

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

GULF COAST ROD, REEL AND
GUN CLUB, INC. and GILCHRIST
COMMUNITY ASSOCIATION,

Plaintiffs

v.

JERRY PATTERSON, in his official
capacity as Commissioner of the
TEXAS GENERAL LAND
OFFICE;

TEXAS GENERAL LAND
OFFICE;

U.S. ARMY CORPS OF
ENGINEERS;

COL. CHRISTOPHER W.
SALLESE, in his official capacity as
DISTRICT ENGINEER,
GALVESTON DISTRICT - U.S.
ARMY CORPS OF ENGINEERS;

LIEUTENANT GENERAL
THOMAS P. BOSTICK, in his
official capacity as COMMANDER
AND CHIEF OF ENGINEERS, U.S.
ARMY CORPS OF ENGINEERS;
and

JOHN M. McHUGH, in his official
capacity as SECRETARY OF THE
ARMY,

Defendants

CIVIL ACTION NO. 3:13-CV-00126

PLAINTIFFS' AMENDED COMPLAINT

COME NOW Gulf Coast Rod, Reel and Gun Club, Inc. and Gilchrist Community Association, Plaintiffs herein, and complain of the following Defendants, in two groups:(i) Jerry Patterson, Commissioner of the General Land Office and the Texas General Land Office, – collectively referred to as “GLO”; and (ii) the U.S. Army Corps of Engineers, Col. Christopher W. Sallese, District Engineer of the Galveston District of the U.S. Army Corps of Engineers, Lieutenant General Thomas P. Bostick, Commander and Chief of Engineers, U.S. Army Corps of Engineers, and John M. McHugh, Secretary of the Army - collectively referred to as the “Corps”. The individual defendants are sued in their official capacities.

I. INTRODUCTION AND SUMMARY OF THE CASE

1. Plaintiffs initially filed this lawsuit with limited information, complaining about a decision, by the Galveston District of the Corps, to approve a Permit (SWG 2009-00833) on August 10, 2012. GLO had requested this Permit to close Rollover Pass, which flows between the Gulf of Mexico and eastern arm of the Galveston Bay system, herein called East Bay.

2. Plaintiffs now have reviewed the Corps’ Administrative Record (AR), and considered additional documents that should have been in the AR, but are not. This has revealed significant ways that the Corps violated the National Environmental Policy Act (NEPA) and Section 404 of the Clean Water Act

(Section 404, or § 404). Pursuant to the Administrative Procedure Act (APA) § 706, Plaintiffs ask this Court to vacate the permit.

3. Plaintiffs believe that many deficiencies of the Corps' analysis reflect decisions by GLO and/or its consultant, Taylor Engineering, to disregard well-known, reliable information that bears directly on this decision. GLO did not submit this information with its application for this Permit, even though Texas itself developed and uses this information for some of the State's most vital recent decisions. Many of these vital decisions directly concern matters at issue in this case – most notably, how the mixing of fresh and salt water is needed for a healthy bay. GLO's application also disregarded critical information that comes from the Corps itself.

4. Plaintiffs respectfully submit that the actions by GLO, including its consultant, amount to a violation of the Public Trust Doctrine. Well-established precedent confirms that the State maintains ownership over public resources, such as East Bay and its fisheries, as a trustee for the public. While the state surely has authority to propose modifications to public resources, equally surely it must ensure a fair analysis that takes into account *what the state itself actually knows*. Moreover, as the AR in fact cites many of the missing documents authored by the State, or by the Corps, federal law mandates these documents should actually be considered.

5. For both state and federal claims, Plaintiffs focus their challenge on scientific data that is undisputed and indisputable, including what Plaintiffs have learned about key information that the Corps ignored in evaluating the Permit application. Abundant evidence demonstrates that conclusions stated in the Corps' Environmental Assessment (EA) lack necessary scientific support. In particular, the Corps' Finding of No Significant Impact (FONSI) cannot be sustained, for multiple independent reasons.

6. Most important, the Corps (like GLO's consultant) turned a blind eye and disregarded critical and readily available evidence that closure of Rollover Pass would cause significant, adverse environmental impacts by drastically reducing salinity, making East Bay too fresh. Indeed, the State of Texas first opened Rollover Pass six decades ago precisely to ensure sufficient saltwater inflows to offset the freshwater inflows in East Bay. The Corps granted that permit to open Rollover Pass for that very purpose, to increase salinity in East Bay. That prior decision, by the State and the Corps, has succeeded very well in its purpose.

7. With Rollover Pass open, East Bay has become a thriving, productive fishery. This is true even though, in more recent times, even more fresh water started flowing to East Bay due to factors such as extensive new development and channelization on land at the north of East Bay, in Chambers and Jefferson

Counties. This increased freshwater runoff means that, if anything, the need for Rollover Pass is greater now than ever.

8. The impact of freshwater inflows easily can be confirmed using computer modeling from the State of Texas, a model that has been validated and calibrated by the Texas Water Development Board (TWDB) pursuant to state legislative mandates. As represented in TxBLEND, this model recently has been relied on by the State of Texas in a legislatively mandated process (known as “SB3” after the enabling legislation, Senate Bill 3) for the vital task to determine the salinity balance needed to ensure the health of Texas bays along the Gulf Coast, including Galveston Bay. In fact, the permit decision purports to rely on the input data from TxBLEND, but GLO’s consultant corrupted that data in two ways.

9. First, GLO’s consultant baselessly eliminated freshwater inflows to East Bay including inflows from both Oyster Bayou and the Gulf Intra-Coastal Waterway (GIWW). Second, GLO’s consultant simply determined the long-term average for the remaining inflows over each of the four seasons, rather than considering the actual daily inflows over a reasonable period of time. This actually required extra work by the consultant, because the TxBLEND model itself includes the actual freshwater inputs on a daily basis for an extended period of time.

10. In any computer model concerning salinity, elimination of critical freshwater inputs and simply averaging daily data both obscures and obfuscates

what actually happens in East Bay if Rollover Pass is closed. By eliminating inflows directly to East Bay and simply inputting long-term averages of the daily inputs elsewhere in the bay system, the critical impact to East Bay was concealed and misrepresented. These fresh water inflow pulses make the East Bay extremely “fresh” (not salty) whenever they occur. Without Rollover Pass, the slow circulation of ocean water into East Bay from its only other nearby entering point, between Galveston Island and Bolivar Peninsula, means that East Bay stays too fresh for too long. This was precisely the problem that caused Texas to seek and obtain a permit from the Corps to open Rollover Pass decades ago. Since then, multiple factors have significantly increased the fresh rain water running off and flowing into East Bay.

11. It would have been simple for the Corps to consider what happens with all recognized TxBLEND freshwater inflows included on a daily basis. Plaintiffs’ expert has done so, revealing that closing Rollover Pass will make East Bay far too fresh to support the current, highly productive fishery. By making East Bay so fresh, closing Rollover Pass would cause significant adverse environmental impacts, and these negative impacts were concealed and misrepresented by these erroneous and manipulated studies by GLO’s consultant.

12. In addition, the Corps’ Environmental Assessment (EA) grossly overstated any benefits that may accrue by closing Rollover Pass. The Corps

asserts that closure could save up to \$1 million in dredging costs per year. However, this disregards two prior published studies by the Corps itself, as well as other studies cited in the AR. Crediting the Corps' own studies, and the others, demonstrates annual savings on the order of no more than \$60,000 per year.

13. The Corps also reported that closing Rollover Pass would reduce erosion of some (now privately owned) beaches. The magnitude of this alleged savings is small, and in any event not estimated by the Corps. However, even the Corps did not agree with the GLO's consultant that the erosion attributable to the Pass being open is significant. Moreover, an even more significant issue exists. The Corps recognized that alternatives exist – such as building groins and jetties – that could well address concerns with erosion that otherwise may be caused by the existing Pass. However, the Corps baselessly failed to consider these alternatives because the supposed salinity and dredging benefits drove the Corps to ignore these otherwise viable alternatives.

14. Plaintiffs do not need to show any deliberate misconduct. It is sufficient – and Plaintiffs can prove – that the Corps arbitrarily and capriciously approved this grievously flawed application for a permit, including (but not limited to, intrinsically flawed analyses, disregard of cumulative impacts and alternatives, and failures to consider required information). 5 U.S.C. §706. In fact, the AR does not even include all of the critical documents cited in the AR– meaning the Corps

did not consider them. The Corps also failed properly to consider socio-economic information, including impacts on persons with disabilities and on small businesses that depend on persons who use Rollover Pass to fish at what the Corps describes as “a nationally-recognized fishing destination.” As against GLO, the question is whether its submission and its erroneous consultant reports met its fiduciary duties as a trustee.

15. This lawsuit seeks declaratory and, if needed, injunctive relief to prevent use of this permit from the Corps of Engineers to allow GLO to close Rollover Pass.

II. JURISDICTION AND VENUE

16. This Court has federal question jurisdiction pursuant to 28 U.S.C. §§ 1331 & 1367(a), with authority for declaratory relief under 28 U.S.C. §§ 2201 & 2202.

17. Against the Corps, this action arises under the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (“APA”), the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* (“NEPA”) and Section 404 of the federal Clean Water Act, 33 U.S.C. § 1251; 1344 (“§ 404”), together with their implementing regulations. Plaintiffs also bring a claim under the Public Trust Doctrine, against GLO.

18. Venue is proper pursuant to 28 U.S.C. § 1391 (b) and (e) because the claim arose in this district and the United States or an agency of the United States is a defendant.

III. PARTIES

19. The Plaintiff, Gulf Coast Rod, Reel and Gun Club, Inc. is a domestic non-profit corporation located at 148 S. Dowlen Road #704, Beaumont, Texas 77707, and is suing on behalf of itself and its members.

20. The Plaintiff, Gilchrist Community Association, is a domestic nonprofit corporation located at P. O. Box 186, High Island, Texas 77623, and is suing on behalf of itself and its members, including members with disabilities, particularly with mobility impairments.

21. Jerry Patterson is sued in his official capacity as Commissioner of the Texas General Land Office and may be served at 1700 N. Congress Avenue, Austin, Texas 78701-1495.

22. The Texas General Land Office is sued as a state agency that is undertaking actions to close Rollover Pass and may be served through Jerry Patterson, Commissioner of the Texas General Land Office located at 1700 N. Congress Avenue, Austin, Texas 78701-1495.

23. The United States Army Corps of Engineers is sued as an agency of the United States and is served through Lieutenant General Thomas P. Bostick,

Commander and Chief of Engineers of the U.S. Army Corps of Engineers at 441 G Street, NW, Washington, D.C. 20314.

24. Col. Christopher W. Sallese is sued in his official capacity as District Engineer and Commanding Officer of the Galveston District of the U.S. Army Corps of Engineers and may be served at 2000 Fort Point Road, Galveston, Texas 77550 in person or by mail at P.O. Box 1229, Galveston, Texas 77553-1229. Plaintiffs understand that Col. Sallese has retired and the current Commander of the Galveston District is Col. Richard P. Pannell. Plaintiffs are willing to substitute Col. Panell for Col. Sallese, who would be sued in his official capacity only.

25. Lieutenant General Thomas P. Bostick is sued in his official capacity as Commander and Chief of Engineers of the U.S. Army Corps of Engineers and may be served at 441 G Street, NW, Washington, D.C. 20314.

26. John M. McHugh is sued in his official capacity as Secretary of the Army and may be served at 101 Army Pentagon, Washington, D.C. 20310-0101.

IV. STANDING

27. The Plaintiff Gulf Coast Rod, Reel and Gun Club, Inc. (Club) owns the property where Rollover Pass is located and that is the subject of the permit sought by the GLO and issued by the Corps and was created to protect, preserve,

and encourage the propagation of marine and wildlife in and around the region including East Bay.

28. Wayne Stupka is President of the Gulf Coast Rod, Reel and Gun Club, Inc. Mr. Stupka has fished at Rollover Pass and in East Bay and plans to continue fishing there.

29. The Gilchrist Community Association (GCA) includes as members, and represents, many residents of the community of Gilchrist whose sole economy is based upon fishermen and women and birdwatchers using the Rollover Pass and East Bay area. One of GCA's purposes is to promote and provide information about saltwater fishing for members as well as other area residents and visitors who fish.

30. Ted Vega is the President of the GCA. Mr. Vega has a local business that benefits economically from the operation of Rollover Pass.

31. Fred Schroeder is a member of the Gilchrist Community Association. Mr. Schroeder is 67 years old and has fished at Rollover Pass since the early 1960s. He has been disabled for the last five years. He uses oxygen and uses a motorized scooter to ambulate. He enjoys getting out and fishing next to his automobile (which holds his supplies), and he plans to continue fishing at the Pass as long as it stays open.

32. Keith Susberry is a member of the Gilchrist Community Association. He has multiple sclerosis, and uses a wheelchair or a scooter. He can travel only short distances using a walker. Rollover Pass is one of the few places he can go and fish, both because of its accessibility and because he needs his gear nearby as he is unable to carry it distances. Mr. Susberry has been fishing at Rollover Pass for at least 30 years, and he plans to continue fishing there.

33. Jean Scurtu is another member of the Gilchrist Community Association, and also has mobility impairments. He requires a walker. Mr. Scurtu has been fishing at Rollover Pass for about 10 years. At Rollover Pass he sits on his ice chest, near to his car, and fishes in the Pass and catches nice fish. He comes about two times a week. He is on a very limited income but plans to continue fishing at the Pass as long as it is open.

V. FACTS

34. Rollover Pass is part of the navigable waters of the United States.

35. The State of Texas opened this large cut through Bolivar Peninsula in 1955, specifically with the purpose to connect the Gulf of Mexico with East Bay, the easternmost bay in the Galveston Bay system. (For the purposes of this Amended Complaint, the term East Bay includes that part of the bay that sometimes is referred to as Rollover Bay).

36. The reason this connection was initially made was that East Bay was too fresh and needed more salt water circulation.

37. The Corps specifically approved the State's prior request to open Rollover Pass, with the purpose to increase salinity in East Bay.

38. This action required administrative review, culminating in a decision by the Corps to issue a permit to the Texas Game and Fish Commission on May 27, 1954 under Section 10 of the River and Harbor Act of 1899, "to dredge a channel and an area, the dredged material to be deposited in Rollover Bay and on shore, and to construct a retaining wall in the Gulf Intra-Coastal Waterway ..."

39. The following diagram illustrates key features of the relevant geography:

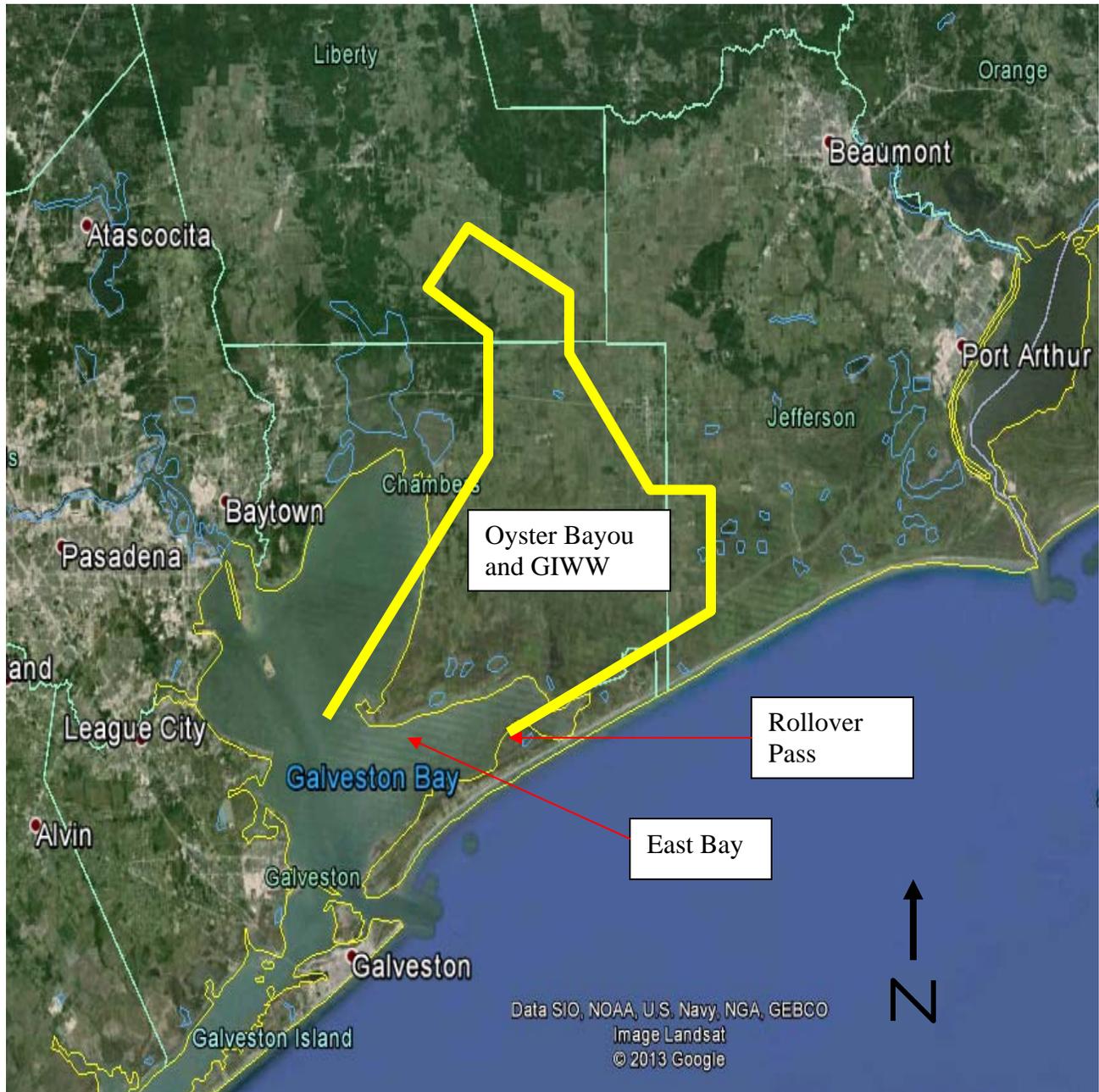


Figure 3. General Watershed Boundary of Freshwater Inflows into East Bay

From this diagram, Plaintiffs initially ask the Court to note the following points:

- (a) East Bay, including Rollover Bay, is a distinct part of Galveston Bay;
- (b) Rollover Pass directly brings salt water into East Bay, with the other saltwater source being some distance away.
- (c) Oyster Bayou and the GIWW (including freshwater inflows from other bayous, including the Needmore Diversion when it is built) drain directly into East Bay (with the above schematic showing what land is drained by this Oyster Bayou system), and additional fresh water sources also drain into East Bay.
- (d) Fresh water flowing into East Bay tends to be diluted by any salt water that enters East Bay, but this salt water ebbs and flows with the tides and, as will be detailed below, only slowly penetrates East Bay.

All these features, except the Needmore Diversion, existed six decades ago when the State decided to open Rollover Pass with a purpose to increase salinity, due to too much fresh water in East Bay, but the extent of development and channelization in the area draining into East Bay has greatly increased over the decades, and will increase with further development, providing even more freshwater into the Bay than existed six decades ago.

40. Rollover Pass was constructed as a joint project of the Gulf Coast Rod, Reel and Gun Club, Inc. (Club) and the Texas Game and Fish Commission, now Texas Parks and Wildlife Department (TPWD).

41. Rollover Pass was constructed on land owned by the Gulf Coast Rod, Reel and the Club, under the terms and conditions of an easement granted to the Game and Fish Commission by the Club in 1954.

42. The easement granted by the Club is for the sole purpose of construction and maintenance of Rollover Pass by the State, and specifically states that the easement “shall be used for no other purpose.”

A. Rollover Pass, Built to Enhance the Fishery in East Bay, Succeeded Tremendously

43. When Rollover Pass was opened, the stated purpose was to enhance the salt water fishery of East Bay which at that time was dominated by freshwater inflows at the northeastern tip of East Bay as well as other smaller bayous draining the mainland of central and southern Chambers County, and to provide additional opportunity for travel of marine fish to and from spawning and feeding areas in the bay.

44. Prior to opening of the Pass, the periodic high freshwater inflows were coupled with limited circulation into and within East Bay, causing slow diffusion of distant oceanic salt water coming into East Bay. This meant that, when East

Bay became extremely fresh from rain run-off, it would stay relatively fresh over large areas for a long time.

45. Rollover Pass addressed this situation head on, by injecting large volumes of salt water directly into East Bay, and by having that injection stir the East Bay to increase circulation, thereby increasing salinity throughout East Bay.

46. Salinity is among the most important factors that determine the health of any bay – indeed, it determines the health of any aquatic ecosystem.

47. As stated in the Draft EA by the GLO’s consultant, the target salinity for East Bay ranges from a low of 17 parts per thousand (“ppt”) to a high of 24 ppt.

48. While it is important that an estuary such as East Bay receive sufficient freshwater inflows to maintain its character as an estuary, a place where salt and fresh water come together, an estuary can be impaired by too much (as well as too little) freshwater inflow.

49. The AR reports that the range of salinities in East Bay under *current* conditions, with Rollover Pass open, is generally between 17 ppt and 24 ppt.

50. By contrast, *before* the opening of Rollover Pass, the salinity as actually measured in East Bay (and reported in the AR), fell far below the minimum target salinity, even at a time of severe drought (minimal freshwater inflow).

51. Because East Bay was too fresh (too little salt from the ocean water) before the opening of Rollover Pass, East Bay was not a good place for oysters and saltwater fish.

52. The State of Texas specifically decided to increase the salinity of the East Bay, to improve the productivity of its fishery, including but not limited to oyster harvests, and gave this as the reason for seeking a federal permit to open Rollover Pass. The GLO has admitted that “the purpose of the Pass was to improve bay water quality and salinity, enhance fish migration into Rollover Bay and East Bay, perpetuate state fish and wildlife resources and improve local fishing conditions.”

53. In addition, this opening of the Pass was intended to “provide water circulation in the bay” which would also promote healthier fisheries.

54. Prior to opening the Pass, there had been marine biological studies that indicated that a decreased salinity in East Bay had driven saltwater fish from the bay into the Gulf of Mexico and contributed to the depletion of the oyster population in the area. Thus, too much fresh water entering the bay, with too little circulation, resulted in reduced saltwater fisheries and oyster production, thereby giving justification to creating an opening between East Bay and the Gulf of Mexico (i.e. Rollover Pass) to bring in more saltwater to mix with the freshwater, and to provide more circulation within the bay.

55. The purpose to increase the salinity of East Bay, in order to improve its productivity, was the basis for the Corps' decision to grant the permit to open Rollover Pass.

56. Rollover Pass succeeded in its purpose to improve the water quality in East Bay, by increasing salinity into the desired range.

57. Over the years since the Pass was opened, fishing has improved in East Bay, making it now one of the best speckled trout fisheries on the Texas coast.

58. Over the years since the Pass was opened, oyster reefs in East Bay have improved and altered to reflect the salinity patterns after the opening of Rollover Pass.

59. Today, an excellent oyster fishery exists in East Bay near its confluence with Galveston Bay as well as within East Bay.

60. An official Texas Historical Marker erected at Rollover Pass detailed the result of constructing the pass i.e. “[c]reation of Rollover Fish Pass has greatly improved salt water fishing conditions for the thousands of sportsmen who flock to East Bay throughout the year.”

61. As a general proposition, reflecting the success of Rollover Pass, the ecology of East Bay is quite robust and healthy, and significantly different from the ecology of East Bay prior to the construction of Rollover Pass.

62. Closing Rollover Pass would, necessarily, cause significant changes to the salinity balance throughout East Bay, significantly altering the existing environment.

B. The Corps Has No Rational Basis to Issue a FONSI Given the Available Facts

63. The most important question presented to the Corps is whether, given available information, there may be significant environmental impacts if Rollover Pass is closed.

64. Under well-established law, if there may be significant environmental impacts, then the Corps must complete an Environmental Impact Statement (EIS) as part of its process to determine whether to issue the requested permit. 42 U.S.C. § 4332(2)(C).

65. In reviewing this permit application, the Corps made only an Environmental Assessment (the EA), far less detailed than an EIS, and made a Finding of No Significant Impact (FONSI) if Rollover Pass is closed.

66. The Corps always has discretion to consider new information. *E.g.* 33 C.F.R. 325 App. A (5)(b & c).

67. If the Corps has issued a FONSI, as here, and then later significant information is revealed that the Corps did not previously consider, the Corps must reconsider and revise the EA to ensure its adequacy as required by law.

68. Plaintiffs respectfully submit that there was no basis for this FONSI on the record presented, because the closure of the Pass indisputably will reduce the salinity in East Bay to unacceptably low levels.

69. Plaintiffs respectfully submit that readily available evidence confirms the reduced salinity will cause a significant environmental impact. Even if that is yet not established, the Corps had no basis to find no significant impact based on evidence in the AR. Due to its deficient analysis to date and, in the alternative, due to information not previously considered, the permit must be vacated and remanded to the Corps for further analysis.

1. Since Rollover Pass Opened, Fresh Water Inflows to East Bay Have Increased

70. As noted above, before the opening of Rollover Pass, East Bay suffered greatly from too much freshwater inflow, and not enough salt water. As also noted above, Rollover Pass added saltwater inflows and produced circulation so that East Bay became a highly productive fishery.

71. To be clear, the excellence of the East Bay fishery is entirely in addition to the excellence, for fishing, at Rollover Pass itself. The closure of Rollover Pass will affect a vast aquatic ecosystem in East Bay, in addition to whatever changes occur at the Pass itself.

72. Since Rollover Pass opened, fresh water inflows to East Bay have increased, which (absent operation of the Pass or some other salt water source)

would cause the salinity of East Bay to decline below its pre-Pass conditions and become an even less productive fishery than it was before the Pass was opened.

73. Before construction of Rollover Pass, East Bay received fresh water directly from two important sources, Oyster Bayou and the GIWW (which receives inflow from several bayous in western Jefferson County).

74. Oyster Bayou and the GIWW receive fresh water by draining a large acreage to the northeast of East Bay, from all the rain that falls there, and streams that flow there.

75. By measuring rainfall and using well-established techniques, engineers can measure and/or estimate how much fresh water runs off land in the drainage basin that flows into East Bay.

76. In the decades since the construction of Rollover Pass, two significant factors have increased the amount of fresh water that drains into Oyster Bayou and the GIWW, and then to East Bay: increased channelization (which speeds the runoff flow) and land use changes (which increase runoff rate and volume).

77. These factors (land use change and channelization) will continue for the foreseeable future, so fresh water inflows directly into East Bay will continue to increase.

78. In addition, the Corps recently granted a permit to construct the Needmore Diversion, which also will drain fresh water from surrounding land (to the northeast) into East Bay.

79. As part of its process to consider and approve the Needmore Diversion, the Corps knew that each of these factors (increased channelization, and development, and the Needmore Diversion) would increase fresh water flow to East Bay.

80. However, the AR for the challenged permit to close Rollover Pass does not disclose and assess this increased inflow of fresh water, neither as a condition of the current East Bay nor as a cumulative impact. In fact, the consultant for the GLO modified the salinity model input data it utilized to remove these inflows from East Bay. This affirmative modification, along with other changes to the model input made by the consultant, altered the outcome of the model.

81. As a result of this increased freshwater inflow, closing Rollover Pass will not return East Bay to conditions that existed before Rollover Pass was opened.

2. Texas Developed the Data Used to Evaluate How Closing the Pass Changes Salinity

82. The effect of closing Rollover Pass on salinity can be evaluated using computer programs that consider data relevant to East Bay.

83. The State's own, widely relied-upon computer model to study changes in Galveston Bay, including East Bay, is called TxBLEND.

84. TxBLEND was developed by the Texas Water Development Board (TWDB) in response to a specific legislative mandate.

85. Significantly, TxBLEND has been used by the State of Texas to evaluate the salinity of all major Texas bays along the Gulf Coast as part of a legislative mandate (under the so-called Senate Bill 3) to protect these essential ecosystems, including (in addition to Galveston Bay), also Sabine Lake, Matagorda Bay, San Antonio Bay and Nueces Bay, among others.

86. For each bay, the TxBLEND program accepts input data that the State has gathered specific to each of the Texas bays.

87. This data has been found, by the State, to be particularly relevant and reliable to determine salinity, including inflows (both fresh water and salt water), geometry of the bay, and other boundary conditions.

88. When run for a particular bay, the TxBLEND program generates a set of data that shows salinity throughout the bay.

89. As such, TxBLEND is the state-approved salinity model for the bays of the Texas coast.

90. TxBLEND's State-developed computer program, as well as the State-gathered data concerning salinity, has been subject to rigorous scientific preview as well as public review.

91. For Galveston Bay in particular, as well as for multiple other Texas bays, TxBLEND has been validated and calibrated by the State of Texas.

92. For its most important decisions, the State of Texas uses TxBLEND to evaluate how salinity changes under various scenarios in which input data is changed.

93. For example, TxBLEND (including its input data and its computer software) can evaluate how salinity changes if fresh water or salt water input to a bay is removed or added, or if the shape of the bay is changed in a known way.

94. Thus, TxBLEND can be used to evaluate how salinity will change if Rollover Pass is closed.

95. When the TxBLEND program is run, using the State-assembled input data on fresh water and saltwater inflows, bay geometry, and other boundary conditions, the output is a report on the predicted salinity at many points (hundreds upon hundreds of points) throughout Galveston Bay.

96. When TxBLEND is run for Galveston Bay, the output is a report that includes many points specifically in East Bay.

97. Thus, TxBLEND can be used to determine and to evaluate how the closure of Rollover Pass will change the salinity in East Bay specifically.

98. TxBLEND is not the only computer program that uses such input data to evaluate how salinity changes if changes are made to fresh water or salt water inflows, geometry, or boundary conditions.

99. Other such programs include RMA2 and RMA4, one of which computes circulation while the other computes salinity.

100. GLO's consultant used RMA2 and RMA4 in its work for the GLO's application to the Corps to close the Pass.

101. RMA2 and RMA4 use the same types of input data as TxBLEND, *ie.*, fresh water and saltwater inflows, bay geometry, and other boundary conditions.

102. In fact, the initial set of input data used by GLO's consultant in developing its computer model of Galveston Bay came from the TxBLEND inputs, but GLO's consultant then made changes to these inputs before creating its own salinity model.

103. These changes go to the heart of this litigation, alleging failure of full disclosure and misrepresentation in violation of NEPA and the APA.

3. The Corps Admits It Relied on GLO's Model That Eliminated Multiple Fresh Water Inflows and, for Remaining Inflows, Aggregated Daily Inflows to Create Averages

104. A well known problem affects all computer programs, generally stated as follows: "garbage in, garbage out." What this phrase means is that, no matter how good the computer program itself may be, if the data entered into the program (input) is incomplete or inaccurate, then the result generated (output) is unreliable.

105. The AR specifically states that, in its evaluation of how closing Rollover Pass will affect salinity, GLO's consultant started with the input data set from TxBLEND.

106. The AR also stated that GLO's consultant made three sets of changes to the input data in TxBLEND.

107. One set of changes affected geometry and/or other boundary conditions, including changes to reflect what would exist if Rollover Pass were closed. At the present time, Plaintiffs do not have a basis to challenge the details of this set of changes to input data.

108. The second set of changes, however, presents a critical problem.

109. The AR admits that it specifically excluded much of the freshwater inflows from multiple sources, including all inflows to East Bay from Oyster Bayou and the GIWW.

110. Additionally, the cumulative effects of diversions from the permitted Needmore Diversion were not included in TxBLEND or in the GLO's consultant's model.

111. While it is indisputable that significant amounts of rain fall on the land north of East Bay, and drain to East Bay via Oyster Bayou and the GIWW, the AR and Corps EA and FONSI do not make any provision to take that fresh water inflow, or other eliminated freshwater inflows, into account.

112. Thus, while it is undeniably known that Oyster Bayou, the GIWW, the Needmore Diversion (in the future), and other eliminated sources in fact all will contribute freshwater inflows to East Bay, none of that is considered in the evaluation submitted by GLO's consultant, on which the Corps relied.

113. A third set of changes also presents a critical problem.

114. The TxBLEND data set of inputs (from which GLO's consultant started) gathers daily fresh water inflows over multiple years.

115. This daily data is vital to create an accurate salinity model, because it takes into account the slow circulation of salt water into East Bay, and reflects the enduring effects of spikes of large fresh water inflows (after storms) that flush salinity out of East Bay.

116. However, rather than use this readily available daily data, the GLO consultant took the few freshwater inflows sources it did consider, and inputted them simply as long-term averaged values by season for a typical year.

117. This third change also prevented the GLO consultant's model from accurately analyzing the resulting salinity in East Bay when the Pass is closed.

4. Knowledgeable Texas Agencies Objected to the Exclusion of Fresh Water Inflows and Simply Using Long-term Averaging of the Remainder

118. After the Corps circulated a draft EA, the Texas Department of Parks and Wildlife (TDPW) responded with comments to the Corps.

119. In preparing these comments, TPWD consulted with TWDB, the agency that had developed and maintains TxBLEND.

120. These comments reported that both agencies, TPWD with TWDB, identified several reasons that the input data and salinity model analysis supplied by the GLO to the Corps was not reliable.

121. The comments reported that both agencies, TPWD with TWDB, identified several changes that should be made to ensure an accurate analysis of salinity in East Bay.

122. Among their suggestions, TPWD with TWDB stated that the data inputs should *include* all freshwater inputs, that is, that the analysis "should utilize observed data that is available from several resource agencies for freshwater inflows [as well as for] tides, precipitation, and salinity."

123. These State agencies recognized that this had not been done.

124. In addition these two state agencies urged that the analysis should be done by using daily data over a period of years, as already exists in TxBLEND, rather than the long-term average data for a typical year.

5. The Corps Has No Legitimate Reason to Disregard the Freshwater Inflows

125. On information and belief, the GLO's consultant Taylor Engineering *did* use the existing RMA2, RMA4, or TxBLEND models of Galveston Bay to evaluate salinity in East Bay, taking into account daily data from all fresh water inputs, because that would have been the simplest course of action. However, GLO's consultant did not include the results of these evaluations in submissions to the Corps and they are not in the AR.

126. The only reason given to exclude freshwater inflow data already in TxBLEND, by the GLO's consultant Taylor Engineering was that it decided to use only inflow data that came from existing stream gauges.

127. The fresh water inflow data concerning Oyster Bayou and the GIWW (and the other missing inflows) do not come from existing stream gauges, but instead comes from runoff modeling using rainfall information.

128. Under well-established scientific practices, confirmed by established textbooks, engineers regularly use such rainfall-runoff modeling data when stream

gauge data is not available, and such information is considered reliable and needed for the best evaluations of salinity.

129. The reliability of, and need for such information is why TxBLEND, as developed by TWDB for essential state purposes, includes rainfall run-off as part of its freshwater inflow input data.

130. The reliability and need for such information is why multiple Texas expert commissions that studied bay salinity, all along the Texas Gulf coast, used the full TxBLEND model – including rainfall run-off input data – when conducting recent legislatively mandated evaluation of bay salinities for purposes of evaluating essential ecological needs.

131. Moreover, it would have been *less* expensive and much easier to take this readily available inflow data into account in developing the GLO model of Galveston Bay than it was to eliminate significant inflows and develop long-term average seasonal inflows for the remaining sources of fresh water input data. GLO's consultant spent money and time to recreate this information that previously was readily available in the TxBLEND input data.

132. The RMA2 and RMA4 programs could have been – and still easily could be – run with the complete set of daily freshwater inflow data included because they were included inputs from TxBLEND.

133. Also, the most updated TxBLEND model for Galveston Bay could be run with all of the daily freshwater inflow data, for a period of years, which Plaintiffs have done, as discussed below.

134. Despite the obvious importance of TxBLEND to evaluation of how closure of Rollover Pass will reduce East Bay's salinity, the AR does not include either TxBLEND or any of the State's materials that validate, calibrate, and otherwise confirm TxBLEND's reliability.

6. The Corps Disregarded the Soon-to-be-Constructed Needmore Diversion

135. The recently approved Needmore Diversion provides additional reasons why the amount of freshwater flowing to East Bay has increased since the construction of Rollover Pass, illustrating the inevitability of future increases in fresh water inflows into East Bay.

136. Historically, the Needmore Diversion did not exist.

137. The Needmore Diversion initially was permitted by the Corps in 2007. It connects Taylor Bayou in Jefferson County with the GIWW, about 12 to 15 miles inland from East Bay.

138. The Needmore Diversion will divert stormwater from Sabine Lake estuary and Taylor Bayou watershed southward into the GIWW, where it then can travel to East Bay.

139. According to Corps documents, flood flows from Taylor Bayou will move down the Needmore Diversion, enter the GIWW and can then flow into East Bay.

140. Prior to the opening of Rollover Pass, the Taylor Bayou watershed was not part of the watershed of East Bay.

141. When the Needmore Diversion was permitted by the Corps, Rollover Pass had been open for decades and was a baseline existing condition for East Bay salinity. Rollover Pass was assumed to be open and all hydrologic and environmental assessments of the impact of the diversion on East Bay were made with the assumption that there was exchange between East Bay and the Gulf of Mexico through Rollover Pass.

142. By closing Rollover Pass, the fresh water diverted by the Needmore Diversion will no longer be offset or mitigated by salinity from the Gulf of Mexico into East Bay.

143. The cumulative effect of the closure of Rollover Pass and the operation of the Needmore Diversion was not analyzed in any serious manner in the EA.

144. Other future increases in freshwater inflows to East Bay were not analyzed at all.

7. With No Data, and No Review by the Corps' Own Division with this Expertise, Any Comment on the Impact of Missing Freshwater Inflows and Averaging is Pure Speculation

145. The Galveston District of the Corps has a Division of Hydrology and Hydraulics (the “ H&H Division”) with expertise to evaluate matters such as circulation, freshwater inputs, and salinity.

146. Insofar as GLO’s consultant did not consider all of the freshwater inputs, and took daily data and changed it to long-term average data from a supposedly “typical” year, it would not be possible for the H&H Division (or anyone else) to do more than speculate on the impact of closing Rollover Pass.

147. However, after reviewing the AR, it does not appear that the Corps even asked the H&H Division to evaluate this permit application.

148. In its submission to the Corps, GLO’s consultant speculated that its decision to eliminate certain fresh water inflows and average the others “would” have no appreciable impact on the salinity predicted for East Bay.

149. The combination of Oyster Bayou and the GIWW is the most important inflow to East Bay, and is larger than some of the freshwater inputs that were considered by GLO’s consultant.

150. GLO’s consultant actually groups these freshwater inflows directly into East Bay together under the name of Oyster Bayou, and recognizes this as the primary source of fresh water directly into East Bay.

151. The significance of this “primary” source is confirmed by TxBLEND, which identifies that the total freshwater flows from the combination of the Oyster Bayou and GIWW are in fact *larger* – up to seven (7) times larger – than one of the gauged inputs (Cedar Bayou) that GLO’s consultant *did* include in the data, and that *was* considered by the Corps in the AR.

152. By eliminating many of the freshwater inputs in the TxBLEND model, the AR in fact disregarded 15% or more of all fresh water that flows into Galveston Bay.

153. Moreover, Oyster Bayou and GIWW feed directly into East Bay and so, taking into account the water flows within this distinct region, these direct sources are much more significant to East Bay salinity than would be a comparable source from further away.

154. Decades ago, when the State of Texas recognized the need to open Rollover Pass, the decision reflected actual measurements that showed East Bay had become too fresh (salinity being too low) for a productive fishery.

155. Those measurements showed Rollover Bay to have a salinity of 12-13 ppt, with East Bay overall getting as low as 10 ppt at its eastern side.

156. At one point the AR purports to claim that its current prediction of salinity (without the freshwater inflows) is comparable to what was measured six decades ago, but that is simply wrong. Instead of these very low salinities, the AR

(baselessly) predicts that salinity remains within the target range, never falling below 15 ppt. Of course that prediction would be desirable if true, but it cannot be supported because (as discussed above) the AR expressly excludes so much freshwater inflow that indisputably takes place. Moreover, on the face of the data, there is no basis to conclude that the salinity levels (baselessly) predicted in the AR could match those measured years ago.

157. The excessive freshness of water in East Bay, decades ago, could be expected to be even fresher due to the known current and future increases in rainwater that runs off and into Oyster Bayou, the GIWW, and the to-be-built Needmore Diversion.

158. Indeed, when Plaintiffs employed an expert to evaluate the situation of Rollover's potential closure and take into account fresh water known by the State (as reported in TxBLEND), most parts of East Bay will actually fall and stay below 10 ppt, fresher than before Rollover Pass was built.

159. Even when responding to the comments by TPWD and TWDB, the Corps did not provide any data to assess the impact of eliminating the freshwater inflows and simply using long-term averaging for the remainder from consideration in predicting salinity.

8. Review of All TxBLEND Freshwater Data Shows the FONSI Cannot be Upheld

160. Given the readily available data in TxBLEND that already included all freshwater inflows, including Oyster Bayou and the GIWW, there is no justification whatsoever for not at least running this readily available computer model of Galveston Bay to see the projected impact of including all of the freshwater inflows on a daily basis for an extended period of time.

161. The Corps, and GLO's consultant, could have – and still easily could – run the RMA2 and RMA4 models including these fresh water inflows on a daily basis for a representative period of years.

162. Plaintiffs do not have ready access to GLO's consultant's RMA2 and RMA4 computer models, but do have access to the TxBLEND computer program, and all its inputs and its model for Galveston Bay.

163. Plaintiffs engaged an expert engineer to run the TxBLEND model for Galveston Bay using the daily data for all of the fresh water inputs for a period of years, with the Pass open and closed.

164. Comparison of these two resulting salinity model runs, one with the Pass open, the other with the Pass closed, produced a significant result.

165. Using the TxBLEND model of Galveston Bay, Plaintiffs' expert engineer found that, with all freshwater inflow inputs included, salinity throughout East Bay almost always remains below the range of 17 ppt to 24 ppt.

166. These results mandate finding a significant adverse impact due to the closing of Rollover Pass, and reveal that the Corps cannot make a FONSI (“Finding of *No Significant Impact*”).

167. At the very least, the fact that the Corps knowingly disregarded readily available data on fresh water developed and, in other important situations, relied on by the State of Texas, means that there is no substantial basis for the Corps to make a FONSI without first evaluating the impact of the known, and anticipated, freshwater inflow inputs with the Pass open and closed.

168. This would be true even if there never had been a determination that there was a need to open Rollover Pass in 1953 to obtain desired salinities, and is even more true because the decision to close Rollover Pass is so diametrically opposed to the decision to open the Pass, even when new fresh water sources flow directly into East Bay.

B. The EA Grossly Overstates How Much Rollover Pass Causes the GIWW to be Dredged

169. In addition to salinity, the EA purports to evaluate how closure of Rollover Pass may affect the need to dredge the GIWW.

170. With Rollover Pass open or closed, the GIWW does require periodic dredging, to remove silt that runs off into the channel.

171. Silt comes from many places outside of Rollover Pass, being in runoff, the channel walls, and the rest of the Bay. The question is how much this need for dredging might change if Rollover Pass is closed.

172. As with salinity, the EA makes a fundamental error by disregarding critical, and uncontradicted, information.

173. On this issue, the information comes from the Corps itself.

174. The Corps' own uncontradicted data shows that sand passing through Rollover Pass falls into a one-half (1/2) mile stretch of the GIWW, and the total amount of such sand is about 15,000 cubic yards per year.

175. By contrast, the EA baselessly asserts that between 80,000 and 290,000 cubic yards per year of sand is transported from the Gulf of Mexico via the Pass into Rollover Bay and falls in a stretch of the GIWW between either 2 or 10 miles long, respectively.

176. The EA presents this grossly and unduly inflated estimate of sand deposited in the GIWW due to the Pass with an annual savings of 1 million dollars per year in reduced dredging costs if the Pass were closed.

177. Plaintiffs submit that the AR does not support this finding.

1. The Corps Did Its Critical Study Very Recently, Published in the Year 2000

178. The Corps did the most important study of how Rollover Pass may affect dredging in the GIWW.

179. The study is known as ERDC/Parchure (2000), with Mr. Parchure being the lead researcher of this study by the Corps' own Engineering Research and Development Center.

180. This study was done at the request of the Galveston District of the Corps, which is the *same* District that reviewed and wrongly approved this permit application.

181. This study is referenced in the EA, stating that it confirms that Rollover Pass contributes coarser sand filling the GIWW, which is a true statement from this study document.

182. However, the most important findings of the ERDC/Parchure study are not disclosed or discussed in the EA.

183. ERDC/Parchure found that the GIWW gets filled primarily with silt, but only a small reach of the GIWW gets filled with coarser sand.

184. It was assumed that this coarser sand comes from the Gulf of Mexico through Rollover Pass.

185. The silt comes from other places along the GIWW.

186. Typically the silt is carried along in the GIWW flow but, when the GIWW enters East Bay, the much greater width causes a slowing of the flow in the GIWW, giving more time for silt to drop into the channel.

187. ERDC/Parchure took samples of the material filling the GIWW in the vicinity of Rollover Pass.

188. Significantly, in this study, the Corps found coarse sand from Rollover Pass *only* in about a one-half (1/2) mile stretch near to Rollover Pass itself meaning that the impact of Rollover Pass was restricted to about a ½ mile long stretch.

189. In ERDC/Parchure, the Corps presented two different estimates based on dredging records and sediment sampling of how much sand comes from Rollover Pass into the GIWW.

190. Using data from 1995 to 1997, the Corps found Rollover Pass contributed about 13,500 cubic feet per year of sand to the GIWW.

191. Using data from 1997 to 1999, the Corps found about 15,500 cubic feet per year of sand came from Rollover Pass in the GIWW.

192. Averaging these two gives about 15,000 cubic yards per year of additional sediment to be dredged from the GIWW due to the Pass.

193. In the AR, a table in the GLO consultant's report refers to this study as finding 15,400 cubic feet of sand per year, as attributable to the Pass.

194. Although these results are reported in the AR, they are not presented or discussed in the EA.

195. The ERDC/Parchure study result, showing that some of the sediment being dredged from the GIWW comes from the Pass, is presented in the EA, correctly, but is presented in the EA immediately after the representation that the amount of such sediment due to the Pass is between 80,000 and 290,000 cubic yards per year, and not the 15,000 cubic yards per year as presented in the ERDC/Parchure study. In addition, this ERDC/Parchure study was based on “dredging” records from the Corps— which is indeed the method that GLO’s contractor (as well as Bales and Holley) described as the better approach than using beach erosion estimates to arrive at the increased sediment in the GIWW due to the Pass.

2. A Much Earlier (1958) Study by the Corps Came to a Similar Conclusion

196. In addition to dredging studies, so-called beach-erosion studies have been used to estimate how much sand Rollover Pass contributes to the GIWW.

197. In 1958, the Corps did one such beach-erosion study, and estimated that 18,000 cubic yards per year of sand eroded from the beach and flowed through Rollover Pass.

198. The estimate by the Corps in 1958 is consistent with its later estimate of about 15,000 cubic yards per year in ERDC/Parchure (2000).

199. Again, this study is in the AR, but not cited in the EA, nor discussed.

3. Two Additional Beach-Erosion Studies Support the Findings by the Corps in 2000

200. The AR contains two additional beach erosion studies that sought to measure how much sand flows through Rollover Pass.

201. One, known as the Bales-Holley study, done in 1989 with two different methods, gave ranges of potential erosion.

202. The first estimate gave a range from 9,000 to 26,000 cubic yards of sand per year flows through the Pass.

203. The second gave a range of 4,000 to 29,000 cubic yards per year. Both are consistent with the conclusion of the Corps in its ERDC/Parchure study (2000).

204. Another study referenced by GLO's consultant in the AR, by Morang (2006), also found about 15,434 cubic yards per year of sand attributable to Rollover Pass, based on sediment sampling and modeling.

205. This study is not mentioned in the EA.

4. Rejecting the Corps' own ERDC/Parchure study and Other Consistent Studies, the EA Cites Unreliable Data

206. The Corps ignores its own study results and the above-described studies.

207. Instead of those studies, the Corps cites to another part of the Bales and Holley 1989 study to give its estimate of 80,000 – 290,000 cubic yards per year of sand flowing through Rollover Pass.

208. This estimate by Bales and Holley was based on dredging records for GIWW, over a period of time up to 1980, for a stretch of the GIWW that is much longer than was found applicable by the Corps' study discussed above.

209. The problem for the Corps, and for GLO's consultant, is that Bales and Holley in their own report acknowledge that the source of the sediment in the GIWW that they calculated was unknown.

210. That part of the study confirms that Bales and Holley merely assumed any increase in sediment in the GIWW over a 10-mile reach of the GIWW came from the Pass.

211. This results in an extraordinary guesstimate for sand flowing through Rollover Pass.

212. This guesstimate is at least five (5) to almost twenty (20) times what the Corps itself had subsequently found in 2000, in the ERDC/Parchure study.

213. There is no basis for the Corps to disregard the results of its own studies, both the ERDC/Parchure study and the 1958 study.

214. This study, by Bales and Holley, looked at the increase in dredging of the GIWW during the period from 1943 (before Rollover Pass) until 1980 (after the opening of Rollover Pass).

215. This study does show that, along a long (at least 10 miles) stretch of the GIWW, the amount of required dredging has increased since the time of the opening of the Pass.

216. This Bales and Holley study does not determine the cause or source of the increased amount of dredging, which could well be due to increased run-off from the GIWW due to channelization and development or erosion of its banks. Or perhaps there is another reason.

217. Bales and Holley specifically *admit* that they do not know where the additional sediment came from.

218. They cannot and do not claim that Rollover Pass generated all – or even a substantial part – of sediment in the GIWW stretch of 2 to 10 miles.

219. However, the EA does not disclose that Bales and Holley admitted they do not know where the sediment comes from that is the basis of their estimate.

220. To be clear, nothing in this Bales and Holley study, or any other study, provides a basis to believe that Rollover Pass contributes sand to any part of the GIWW outside of the approximate one-half (1/2) mile stretch found by the Corps in its ERDC/Parchure study.

221. However, with no basis, the EA considers the total increased dredging to be over a 2 to 10-mile stretch.

222. Over the 2-mile stretch, the EA found a total increase (of silt as well as sand) of some 80,000 cubic yards/year.

223. Over the 10-mile stretch, the EA found a total increase of 290,000 cubic yards per year.

224. Even greater amounts would be found if the EA considered a longer stretch, but there is no basis for considering anything longer than about one-half (1/2) mile stretch as being affected by Rollover Pass.

225. That was established by the Corps itself, with no contradictory study.

226. The fact that there is a consistent increase in the amount of dredging of the GIWW over a stretch of both 2 miles away from Rollover Pass, and 10 miles away, and even beyond 10 miles, is evidence that something other than Rollover Pass caused more dredging in 1980 compared to prior to the Pass.

227. Using the dredging data from this admittedly inconclusive part of the Bales and Holley study, it is possible to estimate an upper limit on the amount of sand that flows through Rollover Pass to the relevant one-half (1/2) mile stretch of the GIWW. This data shows approximately 10,000 cubic yards of sand per year of additional sediment, which is a little less than what was shown by the Corps' own ERDC/Parchure study.

228. On this AR, the Corps has no rational basis to support its guesstimate that 80,000 to 290,000 cubic yards per year of sand flows through Rollover Pass into the GIWW which was its finding in the EA and the FONSI.

C. Rollover Pass Causes Minimal Beach Erosion That Can be Addressed Without Closure

229. The EA discussed how Rollover Pass may contribute to erosion of beaches to the southwest, primarily from sand that is intercepted from the Gulf of Mexico and brought through the Pass and into the GIWW, as discussed above.

230. The magnitude of such erosion is, in any event, relatively small, affects relatively few lots of private property, and is readily mitigated by replenishment with sediment piped from the GIWW. While the GLO's consultant characterized this shore erosion due to the Pass as "significant", the Corps in its EA did not make such a finding.

231. But even more important, as the EA recognizes, alternatives to closure are readily available to address any such erosion problems.

232. Despite the Corps' admitting the alternatives exist, however, the EA expressly, and baselessly, refused to consider such alternatives if they did not include closing the Pass.

1. Any Impact of Rollover Pass on Beachfront Erosion is Small, and Easily Mitigated

233. Beach erosion along Bolivar Peninsula occurred before construction of Rollover Pass, and would occur with or without Rollover Pass due to the reduction of sediment from dams up the Mississippi River that catch sediment that would otherwise flow out of the mouth of the Mississippi and otherwise be moved westward by the nearshore current.

234. The State's own Bureau of Economic Geology (BEG), the agency responsible to monitor shoreline erosion, conducted a study showing that the Rollover Pass area has *less* shoreline erosion than other areas adjacent thereto.

235. Indeed, the BEG study considers beaches three miles on either side of Rollover Pass.

236. This study is not in the AR but was available at the time of the EA.

237. Those studies that are in the AR suggest that the beach area immediately to the southwest of the Pass has eroded more than other areas due to the loss of sediment from updrift that is intercepted by the Pass and transported to the GIWW.

238. As discussed above, this amount of sediment that goes through the Pass is only about 15,000 cubic yards per year, much smaller than the EA's estimate of 80,000 – 290,000 cubic yards per year.

239. Several additional studies confirm that Rollover Pass has, at most, an effect on the erosion of one-half mile of beach to its south and west.

240. This beach area at Rollover Pass was considered to be publicly accessible when GLO began to develop this proposal for Rollover, but, during the process, a decision by the Supreme Court of Texas undermined the force of the Open Beaches Act. *Severance v. Patterson*, 345 S.W. 3d 18 (Tex. 2011), *opinion withdrawn by, substituted opinion*, 370 S.W. 3d 705 (Tex. 2012). On information and belief, GLO never advised the Corps of this status of the change in beach ownership (from public to private) as part of this permit process.

241. As part of the Corps' permit issuance regulations, a public interest review is required. 33 C.F.R. § 320.4(a). In the Public Interest Review associated with the permit to close Rollover Pass, the Corps gave great weight to a supposed benefit of protecting beaches southwest of Rollover Pass. However, no mention is contained in this Public Interest Review that the beaches supposedly to be benefited by the closure of Rollover Pass are now considered private beaches as opposed to public beaches. Nor is there any mention of the relatively small number of homes that might obtain some benefit by protection from erosion obtained at immense cost by closing Rollover Pass.

242. In any event, the beach southwest of Rollover Pass can be, and has been replenished using sand and silt removed from the GIWW.

2. The EA Did Not Discuss Alternatives That Would Address Erosion Caused by the Pass

243. As originally proposed, the construction of Rollover Pass was to be accompanied by the construction of two groins or jetties, permitted to be on either side of the channel extending 2500 feet into the Gulf of Mexico.

244. These jetties were never constructed by the State of Texas, or anyone else.

245. Some years after the construction of Rollover Pass, a weir was placed within the Pass to slow the current movement and to reduce beach erosion. However, weirs are not as effective as groins or jetties in reducing beach erosion. More recently, in another study, the Corps again proposed a series of groins or jetties to the southwest of the Pass to reduce/eliminate any beach erosion, but none have been built to date.

246. Since then, over the decades, beaches along the Bolivar Peninsula both up and down current of Rollover Pass have experienced modest erosion.

247. The EA admits that such erosion could be addressed by alternatives such as the groins and jetties that previously were in fact proposed, and by other alternatives. Indeed the EA cites to the so-called PIE study, which reviews such readily available alternatives. Although cited, the PIE study is not in the AR. GLO's consultant also recognizes that groins or jetties would address existing erosion.

248. Despite admitting that readily available alternatives could address existing erosion caused by Rollover Pass, the Corps specifically refused to discuss such alternatives in the EA.

249. As its only given reason not to address existing alternatives, such as groins and jetties, the Corps stated that these alternatives would not return East Bay, including Rollover Bay, to “historic conditions.”

250. In fact, it is not possible to return East Bay to “historic conditions’ because, in part, there is now even more freshwater runoff that flows from the northern land, caused by increased development and channelization.

251. Moreover, as the State of Texas expressly determined, before the opening of Rollover Pass, East Bay suffered significantly by being too fresh – historic conditions were bad. That was the reason that the Corps accepted to permit the opening of Rollover Pass.

252. There is no advantage of “historic conditions” in and of themselves.

1. Indisputably, Rollover Pass Offers Unparalleled Fishing Opportunities

253. Since its opening in 1955, Rollover Pass has been a major public access fishing venue for all citizens, some of whom live locally, but many of whom travel long distances because of the extraordinary high quality of fishing it offers, from the channel walls.

254. Part of the quality of the Rollover Pass site reflects its direct connection between the Gulf of Mexico and Galveston Bay: many large fish, and diverse fish swim through this pass and can be caught while fishing from shore.

255. Fishing at Rollover Pass during certain times of the year, such as the golden croaker run and flounder migration, is renowned and extremely popular.

256. To the best of Plaintiffs' knowledge, no shoreline location offers any comparable opportunity to catch so many types of fish, particularly large fish, on Galveston Bay. Indeed, even if one travels a great distance from Galveston Bay, no shoreline location offers a comparable opportunity to catch such fish. This is part of the reason why, in the words of the Corps, Rollover Pass is "a nationally-recognized fishing destination."

2. Rollover Pass Provides Particularly Special Opportunities for Persons with Disabilities

257. The Corps also recognizes a second distinguishing characteristic of Rollover Pass: it is "accessible for handicapped fishing enthusiasts". It is possible to drive up to the Pass, park and fish literally out of the back of a truck, with no need to move through any water, to get on any boat, or to transport any gear.

258. The accessibility of Rollover Pass makes it of particular importance for persons with mobility impairments, including (but by no means limited to) Messers. Schroeder, Susberry, and Scurtu. No comparable accessible fishing site

is known to exist, so Rollover Pass provides benefits that persons with disabilities cannot find elsewhere.

259. They cannot readily wade into the water to fish.

260. Also, they face significant difficulties and particular dangers in fishing from boats.

261. There are, of course, other on-shore locations from which people can fish, but none known to Plaintiffs offer any opportunities that compare to the direct access that Rollover Pass provides for persons with mobility impairments to catch so many large and varied kinds of fish.

262. Other on-shore sites also create barriers to use by persons with mobility impairments, because they have difficulties fishing if they must transport fishing tackle, bait, food and drinks, and other gear over significant distances (rather than fish from near to their vehicles).

263. In short, while persons without disabilities have other opportunities, Rollover Pass provides the only fishing access for persons with disabilities to catch large and varied fish of any place on the Texas coast because it is accessible, and there is a chance of catching a truly spectacular fish.

264. Messers. Schroeder, Susberry, and Scurtu are thus among many persons with disabilities who are devout fans of this fishing venue.

265. Fishing is part of the recreational services, programs, and activities promoted by the State of Texas, for which Rollover Pass is very important as described above.

266. The closure of Rollover Pass will take away this public access fishing for persons with mobility impairments on the Texas coast.

267. Persons who do not have disabilities can replace the benefits of Rollover Pass by alternatives, but these alternatives are not available to Messers. Schroeder, Susberry, and Scurtu, or to other persons with mobility impairments.

268. Although the Corps has speculated about the possibility that, at some unknown time, with some unknown funds, some unknown agency may decide to construct a facility that might somehow enable persons with disabilities to replace some benefits of Rollover Pass, the GLO makes no commitment to do so, anywhere – nor does anyone else.

269. No provision has been made for the replacement of the access to high quality public fishing that will occur if the Pass is closed.

270. In fact, closing Rollover Pass would have significant discriminatory effects on such persons, including, among others, Messers. Schroeder, Susberry, and Scurtu – each of whom is a qualified person with disabilities and a member of Plaintiff Gilchrist Community Association.

3. Rollover Pass Also Provides Excellent Opportunities for Others Who Fish From Land

271. Of course it is not only persons with disabilities who flock to Rollover Pass.

272. In addition to local users, the non-local users of the Pass are often of lower income and ethnically diverse.

273. Many of these other persons cannot easily afford to fish from boats, but they want to be able to catch excellent fish from the shore.

274. Rollover Pass thus provides an important component of the recreational fishing program offered by the State of Texas, throughout the year, free and open to all.

275. The community of Gilchrist exists adjacent to Rollover Pass.

276. Rollover Pass has become a major recreational venue, with camping, birdwatching and fishing activities.

277. The economy of Gilchrist primarily is based upon recreational users coming to and utilizing Rollover Pass.

278. As part of its analysis of impacts, the Corps never identified the number or socio-economic characteristics of users of Rollover Pass who do not reside locally. These users are quite different than those people living in the census tract covering Rollover Pass. Due to these differences, closure of the Pass will have a disproportionate effect on persons protected by Executive Order 12898.

4. The Corps Disregarded Key Socio-Economic Impacts of Closing Rollover Pass

279. The EA does not discuss how closing Rollover Pass will significantly affect persons with disabilities, who will not have any other way to engage in such exceptional fishing.

280. The Corps did recognize that, if the Pass is closed, “[r]egionally speaking, those seeking fishing opportunities will either have to travel to another location or fish from a boat.”

281. The Corps recognized that, at some otherwise unspecified time in the future, specifically “[t]o offset the lost recreational benefits, the Texas General Land Office [GLO] intends to investigate additional recreational fishing amenities.”

282. Regarding Rollover Pass, the EA states:

Rollover Pass, a nationally-recognized fishing destination, provides recreational fishing opportunities that would no longer exist after project construction. Fishing at the site is free, and accessible for handicapped fishing enthusiasts. Regionally speaking, those seeking fishing opportunities will either have to travel to another location or fish from a boat. To offset the lost recreational benefits, the Texas General Land Office intends to investigate additional recreational fishing amenities. Texas Senate Bill 2043 provides the legislative authority for this project and contains the following language regarding recreational impacts:

If the closing of a man-made Pass under this section results in a loss of public recreational opportunities, the commissioner shall develop, in consultation with the Parks and Wildlife Department and the county and, if applicable, the municipality in which the Pass is located, and approve a plan to mitigate the loss. In developing the plan, the commissioner is

strongly encouraged to assess the feasibility of installing fishing piers, boat ramps, and other facilities that provide public recreational opportunities. The plan must be presented to the public for comment before the commissioner approves it.

283. Having reviewed this language, the Corps actually knew that neither the GLO nor any other state agency had authorized funds to construct or otherwise undertaken any obligation to create facilities to replace the loss of Rollover Pass.

284. The GLO did not make any commitment to the Corps to provide any such future “amenities” and, so far as Plaintiffs are aware, has not made any specific commitments to anyone else. See TEX. NATURAL RESOURCES CODE § 33.613(b).

285. The Corps, in its ultimate decision to grant the permit, did not include any condition, or requirement, that any such “amenities” be developed.

286. Although the Corps did recognize the importance of Rollover Pass as being “accessible for handicapped fishing enthusiasts” it did not evaluate how the closure of Rollover Pass would impact their participation in the Texas recreational fishing program.

287. No effect of this closure on persons with disabilities was evaluated in the EA.

288. Thus, the Corps has taken on faith that the State will provide some new facilities without assessing whether they may come close to replacing opportunities that are lost for persons with disabilities.

289. No information about the physical disabilities or socio-economic composition of the users of Rollover Pass was included in EA.

290. No information about recreational users was included in the EA.

291. Likewise the Corps has taken on faith that the State will provide some new facilities without assessing whether they may come close to replacing opportunities that are lost for persons who cannot easily afford to fish except from land.

292. The lack of information on recreational users matters, because the economy of the Gilchrist community and small businesses depend so totally on such visitors.

VI. CAUSES OF ACTION

293. GLO's permit application to close Rollover Pass was submitted to the Corps under the provisions of Section 10 of the River and Harbor Act of 1899 and § 404 of the Clean Water Act and the implementing regulations found at 33 C.F.R. §§ 320-330.

294. Granting a permit is a final action of the Corps with respect to the closure of Rollover Pass.

295. The issuance of a permit by the Corps of Engineers is a major federal action.

296. The request for a permit triggers the provisions of NEPA and Section 404.

297. Pursuant to NEPA and Section 404, the Corps was required to prepare an Environmental Assessment (EA) to assess the impacts of the closure of Rollover Pass in order to determine whether or not significant impacts would ensue from the closure.

298. In addition to an EA, the Corps included certain fact findings in its document titled EA and Statement of Findings.

299. The APA, in § 706(2), provides authority for this Court to “hold unlawful and set aside agency action, findings, and conclusions found to be –

- (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; ...
- (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; and/or
- (D) without observance of procedure required by law

CAUSE OF ACTION NO. 1, UNDER NEPA & CLEAN WATER ACT, AGAINST THE CORPS OF ENGINEERS: ARBITRARY AND CAPRICIOUS ACTIONS

300. The factual and legal assertions in the above paragraphs are incorporated by reference.

301. Using the standards of the APA §706, the facts recited above demonstrate that the Corps violated NEPA and Section 404 in issuing the FONSI (finding that there would be no significant impact) due to closing Rollover Pass.

Without repeating all the facts detailed above, in brief:

- a. there is no lawful basis to find such a closure would not affect salinity of East Bay;
- b. there is no lawful basis to exclude known freshwater inputs from consideration given that they already are in the data set and validated and calibrated by the State of Texas itself;
- c. there is no lawful basis not even to study the difference in projections of freshwater inputs, which is easy to do using data from TxBLEND and either the TxBLEND computer program and/or RMA2 and RMA4;
- d. there is no lawful basis to refuse to take into account that freshwater inflows have increased since the opening of Rollover Pass, at which time actually measured data revealed that East Bay was too fresh;
- e. there is no lawful basis to refuse even to consider the data on daily freshwater inflows that are important given the low circulation in East Bay.

302. Moreover, given the prior permit issued by the Corps to open Rollover Pass specifically to increase the salinity of East Bay, any reversal of that decision requires extra care and extra explanation that was not set out in the EA and Statement of Findings.

303. Likewise, under the standards of the APA § 706, the facts recited above demonstrate that the Corps violated NEPA and Section 404 in evaluating the possibility of benefits from reduced dredging if Rollover Pass is closed. Without repeating all the facts detailed above, in brief: the Corps had no basis to refuse to consider the results of its own study, showing very limited amounts of coarse sand flowing into only a short stretch of the GIWW, and no basis to expect the highest possible charge for cleaning the GIWW.

304. Additional violations of NEPA and Section 404, under the standards of the APA § 706, reflect: the unsupported claim of significant beach erosion to the south and west of Rollover Pass; the reliance on a stated goal to restore the East Bay to “historical conditions” when that is neither possible (due to changes in inflows, among other factors) nor desirable (due to the previously established condition of too low salinity); the failure to review critical documents (as demonstrated both by the lack of the documents in the AR and the lack of analysis of the documents in the EA); and the refusal even to consider the facts showing

GLO lacked the possessory interest in Rollover Pass as expressly required by the Corps' own regulation, 33 C.F.R. § 325.1(d)(8).

305. Individually the actions by the Corps manifest a disregard of thoughtful science. Collectively, violation of NEPA and Section 404 (using the APA standards) is even more clear.

CAUSE OF ACTION NO. 2, UNDER NEPA, AGAINST THE CORPS OF ENGINEERS: FAILURE TO FULLY AND HONESTLY DISCLOSE ENVIRONMENTAL IMPACTS

306. The factual and legal assertions in the above paragraphs are incorporated by reference.

307. A *sine quo non* of NEPA compliance is full and honest disclosure and compliance with the rules of the Council on Environmental Quality (CEQ) found at 40 C.F.R. 1500.

308. In the EA prepared by the Corps, full and honest disclosure did not occur and various procedural rules applicable to environmental assessments were not followed.

309. The Corps failed to fully and honestly disclose the impacts of the closure of Rollover Pass on East Bay by failing to fully consider the impacts of freshwater inflows on the salinity of East Bay after closure of Rollover Pass and the resultant negative impact that such fresh water would have on coastal commercial and recreational fisheries.

310. The Corps failed to fully and honestly disclose the impacts of the current operation of Rollover Pass on the dredging operations on the GIWW by ignoring studies that were prepared by the Corps itself that differed with the conclusions in the EA and Statement of Findings.

311. The Corps failed to fully and honestly disclose the impacts of the current operation of Rollover Pass on the erosion of beaches adjacent to Rollover Pass by failing to discuss documentation that differs with the presentation in the EA, including documentation prepared by the Bureau of Economic Geology concerning beach erosion at Rollover Pass that identifies that geologic conditions at that part of the Texas coast are more erosive than at other locations and that show other locations exhibiting greater erosion than found adjacent to Rollover Pass.

312. The Corps failed to fully and honestly evaluate alternatives as required by 40 C.F.R. 1502.14 by eliminating all alternatives that did not involve closing Rollover Pass.

313. The Corps failed to fully and honestly evaluate cumulative impacts by failing to consider the impacts of the increasing fresh water runoff from Oyster Bayou, the GIWW, and other sources including the forthcoming Needmore Diversion in violation of the requirements of 40 C.F.R.1508.7 and the 5th Circuit's *Fritiofson* case.

314. The Corps failed to fully and honestly evaluate the social, economic, and Environmental Justice (see Executive Order 12898) impacts caused by the closure of Rollover Pass, including the impacts on low-income persons and racial minorities who do not reside locally, as well as on persons with mobility impairments who use Rollover Pass because of its unparalleled accessibility for exceptional quality fishing.

CAUSE OF ACTION NO. 3, UNDER NEPA, AGAINST THE CORPS OF ENGINEERS: DUTY TO REVISE THE EA BASED ON SIGNIFICANT INFORMATION NOT PREVIOUSLY CONSIDERED

315. The factual and legal assertions in the above paragraphs are incorporated by reference.

316. The Corps must reconsider and revise its EA if, after issuing a FONSI, it later learns of significant information (relevant to environmental impacts) not previously considered.

317. As demonstrated above, the Corps failed to consider significant information that bears on key environmental issues. This includes (without limitation) information developed by the Corps itself as well as information developed by the State and others under contract to state agencies.

ACTION NO. 4, UNDER SECTION 404: AGAINST THE CORPS OF ENGINEERS: VIOLATION OF THE CLEAN WATER ACT'S ALTERNATIVES REQUIREMENTS

318. The factual and legal assertions in the above paragraphs are incorporated by reference.

319. As stated previously, the regulations implementing the National Environmental Policy Act at 40 C.F.R. § 1502.14 require that alternatives to the proposed action be evaluated.

320. In addition to the NEPA alternative evaluation requirement, a second mandate to evaluate alternatives is found in the Clean Water Act § 404(b)(1) guidelines that are binding upon the Corps. These set a mandate that is greater than simple evaluation.

321. One of these regulations, 40 C.F.R. § 230.10(a), requires the Corps of Engineers to permit the least environmentally damaging practicable alternative that achieves the project purposes.

322. If the groins or jetties originally proposed and permitted in the late 1950s were to be constructed, sediment movement into the GIWW would be effectively halted while preserving all environmentally beneficial effects of the pass bringing water and fish into East Bay.

323. The same groins and jetties could be used to reduce beach erosion south and west of Rollover Pass.

324. Plaintiffs allege that the evaluation of alternatives improperly refused even to consider groins and jetties as an alternative, even though they were actually known by the Corps (and GLO's consultant) to have significant beneficial effects.

325. As such, the full disclosure provisions of NEPA are violated.

326. As such, the affirmative obligation to adopt the least damaging alternative under Section 404 was violated.

327. Additionally, an applicant cannot define a project so narrowly so as to preclude consideration of alternatives and thus make what is practicable appear impracticable.

CAUSE OF ACTION NO. 5, UNDER NEPA, AGAINST THE CORP OF ENGINEERS: VIOLATION OF MANDATE FOR PUBLIC INTEREST REVIEW, 33 C.F.R. § 320.4(a)

328. The factual and legal assertions in the above paragraphs are incorporated by reference.

329. The Corps violated its own NEPA regulations under the standards of the APA § 706, by failing to disclose and consider— in addition to all of the above-described failures —all of the facts associated with the change in status of Texas beaches after the *Severance* decision.

330. The Public Interest Review regulation, 33 C.F.R. § 320.4(a), provides:

The decision whether to issue a permit will be based on an evaluation of the probable impacts, including cumulative impacts of the proposed activity and its intended use on the public interest. Evaluation of the probable impact which the proposed activity may have on the public interest requires a

careful weighing of all those factors which become relevant in each particular case. The benefits which reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments. The decision whether to authorize a proposal, and if so, the conditions under which it will be allowed to occur, are therefore determined by the outcome of this general balancing process. ...

331. No mention is made in the Statement of Findings or anywhere else as far Plaintiffs know, that following the *Severance* decision (see above), that the beach erosion complained about may be to “private beaches” owned by private individuals (and only a small number of them) rather than public beaches.

CAUSE OF ACTION NO. 6, AGAINST THE GLO: VIOLATION OF THE PUBLIC TRUST DOCTRINE

332. The factual and legal assertions in the above paragraphs are incorporated by reference.

333. The Public Trust Doctrine is an ancient legal mandate originating in Roman law and adopted into the common law that establishes a sovereign obligation in states to hold vital natural resources in trust for the benefit of their citizens.

334. This long-standing judicial principle helps ensure the protection of natural resources vital to the well-being of all people.

335. The Public Trust Doctrine imposes a duty on the State, as perpetual trustee, to act as a steward of public trust lands.

336. Texas maintains ownership over public resources, such as the beds and waters of all navigable bodies, including bays, as trustee for the public.

337. Where the State holds navigable waters as trustee for the public, all fish and other aquatic life contained therein are also public trust property.

338. The State, acting through the GLO with respect to East Bay, has the duty to manage fisheries in the fashion of a prudent trustee, including the duty to protect and preserve fish stocks and aquatic resources.

339. No responsible balancing of benefits and detriments can occur when a state agency systematically fails to take into account actually known, relevant facts bearing on environmental impact of a proposed action.

340. Closing Rollover Pass will make East Bay too fresh to support the highly productive fishery that currently exists in the bay.

341. The closure of Rollover Pass will substantially impair the public's use and enjoyment of trust waters and trust living resources, including the productive fishery in East Bay.

342. The closure of Rollover Pass will directly harm Plaintiffs and their members in their future ability to enjoy the resources of East Bay that are held in trust, and in their economic interests to fish and to derive income from others who come to East Bay to fish.

343. Under the Public Trust Doctrine, the GLO is responsible for actions and inactions of its agents, including (without limitation) its consultant for this Permit application.

344. The GLO has breached (or will breach) its duties under the Public Trust Doctrine:

- a. to preserve the uses protected by the trust as applied to East Bay;
- b. to protect, maintain, and preserve trust property as applied to East Bay;
- c. to manage the fisheries in East Bay in the fashion of a prudent trustee; and
- d. to protect water quality sufficient to ensure that the fish and other aquatic resources making up the trust are healthy in East Bay.

345. GLO has ready access to all materials related to TxBLEND as it concerns Galveston Bay, and the validation, and calibration, of TxBLEND.

346. GLO's own files, including documents provided in initial disclosures in this case, include information relevant to issues concerning alleged impacts of closing Rollover Pass, but GLO did not provide this information for inclusion in the AR concerning this Permit application.

347. The GLO has breached its duties under the Public Trust Doctrine by decisions as detailed above, including (without limitation) decisions in its application for the Permit to close Rollover Pass:

- a. Systematically suppressing information actually known to the State, including information developed by state agencies and/or their consultants, where such information directly contradicted or in one or more ways undermined arguments made in support of closing Rollover Pass;
- b. systematically disregarding, refusing to consider, or ignoring readily available information, including information developed by state agencies and/or their consultants, where such information directly contradicted or in one or more ways undermined arguments made in support of closing Rollover Pass;
- c. relying on and advocating for the Corps to rely on a model of salinity that both disregarded important freshwater inflows and disregarded readily available data on daily inflows in East Bay when, in light of what the State's own information demonstrates, such a model does not provide a reliable basis for a fiduciary to evaluate impacts of the proposed action;

- d. asserting that closing Rollover Pass will create significant benefits concerning dredging of the GIWW when, taking into account information actually available to the State, there is no reliable basis to find a significant benefit;
- e. asserting that closing Rollover Pass will create significant benefits concerning beach erosion when, taking into account information actually available to the State, there is no reliable basis to find a significant benefit;
- f. asserting that closing Rollover Pass will create significant benefits without taking into account the actual existence of known alternatives that would provide many of the asserted benefits from closing without incurring the risks.

348. GLO's violation of the Public Trust Doctrine, through its lack of proper investigation, disclosure, analysis, and reporting of relevant information is particularly egregious because the State itself, six decades ago, recognized the need to open Rollover Pass precisely to enhance this natural resource by improving the salinity for a productive fishery.

VII. RELIEF REQUESTED

349. The interests of Plaintiffs Gulf Coast Rod, Reel and Gun Club, Inc. and Gilchrist Community Association, along with the specific interest of its

individual members, will be irreparably harmed by closing and filling of Rollover Pass. These interests are germane to the purpose of the Plaintiffs and their members.

350. Plaintiffs request that this Court declare that the Corps did not issue a permit that lawfully can be used by the GLO as the basis to close and fill Rollover Pass.

351. To whatever extent may be appropriate in addition to declaratory relief, Plaintiffs request that this Court issue an order directing the Corps to revoke this permit as a basis for the GLO to close and fill Rollover Pass, with or without a remand to the Corps.

352. Plaintiffs further request that this Court issue an order directing GLO to reconsider its decision to seek to close Rollover Pass, and in any future evaluation of such a possible application, to direct order that GLO and its consultants must, at the very least, consider information actually known to the state of Texas and its agencies, including (without limitation) the information actually available in TxBLEND, the information available concerning dredging of the GIWW, and the alternatives to closing Rollover Pass that could accomplish purposes that closing of the Pass might further.

353. All conditions precedent to Plaintiffs' claims for relief have been performed or have occurred.

354. Plaintiffs are entitled to attorney fees, expert fees, and costs under the Equal Access to Justice Act, 24 U.S.C. § 2412.

355. Plaintiffs request any other relief that will redress Plaintiffs' harm.

VIII. PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiffs request that upon a final hearing hereof, that a declaration and permanent injunction be issued as requested above, and for other and further relief to which Plaintiffs may show itself justly entitled.

BLACKBURN CARTER, P.C.

by: s/ James B. Blackburn, Jr.

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CERTIFICATE OF SERVICE

On this 31st day of January 31, 2014, a true and correct copy of the foregoing PLAINTIFFS' AMENDED COMPLAINT was served on all attorneys of record by the Court's ECF System.

/s/ James B. Blackburn, Jr.

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