Guidelines found at 40 C.F.R. § 230 *et seq*. These guidelines provide, *inter alia*, that no discharge of dredge or fill material may be permitted if there is a less damaging "practicable alternative" available, or if it will "cause or contribute to significant degradation" of waters of the United States. *Id.* § 230.10. The Section 404(b)(1) Guidelines further provide that "the degradation or destruction of special aquatic sites is considered to be among the most severe environmental impacts covered by these Guidelines." *Id.* § 230.1. Wetlands are considered "special aquatic sites" under the Guidelines. *Id.* § 230.41.

The Guidelines require that the Corps follow a specific two step procedure in applying the practicable alternative standard. First, a correct statement of the project's "basic purpose" is necessary. *See id.* § 230.10(a)(3). The Corps defines a project's basic purpose. *See* 33 C.F.R. Part 325, App. B(9)(b)(4). Second, after the Corps defines the basic purpose of the project, it must determine whether that basic purpose is "water dependent." *See* 40 C.F.R. § 230.10(a)(3). An activity is "water dependent" if it requires access or proximity within a wetland to fulfill its basic purpose. *Id.*

If the activity is not "water dependent," as is the case here, the Guidelines require that the Corps apply a presumption that a practicable alternative that has a less adverse environmental impact on the wetland is available. *Id.*; *see also Bering Strait,* 524 F.3d 938, 947 (9th Cir. 2008) (applying the presumption that practicable alternatives exists for an Alaskan gold mining project because the project was not water dependent). When this presumption applies, the applicant must then rebut the presumption by "clearly demonstrat[ing]" that a practicable alternative is not available. *Id.* In addition, unless the applicant clearly demonstrates otherwise, the Corps presumes that all practicable alternatives that do not involve the discharge into a wetland have a less adverse environmental impact. *Id.* Where the presumption applies, the permit applicant bears the burden of providing "detailed, clear, and convincing information *proving* that an alternative with less adverse impact is impracticable." *Greater Yellowstone Coalition v. Flowers,* 359 F.3d 1257, 1269 (10th Cir. 2004) (internal quotations and citation omitted). Moreover, the Corps may rely on information submitted by the applicant but must independently verify such information. *Id.*; 40 C.F.R. § 1506.5(a).

A. The Corps erred in failing to independently evaluate the purpose for I-73.

The 404(b)(1) Guidelines require the Corps to independently assess the "overall project purposes" and "basic purpose." *See* 40 C.F.R. § 230.10(a)(2), (3); *see also* 33 C.F.R., Pt. 325, App. B(9)(b)(4). As the Corps has explained, "[i]t is only when the 'basic project purpose' is reasonably defined that the alternatives analysis required by the [404(b)(1)] Guidelines can be usefully undertaken by the applicant and evaluated by the Corps."[3] Courts routinely explain that determining the project's purpose is "central" to the Corps' analysis, dictating both the range of practicable alternatives and the applicant's burden of proof. *See, e.g., Nat'l Wildlife Fed'n v. Whistler*, 27 F.3d 1341, 1345 (8th Cir. 1994).

[3] U.S. Army Corps of Engineers, Permit Elevation, Old Cutler Bay Associates, at 6 (Sept. 30, 1990).

Corps regulations further require that "the Corps will, in all cases, exercise independent judgment in defining the purpose and need for the project from both the applicant's and the public's perspective." 33 C.F.R. § 325, App. B(9)(b)(4). This ensures that "an applicant cannot define a project in order to preclude the existence of any alternative sites and thus make what is practicable appear impracticable." *Sylvester v. U.S. Army Corps of Engineers*, 882 F.2d 407, 409 (9th Cir. 1989).[4] Stated otherwise, "the definition of a project purpose may not be used by the sponsor as a tool to artificially exclude what would otherwise be practicable alternatives to the project – in other words, the sponsor's project purpose must be 'legitimate.'" *Florida Clean Water Network, Inc. v. Grosskruger*, 587 F. Supp. 2d 1236, 1243–44 (M.D. Fla. 2008) (quoting *Sylvester*, 882 F.2d at 409).

In this case, the Corps impermissibly has adopted the applicant's narrowly-defined purpose without exercising its independent judgment. By doing so, the Corps has done just what the law prohibits – allowed the applicant to define a project in the narrowest of all possible ways to preclude the existence of practicable alternatives. *See Sylvester,* 882 F.2d at 409.

The Corps explains that the project purpose is "to provide an interstate link between the I-73/I-74 Corridor in North Carolina to the Myrtle Beach region in South Carolina, to serve residents, businesses, and travelers while fulfilling congressional intent in an environmentally sensitive manner." U.S. Army Corps of Engineers, Record of Decision, CESAC-RD-SAC-2008-1333, Interstate 73, at 8 (June 19, 2017) (hereinafter "ROD"). Providing an "interstate link," however, is not an appropriate project purpose, but an unreasonably narrow statement of a specific project design. This statement does not represent the Corps' independent analysis of the purpose and need for the project, but is an almost verbatim rephrasing of the applicant's purpose statements.[5]

By mandating a specific project design – a new interstate – the stated project purpose forecloses consideration of reasonable alternatives, such as upgrading existing roadways to expressway or other non-interstate standards. Further, due to right of way requirements associated with interstate design standards, upgrading existing roadways in all but the most rural

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[4] Similarly, under NEPA, the Corps "cannot restrict its analysis to those 'alternative means by which a particular applicant can reach *his* goals.'" *Simmons v. U.S. Army Corps of Engineers*, 120 F.3d 664, 669 (7th Cir. 1997).

[5] Compare ROD, at 7 ("As described in the public notice, the applicant's stated purpose is to provide an interstate link between the I-73/I-74 Corridor in North Carolina to the Myrtle Beach region in South Carolina, to serve residents, businesses, and travelers while fulfilling congressional intent in an environmentally sensitive manner.") with ROD at 8 ("The overall project purpose, as defined by the Corps, is to provide an interstate link between the I-73/I-74 Corridor in North Carolina to the Myrtle Beach region in South Carolina, to serve residents, businesses, and travelers while fulfilling congressional intent in an environmentally sensitive manner.").

Further, the overall project purpose identified by the Corps is merely a restatement of the applicant's stated purposes for the separate I-73 South and I-73 North segments, which are provided in the Reevaluations:

> *The purpose of the I-73 South project is to provide an interstate link between I-95 and the Myrtle Beach region to serve residents, businesses, and tourists while fulfilling congressional intent in an environmentally responsible and community sensitive manner.*

South Reevaluation, at 3.

> *The purpose of the I-73 North project is to provide an interstate link between the southernmost proposed segment of I-73 (between I-95 and the Myrtle Beach Region) and the I-73/I-74 Corridor to serve residents, businesses, and tourists while fulfilling congressional intent in an environmentally responsible and community sensitive manner.*

North Reevaluation, at 3.

of areas becomes highly challenging – effectively foreclosing all options other than new location interstate alternatives. Notably, the ROD goes on to state that the "I-73 primary needs are to provide system linkage and to enhance economic development." ROD at 7. Meeting these needs, however, does not require the construction of a new interstate; instead, the least damaging practicable alternative for meeting these needs is to upgrade existing roadways to an expressway level of service.[6]

The purpose and need statements for the South and North portions of I-73 were finalized by FHWA and SCDOT on December 4, 2004 and January 19, 2006, respectively. Over the intervening years; however, there have been numerous changes that have undercut the purpose for the project, making it all the more critical for the Corps to have taken its own hard look at the project purpose – as it is legally required to do – before issuing the 404 Permit in 2017. The Corps failed to meet this obligation to independently evaluate the project purpose as part of its 404 Permit review process.

To the extent that the Corps claims it is bound by a Congressionally-defined purpose to construct an interstate highway, the experience of other states along the I-73 corridor shows that Congressional intent to promote regional integration through development of transportation corridors does not *require* the construction of a new interstate. Rather, these goals have largely been met through means other than building a new interstate highway in other states for which I-73 was contemplated. For example, Michigan, Ohio, and West Virginia have effectively given up on building out the I-73 corridor to interstate standards, but instead plan to meet Congressional intent by improving the existing highway network to a comparable level of service, but not meeting interstate standards. Similarly, only a small portion of the I-73/I-74 corridor in North Carolina is planned to be built as new location freeway, while most of the I-73 mileage will consist of upgraded existing highways. Only a portion of the I-73 route in Virginia even remains in the planning stages, and the state has no plans to build the corridor north/west of Roanoke. Thus, over the past two decades, it has become clear that there is unlikely to ever be a national I-73 interstate highway running from Sault Ste. Marie, Michigan to Myrtle Beach, South Carolina.

In addition to this fundamental shift in the overall national I-73 project, numerous changes in circumstances have undermined the purpose and need for I-73 in South Carolina.[7] For example, there have been significant changes to regional transportation infrastructure, including ongoing construction of Phase III of the Carolina Bays, development of new interstate-standard interchanges along the S.C. 38/U.S. 501 corridor, and a widening and interchange project on SC Route 707.

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[6] In its application, SCDOT also identified secondary needs including "improved access for tourism, increased safety on existing roads, and multimodal planning," for the Northern portion, and facilitating hurricane evacuation and relieving local traffic congestion for the Southern portion. Joint Public Notice, CESAC-RD-SAC-2008-1333, 2-3 (June 8, 2016). Notably, however, the Corps never adopted these secondary needs as part of the overall purpose, despite these needs being part of SCDOT's justification for a new location interstate.

[7] As we have previously explained, under NEPA these significant changes in circumstances also mandate the preparation of a Supplemental Environmental Impact Statement. *See* Letter from C. Wannamaker & D. Timmons, Southern Environmental Law Center, to S. Brumagin, U.S. Army Corps of Engineers (July 11, 2017).

Further, in the years since the purpose and need statements were developed, the widespread adoption of GPS navigation systems has greatly diminished the value of an "interstate" designation in simplifying driving directions for non-local travelers. For an increasing number of drivers, the choice of a route is now left to the navigation device, and the algorithms doing this routing are not driven by whether a route is designated as "interstate", but rather are based on speed limit, likely operating speed, distance and, increasingly, traffic congestion. Thus, modern technology has also undermined the need for "interstate" designation.

In sum, the Corps erred in failing to independently determine the project purpose here, instead relying on the applicant's narrowly-defined project purpose and an outdated expression of Congressional intent as justification for a narrowly defined purpose to build a new location interstate in South Carolina. By doing so, the Corps impermissibly narrowed the scope of practicable alternatives that could meet the project's overall purpose. The Corps violated the Section 404(b)(1) Guidelines by failing to independently evaluate the overall project purpose and evaluate practicable alternatives to meet the actual need for the project.

B. The Corps erred in failing to adequately consider practicable alternatives to I-73.

Under the 404(b)(1) Guidelines, the Corps must not only independently assess the overall project purpose, but also conduct its own "independent evaluation" of practicable alternatives to meet the purpose. *Fund for Animals, Inc. v. Rice*, 85 F.3d 535, 543 (11th Cir. 1996). Relying on supposed Congressional intent to build an interstate, the Corps further erred by blindly accepting the impermissibly narrow scope of practicable alternatives considered by SCDOT and FHWA in the FEIS and NEPA Reevaluations. Thus, the Corps failed to meet its mandatory duty to conduct its own, broader alternatives analysis.

Instead of fully evaluating all practicable alternatives, the Corps unilaterally accepted SCDOT's and FHWA's narrow range of alternatives as provided in the FEIS and Reevaluations. However, where, as here, the NEPA documents such as the FEIS "do not consider the alternatives in sufficient detail to respond to the requirements of the Guidelines, it may be necessary to supplement NEPA documents with additional information." *Utahns v. U.S. DOT,* 305 F.3d 1152, 1163 (10th Cir. 2002) (citing 40 C.F.R. § 230.10(a)(4)). Here, the alternatives considered in the NEPA review focused solely on alternative locations for a new interstate highway, thereby ignoring the potential for upgrades to existing roadways to meet project needs. Accordingly, the FEIS and NEPA Reevaluations fail to provide the Corps with all the information needed to evaluate practicable alternatives, and the Corps should have independently assessed a range of practicable alternatives, including upgrading existing highways to non-interstate standards. *See* 40 C.F.R. § 230.10(a)(4).

As we have previously explained, the S.C. 38/U.S. 501 corridor from Conway to I-95 provides an alternative route for an upgrade alternative that would meet the project need at a much-reduced impact on aquatic resources and the environment. Similarly, upgrading S.C. 9 to a four-lane highway from SC 22 to I-95 would fulfill any valid need for the project. North of I-95, upgrades to either the S.C. 38 or S.C. 9 corridors could also meet the project need. The Reevaluations, however, make clear that SCDOT and FHWA never considered upgrading these highways to non-interstate standards. Therefore, no analysis of whether such upgrades could

meet the project purposes of serving regional trade and economic development needs, serving residents, businesses, and tourists, and improving hurricane evacuation times, was ever conducted. Nor did the Corps evaluate such an alternative.

The Corps had an independent duty to evaluate these alternatives – particularly in light of EPA's conclusions regarding the agencies' alternatives analysis - and has violated the Guidelines by issuing a permit without this analysis. *See* 40 CFR § 230.10(a)(4) (explaining that the Corps must supplement NEPA documents with additional information when such documents have not "considered the alternatives in sufficient detail to respond to the requirements of these Guidelines").

C. The Corps erred in accepting SCDOT's determination that upgrading existing highway corridors would have greater environmental impacts than construction of a new-location I-73.

With respect to potential upgrades of existing highways to interstate standards, the Reevaluations adopted by the Corps claim that the agencies considered these alternatives, which were found "to have more impacts to both the natural and human environment than preliminary alternatives using new alignment segments." This claim is inaccurate and misleading.

First, none of the 141 preliminary alternatives reviewed in the NEPA process in fact follow the entire S.C. 38/U.S. 501 corridor from I-95 to the juncture with S.C. 22. *See Alternative Development Technical Memorandum: From I-95 to the Myrtle Beach Region* (Technical Memorandum). "Instead, each of the preliminary alternatives considered included significant deviations from the existing highway corridor, thereby artificially altering the number of wetland and aquatic stream impacts."[8]

Second, the introduction of artificial weigh-points in the Corridor Assessment Tool (CAT) model used to compare the preliminary alternatives served to exclude the true "least cost path" from an environmental perspective. In fact, the "true least cost path" was never even shown or considered by the Agency Coordinating Team (ACT). Email from L. Rose, SCDNR, to E. Duncan, R. Ahle, & G. Mixon, SCDNR (July 5, 2005). Accordingly, the alternatives analysis was artificially manipulated from the very start.

Third, in reaching the conclusion that alternatives along existing corridors had greater impacts than a new location interstate, the agencies relied on outdated NWI wetlands data instead of site-specific analysis. Agency personnel "generally thought the NWI mapping consistently overestimated the amount of wetlands in the study area," but yet continued to rely on this inaccurate dataset.[9] Further, wetland impacts of the preliminary alternatives were evaluated based on a 600 foot-wide corridor, despite the Technical Memorandum specifically noting that only a 300 foot right-of-way would generally be required (up to 400 foot right-of-way in areas where frontage roads would be required). Thus, the upgrade alternatives were rejected

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[8] Letter from G. Hickerson, Environmental Research Inc., to Southern Environmental Law Center, 3 (June 15, 2017).

[9] Technical Memorandum, at 18.

from further consideration after an inaccurate preliminary assessment that dramatically inflated the wetland impacts of these upgrade alternatives.

The agencies, including the Corps and EPA, have been aware of these deficiencies in the alternatives analysis for years. For example, by letter dated March 28, 2011, the U.S. EPA specifically recommended that the Corps consider the "existing S.C. 38/U.S. 501 route, along with phased up-grades, as the preferred alternative for the I-73 corridor, as it is an existing four lane highway with up-grade potential, and transects already degraded waters of the U.S." The EPA specifically identified S.C. 38/U.S. 501 as "a lower impact alternative to the applicant's preferred alternative corridor."

EPA further described the inadequacies of the NEPA alternatives analysis and that any permit issued without a new alternatives analysis would violate the 404(b)(1) Guidelines:

> The US 501 and SC Route 9 corridors were both examined early in the NEPA process, by evaluating very wide corridors which resulted in estimates of large impacts. For this reason, they were both eliminated from further consideration. EPA, however, recommends a re-examination of these options using the more narrow corridor width that was later used to evaluate the applicant's preferred alternative, to allow for an equivalent comparison with the existing SC 38/US 501 corridor. . . . EPA has determined that the project, as currently proposed, does not comply with the Section 404(b)(1) Guidelines and may have substantial and unacceptable adverse impacts on ARNIs. Therefore we recommend denial of the project, as currently proposed.

EPA further noted that aerial photography of the S.C. 38/U.S. 501 route indicated that "a large portion of the wetlands" along this corridor based on the NWI maps "are now agricultural fields and pine plantations and are likely degraded, drained, or filled." EPA recommended using "aerial photography or more recent wetland inventories to determine the accuracy of the estimated impacts from the use of the NWI mapping layers that do not reflect current conditions in this case," yet this type of more detailed analysis was never conducted.

The Corps violated the Section 404(b)(1) Guidelines by erroneously accepting SCDOT's arbitrary conclusion that its Preferred Alternative would have less impact on aquatic resources than upgrading existing highway corridors. The Corps failed to exercise its independent judgment in assessing the environmental impacts of various alternatives, impermissibly abdicating its responsibility under Section 404 of the Clean Water Act of protecting the waters of the United States against unnecessary degradation.

D. The Corps erred in approving the 404 Permit where there were lesser damaging practicable alternatives.

The Section 404(b)(1) Guidelines require the Corps to deny any 404 permit applications where there is a lesser damaging practicable alternative:

> Except as provided under section 404(b)(2), no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences.

40 C.F.R. § 230.10(a). As described above, the Corps improperly relied on the NEPA alternatives analysis provided by FHWA and SCDOT and did not conduct an independent assessment of a range of practicable alternatives.

The Corps' failure is all the more glaring because less damaging practicable alternatives do exist here. For example, upgrading the S.C. 38/U.S. 501 or S.C. 9 highway corridors, either to interstate standards or a non-interstate, expressway level of service, would result in less aquatic resource impacts than the permitted I-73. Similarly, Alternative 7 from the South FEIS is a feasible alternative that would meet the purpose and need for the project with less overall aquatic impacts.

As described in the previously-submitted 2012 and 2017 Environmental Research, Inc. wetlands assessment reports,[10] a significantly more detailed analysis of the S.C. 38/U.S. 501 corridor south of I-95 shows that this upgrade alternative would have dramatically fewer impacts on wetlands and streams than the agencies' preferred alternative – 49.5 acres along a 200 foot expressway corridor or 118.9 acres along a 300 foot interstate corridor, as compared to the nearly 300 acres that would be impacted by I-73 south of I-95. The Corps' sister agency made this exact point when reviewing this project. EPA emphasized in its March 28, 2011 letter that "the use of the existing S.C. 38/U.S. 501 road corridor would remove the need for a new crossing of Aquatic Resources of National Importance (ARNI) including the State Heritage Preserve wetlands and streams and the Lake Swamp area." EPA recommended the S.C. 38/U.S. 501 corridor be designated as the preferred alternative "as a lower impact alternative to the applicant's preferred alternative corridor." Similarly, South Carolina Department of Natural Resources ("SCDNR") staff referred to the S.C. 9 highway corridor as representing the "true least cost path" in terms of environmental impact; yet neither SCDOT nor the Corps ever adequately considered, much less selected, this lesser damaging alternative.

The Corps failed to heed expert advice from the EPA and SCDNR, and violated the CWA by issuing the 404 permit when there were lesser damaging practicable alternatives to I-73 as proposed.

E. The Corps erred in conflating acreage of wetland impacts with overall impact to "aquatic resources."

The Section 404(b)(1) Guidelines require the Army Corps to deny the requested permit unless the applicant can show that there are no practicable alternatives with less adverse impact on the aquatic ecosystem. Comparing total acreage of impacted wetlands alone, however, does

[10] D. Kisner, Environmental Research Inc., Aerial Photographic Analysis Comparing Aquatic Impacts of S.C. 38/U.S. 501 Upgrade with Proposed I-73, Dillon, Marion, & Horry Counties, South Carolina (Mar. 2012); Letter from G. Hickerson, Environmental Research Inc., to Southern Environmental Law Center (June 15, 2017).

not fully account for all aquatic ecosystem impacts. Instead, the 404(b)(1) Guidelines and relevant Corps guidance documents provide for consideration of a variety of factors in determining which alternative is the least damaging to the overall aquatic resources. These include: stream impacts (quantitative and qualitative), qualitative wetland function, impacts to other waters (quantitative and qualitative), impacts to threatened and endangered species, and cultural resources. 40 C.F.R. Part 230.

In this case, the Army Corps erred in rejecting Alternative 7 based on its narrow assessment of wetland acreage impacted rather than an evaluation of overall aquatic ecosystem impacts. The FEIS specifically found Alternative 7 to be "reasonable" but rejected it based on wetland impacts alone, failing to adequately account for the full range of aquatic ecosystem impacts and the condition of impacted wetlands. When aquatic resources are considered more broadly, the FEIS and South Reevaluation reveal that overall aquatic impacts are less than the Preferred Alternative. Alternative 7 more closely follows existing roadways; thus, the wetlands impacted are largely already in degraded condition. In contrast, the new-location Preferred Alternative would traverse more pristine wetland areas and cause much more significant habitat fragmentation than Alternative 7. Further, the Technical Memorandum establishes that Alternative 7 had the least number of stream crossings (41 vs. 58 for the permitted alternative #3), least amount of perennial stream impacts by linear feet, least community impacts, least number of relocations, and was only slightly more costly than the selected alternative.

Even ignoring all non-interstate alternatives or other preliminary alternatives rejected by the agencies, the Corps should still find Alternative 7 from the FEIS to be a less-damaging practicable alternative to the selected alternative due to its reduced overall impact on the full range of aquatic resources.

F. The Corps erred in approving the 404 Permit where the project has not avoided and minimized impacts to waters of the United States.

The 404(b)(1) Guidelines require SCDOT to take "all appropriate and practicable steps to avoid and minimize adverse impacts to waters of the United States." 40 C.F.R. § 230.91(c)(2); § 230.70 - .77. Compensatory mitigation is only permitted "to offset environmental losses resulting from unavoidable impacts to waters of the United States."40 CFR 230.93(a)(1). In this case, SCDOT has not taken all appropriate and practicable steps to avoid and minimize adverse impacts to waters of the U.S.

As noted above, there are practicable alternatives to the proposed I-73 project that would meet all appropriate project purposes at significantly reduced impact to jurisdictional waters. In addition to the S.C. 38/U.S. 501 "Grand Strand Expressway" and S.C. 9 alternatives, Alternative 7 would have resulted in avoiding numerous stream crossings and impacts to waters of the U.S. The Corps erred in failing to issuing the 404 Permit where SCDOT had not taken all appropriate and practicable steps to avoid and minimize adverse impacts to waters of the U.S.

G. The Corps erred in approving the 404 Permit where the permitted activities cause and contribute to significant degradation of waters of the United States.

The I-73 permit authorizes the filling and other degradation of more than three hundred wetlands and nearly a mile of stream, significantly degrading the waters of the United States. This excessive impact on the nation's waters is prohibited by the Clean Water Act, which provides that "no discharge of dredged or fill material shall be permitted which will cause or contribute to significant degradation of the waters of the United States." 40 CFR 230.10 (c). As the EPA noted in its 2011 letters, I-73 would require a new crossing of ARNI, including State Heritage Preserve wetlands and streams and the Lake Swamp area. This project would unnecessarily fill and degrade large amounts of largely pristine wetland and stream areas along a new road corridor. This is exactly the type of large-scale impact on waters of the United States that the Clean Water Act wetlands program was designed to protect against.

The Corps violated the Section 404(b)(1) Guidelines by approving the 404 Permit when the permitted activities would cause and contribute to significant degradation of waters of the United States.

H. <u>The Corps erred in approving the 404 Permit where the impacts to aquatic resources will not be adequately mitigated.</u>

Under the 404(B)(1) Guidelines, "[c]ompensatory mitigation may be performed using the methods of restoration, enhancement, establishment, and in certain circumstances preservation." 230.93(a)(2). In general, "[r]estoration should generally be the first option considered because the likelihood of success is greater and the impacts to potentially ecologically important uplands are reduced compared to establishment, and the potential gains in terms of aquatic resource functions are greater, compared to enhancement and preservation." *Id.*

The I-73 mitigation proposal, however, largely focuses on wetland and stream preservation, with only a minimal and poorly-defined restoration component. As the rules make clear, preservation is generally a disfavored option only appropriate in certain circumstances. For example, preservation may be an appropriate mitigation strategy where there is a realistic, concrete threat of impairment to the preserved waters of the U.S. In this case, however, while the property owner may have developed a preliminary plan for development, there is no realistic likelihood that the property would, in fact, be developed in the near-term. Given the remote location of Gunter's Island, SCDOT's claims regarding potential retail or restaurant development along the waterfront areas are simply not credible.

The restoration component of the mitigation plan is also inadequate to effectively compensate for the hundreds of acres of wetlands and thousands of feet of streams that will be impaired by I-73. Removing a small section of roadway and a few culverts simply cannot compensate for the vast impacts of an 80 mile long interstate highway.

The mitigation plan fails to meet the requirements of the 404(b)(1) Guidelines, 40 C.F.R. § 230.93. Accordingly, the Corps erred in approving the 404 Permit without requiring additional mitigation to adequately compensate for the unavoidable impacts of the project.

I. The Corps erred in failing to include in its application discharges to streams and wetlands from the construction of I-73 in North Carolina.

As planned, I-73 will run from SC 22 near Conway, SC to the juncture with I-74 near Rockingham, NC. Yet the Corps has only issued a permit for the South Carolina portion of I-73, indicating that a separate permit will be issued for the North Carolina portion of the highway. While North Carolina has not taken any concrete steps to permit or construct this segment, SCDOT's planned construction of I-73 north of I-95 is completely dependent upon North Carolina's construction of this segment. Thus, this North Carolina segment is an integral part of SCDOT's I-73 project.

Corps regulations provide that:

> All activities which the applicant plans to undertake which are reasonably related to the same project and for which a DA permit would be required should be included in the same permit application. District engineers should reject, as incomplete, any permit application which fails to comply with this requirement. For example, a permit application for a marina will include dredging required for access as well as any fill associated with construction of the marina.

33 C.F.R. § 325.1(d)(2)

Despite this, the Corps has arbitrarily segmented this project at the state line and completely failed to consider the impacts associated with the project in North Carolina, including the filling of 20 acres of jurisdictional wetlands and 3322.9 linear feet of streams. Yet I-73 construction activity in North Carolina is directly related to the permitted activity in South Carolina, and the Corps should have required a single permit application for the entire project. Further, filling streams and wetlands have impacts on water quality, aquatic ecosystems, and human uses that extend across arbitrary state borders. Thus, to accurately assess the impacts of I-73 on the nation's aquatic resources – and those specifically in South Carolina – the Corps needed to consider the North Carolina portion of I-73. By failing to evaluate the wetland fill and stream impacts in North Carolina – an integral part of the I-73 project in South Carolina – the Corps impermissibly failed to include the entire I-73 project in its application.

Just as an applicant cannot segment a single project to circumvent the individual permitting process, 33 C.F.R. § 330.6(c) (2003), an applicant cannot seek multiple individual projects for a single project to foreclose analysis of the full scope of the project's impacts on waters of the United States. The Corps should have rejected SCDOT's permit application as incomplete. Without consideration of the full scope of the project's impacts, the Corps cannot make a valid determination as to whether or not the project complies with the 404(b)(1) Guidelines. Thus, the Corps violated 33 C.F.R. § 325.1(d)(2) and the 404(b)(1) Guidelines.

III. EPA's Violation of Its Duties under the Clean Water Act.

Pursuant to the U.S. Court of Appeals for the Fourth Circuit's decision in *National Wildlife Federation v. Hanson*, 859 F.2d 313, 315-16 (4th Cir. 1988), "both the Corps and the

EPA are responsible for the issuance of permits under the CWA and enforcement of their terms . . . . The EPA is ultimately responsible for the protection of wetlands." According to the Fourth Circuit, the Clean Water Act's citizen suit provision "should be interpreted . . . to allow citizens to sue the Administrator and join the Corps when the Corps abdicates its responsibility" under the CWA. *Id.* at 316. Because it has sanctioned the Corps' failures here and abdicated its ultimate responsibility to protect wetlands, EPA is also liable for the violations alleged herein. EPA failed to exercise its mandatory duty of oversight imposed by Section 404, including but not limited to exercise of its Section 404(c) veto authority. Further, in failing to follow established 404(q) elevation procedures, EPA acted contrary to law.

A. EPA Failed to Follow 404(q) Elevation Process.

In its March 28, 2011 and April 28, 2011 letters, the EPA found that the I-73 project failed to comply with the 404(b)(1) Guidelines and recommended denial of the requested 404 permit. Under the 1992 Memorandum of Agreement between the EPA and the Department of the Army, Part IV, paragraph 3(a) regarding Section 404(q) of the Clean Water Act, the EPA determined that the project did not comply with the 404(b)(1) Guidelines and "may have substantial and unacceptable adverse impacts on ARNIs."

This determination was based on three primary factors: the likely availability of lower impact alternatives to I-73, the impacts of the preferred alternative, and the inadequacy of the proposed mitigation. While the mitigation proposal has been substantially revised since 2011, there has been no change in the alternatives analysis or in the assessment of the impacts of I-73 that could have altered EPA's conclusions that the project violates the 404(b)(1) Guidelines.

Thus, while the EPA indicated by letter dated March 31, 2017 that "all concerns regarding mitigation have been addressed," EPA's previously stated concerns related to the inadequate alternatives analysis and the high level of direct impacts from I-73 have never been resolved. The Corps has not conducted any further evaluation of EPA's suggested alternatives, including the S.C. 38/U.S. 501 and S.C. 9 corridors, as recommended by EPA. Nor has the Army Corps provided any of the "comprehensive information detailing the current stream and wetland conditions" requested by EPA to enable assessment of wetland conditions, including existing levels of impairment.

After formally raising substantial concerns with SCDOT's 404 Permit application, EPA erred in failing to follow the 404(q) elevation process outlined in the 1992 Memorandum of Agreement between the EPA and the Department of the Army, regarding Section 404(q) of the Clean Water Act. EPA had valid objections to the permit and arbitrarily and without explanation backed down from its scientifically-based conclusions that the permit application should have been denied, thereby violating Section 404(q) of the Clean Water Act and the agency's responsibility as overall administrator of the CWA.

IV. Conclusion

The Corps' and EPA's issuance and approval of the 404 Permit violate Section 404 of the CWA and the Section 404(b)(1) Guidelines. If the Corps and EPA do not act within 60 days to

correct the violations described in this letter, the Conservation League will pursue these claims in litigation in federal court.

Pursuant to 40 C.F.R. §§ 135.2, 135.3, you are hereby notified of the name and address for the organizations giving this notice:

South Carolina Coastal Conservation League
P.O. Box 1765
Charleston, SC 29402
(843) 723-8035
Southern Environmental Law Center
463 King Street, Suite B
Charleston, SC 29403
(843) 720-5270
(Legal Counsel for South Carolina Coastal Conservation League)

In the meantime, if you have any questions or would like to discuss this matter, please feel free to contact the undersigned at 843-720-5270 or Southern Environmental Law Center, 463 King Street, Suite 200, Charleston, SC 29403.

Sincerely,

Catherine Wannamaker
Daniel L. Timmons
SOUTHERN ENVIRONMENTAL LAW CENTER

cc: The Honorable Jefferson B. Sessions III, Attorney General of the United States
LTC Matthew Luzzatto, U.S. Army Corps of Engineers, Charleston District
LTG Todd Semonite, Chief of Engineers, U.S. Army Corps of Engineers
Trey Glenn, Regional Administrator, EPA Region 4
Christy Hall, Secretary of Transportation, South Carolina Department of Transportation