

enjoin the Corps from conducting hopper dredging outside of traditional winter dredging windows until the agency has conducted a legally sufficient evaluation of the environmental impacts of dredging between April 1 and December 14.¹

BACKGROUND

A. Because hopper dredging is harmful to sea turtles, fisheries, and other coastal wildlife, the Corps has historically limited its use of hopper dredges to winter months.

Maintenance dredging involves the periodic removal of built-up sediment from existing navigational channels in order to keep the channels at their authorized depth. Although there are several methods of dredging available, the Corps typically prefers hopper dredging. *See* U.S. Army Corps of Eng’rs, Wilmington Harbor and Morehead City Harbor Dredging and Bed Leveling: Final Environmental Assessment and Finding of No Significant Impact (Feb. 2021), at 5 (“NC Final EA”) (attached as Ex. 1).

Hopper dredges work by removing sediments with suction pipes—essentially vacuuming up everything on the bottom of the dredged area. Letter from S. Env’t L. Ctr. to Kimberly Garvey, Chief, Planning Branch, U.S. Army Corps of Eng’rs (Apr. 26, 2021) at 1 (“SELC Letter”) (attached as Ex. 2); Daphne W. Goldberg et al., *Hopper dredging impacts on sea turtles on the Northern Coast of Rio de Janeiro State, Brazil*, MARINE TURTLE NEWSLETTER (Oct. 2015)

¹ Because the Corps did not issue any public notice, OHM did not learn of the Corps’ intent to conduct spring and summer hopper dredging in Brunswick Harbor until well after the Corps had awarded a bid. Even now, the Corps’ website still indicates that it intends to apply winter maintenance dredging windows in Brunswick Harbor. U.S. Army Corps of Eng’rs. Brunswick Harbor Operations and Maintenance, GA (last visited Apr. 28, 2021) (“Ocean-going hopper dredging is restricted to December through April by the presence of threatened and endangered sea turtles.”). Counsel for OHM submitted a FOIA request in February 2021 to learn more about the Corps’ intent to remove seasonal dredging windows in February but has not yet received responsive documents. The Corps has indicated that it will provide responsive documents by May 6.

at 17 (attached as Ex. 3). Unfortunately, this often includes federally threatened loggerhead sea turtles and other sensitive species, which can easily become entrained in the hopper dredge pipes. SELC Letter at 1 (citing and attaching scientific studies); Mem. from Mark Dodd, Sr. Wildlife Biologist, Ga. Dep't of Nat. Res., to Kelie Moore, Coastal Consistency Coordinator, Ga. Dep't of Nat. Res. (Feb. 22, 2021), at 1–2 (“DNR Mem.”) (attached as Ex. 4); Goldberg, *supra*, at 17. When this happens, the pipes’ rotating blades can cause massive fractures, crushed organs, hemorrhage, and death. SELC Letter at 1–2 (citing and attaching scientific studies); Goldberg, *supra*, at 17; Declaration of Dr. Minter Holmes (Terry) Norton at ¶¶ 13–20 (attached as Ex. 5) (describing first-hand experience with rehabilitating sea turtles injured by hopper dredges); *see also* Dena Dickerson et al., *Dredging impacts on sea turtles in the southeastern USA: A historical review of protection*, PROCEEDINGS OF THE 17TH WORLD DREDGING CONGRESS (2004) (attached as Ex. 6). These effects are heightened in late spring, summer, and early fall when there are more sea turtles in southeast shipping channels. SELC Letter at 2; DNR Mem. at 2; Letter from Rusty Garrison, Director, Wildlife Res. Div., Ga. Dept. of Nat. Res., to Margaret McIntosh, U.S. Army Corps of Eng’rs (Sept. 28, 2020), at 1 (“WRD Letter”) (attached as Ex. 7); Letter from Doug Haymans, Dir., Coastal Res. Div., Ga. Dept. of Nat. Res., to Kimberly Garvey, U.S. Army Corps of Eng’rs (Apr. 23, 2021), at 7 (“CRD Letter”) (attached as Ex. 8).

Hopper dredging also poses threats to other valuable wildlife resources. For example, impacts to fisheries, such as entrainment and increased sedimentation, can be significant. *See* SELC Letter at 2 (citing and attaching scientific study); *see also* Letter from Melvin Bell, Chair, South Atlantic Fishery Mgm’t Council, to Emily Hughes, U.S. Army Corps of Eng’rs (Oct. 1, 2020) (“SAFMC Letter”) (Attached as Ex. 9); Lisa Wickliffe et al., *An Assessment of Fisheries Species to Inform Time-of-Year Restrictions for North Carolina and South Carolina* (NOAA

Technical Mem. NOS NCCOS 263), NAT'L OCEANIC & ATMOSPHERIC ADMIN. (NOAA) (Oct. 2019) (attached as Ex. 10). Like impacts to sea turtles, these effects are amplified during certain times of the year. *See* SELC Letter at 2; *cf.* SAFMC Letter at 2.

To avoid these impacts, federal and state agencies have historically restricted hopper dredging to winter months when there are fewer sea turtles and other sensitive species in southeast shipping channels. At the state level, the Georgia Department of Natural Resources (“DNR”) has implemented winter dredging windows through the state’s Clean Water Act § 401 Certifications and Coastal Zone Management Act consistency determinations. DNR Mem. at 2. According to DNR:

[D]ata and decades of experience clearly show that winter dredging windows are the best way to maintain deep water channels in Georgia and minimize mortality of threatened loggerhead sea turtles in hopper dredges. Summer dredging will place nesting female loggerhead sea turtles—and loggerhead recovery efforts generally—at unnecessary risk.

WRD Letter at 1.

At the federal level, the National Marine Fisheries Service (“NMFS”) has until recently imposed winter hopper dredging windows through its South Atlantic Regional Biological Opinions, or “SARBOs,” which assess impacts to federally protected species through dredging and related activities at a regional level. *See* NMFS, *Biological Opinion: Dredging of Channels in the Southeastern United States from North Carolina Through Cape Canaveral, Florida* (Nov. 25, 1991); NMFS, *Biological Opinion: Hopper Dredging of Channels and Beach Nourishment Activities in the Southeastern United States from North Carolina Through Florida East Coast* (Aug. 25, 1995); NMFS, *Biological Opinion: The Continued Hopper Dredging of Channels and Borrow Areas in the Southeastern United States* (Sept. 25, 1997). As NMFS recognized nearly three decades ago:

The primary Endangered Species Act (ESA) concern with hopper dredging is the documented take² of a significant number of sea turtles.... What has been learned from past dredging episodes is that turtle take cannot be avoided if hopper dredging occurs when turtles are present.

1991 SARBO at 6.

The South Atlantic Division of the Corps also adopted guidelines during certain years establishing a hopper dredging window of December 15 through March 31 to reduce impacts to sea turtles. *See, e.g.*, U.S. Army Corps of Eng’rs, South Atlantic Division, *Hopper Dredging Protocol for Atlantic Coast: FY 98 – FY 03* (attached as Ex. 11).

By all measures, these seasonal dredging windows have been tremendously successful as a mitigation tool, balancing the need for efficient dredging of navigation channels with the protection of sea turtles, fisheries, and other wildlife. DNR Mem. at 4; WRD Letter at 3 (“The USACE has successfully maintained these channels for the last 22 years using winter dredging windows to assist in the recovery of protected species.”); 1995 SARBO at 10 (finding that seasonal dredging windows have “greatly reduced the rate of sea turtle takes by hopper dredges”); SELC Letter at 3. Although as of 2020 winter dredging windows are no longer mandated by federal guidance,³ the Corps has never conducted any NEPA review assessing the substantial environmental impacts of dredging outside of these traditional winter dredging windows—a necessary step before departing from three decades of practice.

² “Take” means “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 16 U.S.C. § 1532.

³ *See* NMFS, *Biological Opinion: South Atlantic Regional Biological Opinion for Dredging and Material Placement Activities in the Southeast United States* (Mar. 27, 2020).

B. In a substantial departure from its historical practice, the Corps intends to begin maintenance dredging in southeast ports this summer.

Despite the tremendous success of these longstanding protections, last year the Corps began quietly soliciting bids on maintenance dredging contracts for Brunswick Harbor and other regional harbors without placing any restrictions on when dredging could occur. *See* U.S. Army Corps of Eng'rs, Application & Notice to Bidders, A21-W912PM20B0008, Section 00 10 00 Note 6 (attached as Ex. 12) (noting that “there are no environmental windows” for the project); U.S. Army Corps of Eng'rs, *South Atlantic Division Regional Harbor Dredging RTA Specifications* IFB No. W912PM20B0008, SECTION 35 20 23, 1.3 (Aug. 5, 2020) (attached as Ex. 13) (stating that environmental windows are “not applicable”).

On information and belief, on September 23, the Corps awarded the bid to the Great Lakes Dredge & Dock Company, LLC for \$16,362,450, with updated specifications and requirements that do not include any dredging windows for Brunswick Harbor or other southeast harbors. U.S. Army Corps of Eng'rs, *South Atlantic Regional Harbor Dredging Contract Notice* W912PM20B0008, <https://beta.sam.gov/opp/4726ad7b44674b07b7965fe982996b14/view> (updated Sept. 4, 2020).

The Corps has indicated that it intends to continue year-round maintenance dredging in the future. Last month, for example, the Corps held an “Industry Day” event, where it told contractors that it would begin advertising for FY 2022 bids as early as June 2021. It indicated that Brunswick Harbor’s annual maintenance dredging would likely be completed sometime between March and August 2022. *See* U.S. Army Corps of Eng'rs, South Atlantic Division: FY22 Regional Harbor Dredging Contract Industry Day (March 20, 2021), at 3 (“Industry Day Presentation”) (attached as Ex. 14).

Despite soliciting and awarding bids for spring and summer maintenance dredging, the Corps still has not issued any public notice, released any NEPA analysis, or solicited any public comment related to dredging outside of traditional winter dredging windows. Yet it appears from Corps documents and media reports that the Corps is poised to begin hopper dredging in Brunswick Harbor as early as May 15—just as Georgia’s sea turtle nesting season begins. *See* Status Report Corps/Industry Hopper Dredges: Week of 4/26/2021 (attached as composite Ex. 15) (showing South Atlantic Division regional dredging scheduled for May 15, May 18, and May 22); U.S. Army Corps of Eng’rs, South Atlantic Division Regional Harbors 2021 Dredging Schedule (attached as composite Ex. 15); NC Final EA at 18 (noting that “the first dredge [is] expected to arrive in Savannah District [in] the May/June timeframe of 2021”).

C. The Georgia Department of Natural Resources strongly object to the Corps’ decision to dredge outside of traditional winter dredging windows.

DNR strongly objects to hopper dredging outside of traditional winter dredging windows.

As the state recently wrote to the Corps:

Experience shows that summer dredging will lead to increased mortality of nesting female loggerhead turtles and other turtles, undermining decades of species recovery efforts.... We recognize the importance of maintaining Georgia’s deep water ports for commerce[, but] [t]he USACE has successfully maintained these channels for the last 22 years using winter dredging windows to assist in the recovery of protected species.

WRD Letter at 2, 3. Given the concerns its state biologists, DNR has unequivocally advised that “[i]n order to assure recovery of the NRU population of loggerheads, hopper dredging activity in Georgia should be restricted to winter months (15 December – 31 March).” DNR Mem. at 9.

Despite these objections, the Corps still intends to begin dredging in Brunswick Harbor as early as May 15. Proceeding with hopper dredging outside of traditional winter dredging windows without first conducting any NEPA analysis of this unprecedented and controversial

shift is not only illegal, it would likely have significant and irreversible consequences for Georgia's sea turtles, fisheries, and other coastal wildlife. *See* Section II, *infra*. To prevent these irreparable damages, One Hundred Miles requests that the Court issue a preliminary injunction enjoining the Corps from proceeding with year-round hopper dredging in Brunswick Harbor until the Corps has conducted a legally sufficient evaluation of the environmental impacts as required by NEPA.

STANDARD OF REVIEW

To succeed on a motion for preliminary injunction, a plaintiff must show that it is likely to succeed on the merits, that it is likely to suffer irreparable injury absent preliminary relief, that the balance of equities tips in its favor, and that an injunction is in the public interest. *U.S. v. Jenkins*, 714 F. Supp. 2d 1213, 1220 (S.D. Ga. 2008).

ARGUMENT AND CITATION OF AUTHORITIES

I. One Hundred Miles is likely to succeed on the merits.

For all major federal actions, NEPA obligates the Corps to “take a hard and honest look at the environmental consequences of [its] decisions” at the “earliest reasonable time.” *Am. Rivers v. Fed. Energy Regulatory Comm’n*, 895 F.3d 32, 49 (D.C. Cir. 2018); 40 C.F.R. § 1501.2(a). If the Corps believes an action is not likely to have significant effects or it is unsure whether the action will have significant effects, the Corps may first prepare an Environmental Assessment (“EA”) to evaluate whether the action might have significant environmental impacts. 40 C.F.R. § 1501.5. If the EA shows the proposed project will not have any significant environmental impacts, the Corps may issue a Finding of No Significant Impact (“FONSI”). 40 C.F.R. § 1501.6. But if the EA shows that “any significant environmental impacts *might* result” from the proposed action, the Corps must prepare an Environmental Impact Statement (“EIS”) to

fully evaluate the potential direct, indirect, and cumulative impacts of the proposed action and to analyze all reasonable alternatives to the proposed action. *Sierra Club v. Peterson*, 717 F.2d 1409, 1415 (D.C. Cir. 1983) (first emphasis in original); 40 C.F.R. § 1501.3(a)(3); 40 C.F.R. § 1502.14.

Here, the Corps has not prepared any document under NEPA analyzing the impacts of year-round hopper dredging—a clear violation of NEPA.

A. Year-round maintenance dredging is a major federal action to which NEPA applies.

NEPA applies to all “major federal actions.” 42 U.S.C. § 4332(2)(C). Major federal action means “an activity or decision subject to Federal control and responsibility,” including the “approval of specific projects, such as construction or management activities located in a defined geographic area,” or the adoption of “official documents prepared or approved by Federal agencies, which prescribe alternative uses of Federal resources, upon which future agency actions will be based.” 40 C.F.R. § 1508.1(q). The decision to conduct year-round maintenance dredging outside of traditional hopper dredging windows falls within this definition and is therefore subject to NEPA.

B. The Corps did not prepare any new NEPA document and may not rely on the 1998 Brunswick Harbor Deepening EIS or any other document that does not assess the impacts of year-round dredging.

The Corps did not prepare or publish any NEPA document related to its decision to conduct year-round maintenance dredging in Brunswick Harbor this summer.

In previous years, it appears the Corps relied on a 1998 EIS prepared in connection with the Brunswick Harbor deepening project to satisfy its NEPA obligations related to harbor maintenance dredging. U.S. Army Corps of Eng’rs, Final Environmental Impact Statement: Brunswick Harbor Deepening Project (Mar. 1998) (“1998 EIS”) (attached as Ex. 16). That

project involved lowering the mean low-water depth of the Brunswick inner harbor. *Id. at i.*

Although the 1998 EIS briefly considered potential environmental impacts associated with future maintenance dredging of the deepened harbor, it expressly committed:

If hopper dredges are used the District will implement the following precautions:

(a) All hopper dredging will only be performed from December 15 through March, as specified by the NMFS and the Corps' CESAD.

....

With the above provision[], the proposed project is not expected to significantly adversely impact the sea turtles no destroy or modify habitat determined critical for these species' survival.

1998 EIS at 42.⁴

The proposed action—at the time, winter maintenance dredging—has substantially changed since 1998. And with it so have the environmental impacts. NEPA regulations promulgated by the U.S. Council on Environmental Quality (“CEQ”) and the Corps and make clear that the Corps may not rely on a 23-year-old analysis that expressly committed to dredging during winter months to satisfy its NEPA obligation to evaluate the impacts of dredging during summer months. For example, Corps regulations provide that a new EIS or EA is typically required for “operations and maintenance” activities when there are “changes in environmental impacts which were not considered in the project EIS or EA.” 33 C.F.R. 230.7(d); *see also* 33

⁴ *See also id.* at v-vi (“Special conditions will be placed in the dredging contracts pertaining to the use of hopper dredges, since impacts to whales, manatees and sea turtles are possible with that type of equipment. All hopper dredging will be performed within the dredging windows specified by the NMFS to avoid adverse impacts to sea turtles. Presently those windows allow that equipment to be used during the months of December through March.”); *id.* at 23 (“Dredging performed outside of [the December through March] window must use different dredging equipment [i.e., not hopper dredges]. The alternate equipment includes pipeline dredges, clamshell dredges, bucket dredges, etc. which move at much slower rates than do hopper dredges.”); *id.* at 24 (“Additional guidelines from the South Atlantic Division, COE, has established a hopper dredging window of 15 December to March to reduce potential impacts to turtles.”)

C.F.R. § 230.8 (noting that an EIS is typically required for “proposed major changes in the operation or maintenance of completed projects”). Likewise, CEQ regulations provide that, if an agency intends to rely on an existing EIS for an ongoing action, the agency must supplement the original EIS if it makes “substantial changes to the proposed action that are relevant to environmental concerns” or if “there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” 40 C.F.R. § 1502.9(d).

That is precisely the case here. Because the 1998 EIS expressly assumed dredging would be conducted between December 15 and March 30, it did not adequately evaluate the effects of or alternatives to spring and summer hopper dredging. And there is no real debate that removing the previous dredging window creates “changes in environmental impacts which were not considered in the original project EIS or EA,” or at a minimum, creates “new circumstances...relevant to environmental concerns and bearing on the proposed action of its impacts.” As described below in Section II, year-round hopper dredging would almost certainly injure and kill federally protected loggerhead sea turtles and may also cause substantial harm to fisheries and other vulnerable species. As the Georgia Department of Natural Resources warned, “Unrestricted hopper dredging in Georgia will result in significant mortality of marine wildlife and the possible extirpation of species including loggerhead turtles....” DNR Mem. at 9.

D. The Corps conducted a NEPA analysis in other states.

Although not dispositive, the Corps’ actions in other states suggest it is aware of its obligations to prepare at least some form of new or supplemental NEPA analysis before proceeding with year-round dredging in southeast harbors. For example, before abandoning maintenance dredging windows in North Carolina, the Corps circulated a scoping announcement

to state and federal resource agencies, issued a public notice, released a draft EA, and opened a 45-day public comment period.⁵ See U.S. Army Corps of Eng’rs, Wilmington Harbor and Morehead City Harbor Maintenance Dredging and Bed Leveling: Draft Environmental Assessment (Aug. 2020), at 5 (“NC Draft EA”) (attached as Ex. 17); NC Final EA at 77. Like here, the Corps had previously prepared NEPA documents assessing the environmental impacts of maintenance dredging in Wilmington and Morehead City Harbors, but those “[p]revious analyses had assumed a hopper dredging window of 1 December to 15 April.” NC Final EA at 5, 14. As a result, in North Carolina, the Corps noted it was preparing a new EA because “[p]ursuant to NEPA, a new EA will be prepared if there are significant new circumstances or information relevant to the environmental impacts of the proposed action.” *Id.* at 77. The Corps has not articulated any rational explanation for why allowing year-round maintenance dredging triggered a NEPA review in North Carolina but not here in Georgia.

II. OHM will suffer irreparable injury absent preliminary relief.

OHM and its members will suffer irreparable harm if the Corps begins dredging this summer in Brunswick Harbor without adequately analyzing the environmental impacts of year-round dredging. As now-Justice Breyer recognized in *Sierra Club v. Marsh*, 872 F.2d 497, 500 (1st Cir. 1989), the harm inflicted by a violation of NEPA is not “a ‘procedural’ harm, as if it were a harm to ‘procedure.’”

Rather, the harm at stake is a harm to the *environment*, but the harm consists of the added *risk* to the environment that takes place when governmental

⁵ Although the Corps prepared an EA in North Carolina, the EA did not accurately identify the relevant environmental concerns, did not take a hard look at the problem, and did not make a convincing case for its finding of no significant impact. Instead, the Corps should have prepared an EIS to fully assess the direct, indirect, and cumulative impacts of the decision. Still, the Corps’ acknowledgment that some form of NEPA analysis was necessary in North Carolina is telling here.

decisionmakers make up their minds without having before them an analysis (with prior public comment) of the likely effects of their decision upon the environment.

Sierra Club v. Marsh, 872 F.2d 497, 500 (1st Cir. 1989) (emphasis in original). In other words, the “the risk implied by a violation of NEPA is that real environmental harm will occur through inadequate foresight and deliberation.” *Id.* (“[W]hen a decision to which NEPA obligations attach is made without the informed environmental consideration that NEPA requires, the harm that NEPA intends to prevent has been suffered.”). This “real environmental harm” is often irreparable. As the Supreme Court has recognized, “[E]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable.” *See Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987).

Here, year-round hopper dredging will almost certainly kill and injure federally threatened loggerhead sea turtles. *See* DNR Mem. at 4. As described above, sea turtles and other sensitive species can easily become entrained in hopper dredge pipes, causing massive fractures, crushed organs, hemorrhage, and death. SELC Letter at 2–3, Goldberg, *supra*, at 17 (collecting studies and noting that hopper dredges cause “physical harm (e.g., massive injuries, fractures, crushed tissues and hemorrhage) and mortality” to sea turtles); DNR Mem. at 2–6 (describing history of sea turtles takes from hopper dredging); Dickerson, *supra*, at 2 (noting that a total of 508 sea turtle takes by hopper dredges were documented between 1980 and 2003, but that this is likely a “low estimate”); Norton Decl. ¶¶ 13–20 (describing first-hand account of dredging injuries). These effects will be particularly amplified during the next several months, when nesting females are congregated in local waters and actively using shipping channels, including Brunswick’s, during their inter-nesting periods. DNR Mem. at 2, 9.

Recent history confirms the high likelihood of turtle mortality under these circumstances. In September 2009 (several months earlier than the typical start of dredging in December but still after the majority of adult females had left the area), the Corps conducted a “test case” to determine the feasibility of summer dredging in Georgia’s harbor. DNR Mem. at 4.

Within the first nine days of dredging in Brunswick, dredges killed four loggerhead turtles before the project was discontinued. DNR Mem. at 4. In Savannah, dredges killed two loggerhead turtles in just six days before the project was shut down. *Id.* This late summer mortality rate was more than eight times higher than that of the winter dredging window, *id.*—and presumably would have been even more significant if it had taken place during the early summer timeframe.

There is no reason to believe turtles will fare any better during the upcoming maintenance dredging. Indeed, according to DNR, “similar results will occur if hopper dredging resumes in summer months.” WRD Letter at 3. However, unlike the 2009 demonstration, which had low take limits, the Corps is currently authorized to kill as many as 214 loggerheads across the Southeast over the next three years. DNR Mem. at 7. This legal allowable take for loggerheads could lead to significant declines in Georgia’s population—potentially killing as many as 87% of the females nesting in the vicinity of the Brunswick shipping channel, according to DNR data. *Id.*

Concerningly, there are no restrictions on the age class or life stage of the turtles allowed to be killed during this process. DNR Mem. at 7, 11. While any loss is unwanted, the take of reproductively active adult females—as is likely during nesting season—would be particularly devastating. *Id.* Unlike many species, loggerhead sea turtles do not reach sexual maturity until

their early to mid-30s. DNR Mem. at 11. As a result, any adult loggerhead killed would take at least three decades to replace. *See id.*

These losses will come at a high cost. Loggerhead sea turtles are listed as threatened and protected under state and federal laws. While annual nesting is slowly increasing, models show that the Northern Recovery Unit population (loggerheads born on nesting beaches from the Florida/Georgia border through southern Virginia) is only a third to half of its size from the 1960s. DNR Mem. at 7; Bryan L. Nuse, et al., *An integrated population model for loggerhead sea turtles in the Northern Recovery Unit* (Oct. 21, 2020) (attached as Ex. 18). Despite recent high nesting seasons, Georgia experienced record low nesting seasons in the early 2000s. DNR Mem. at 9. That string of low nesting years means that if current protections and management practices are kept in place, Georgia's loggerhead population is predicted to plateau or even decline for the next two decades as the hatchlings born in the early 2000s reach maturity. DNR Mem. at 9. If dredging windows or other protections are lifted, this decline could be even more precipitous. *Id.*

Courts in this Circuit and others have routinely held that this type of harm—a NEPA violation paired with a likelihood of harm to wildlife—amounts to an irreparable injury sufficient to warrant a preliminary injunction. *See, e.g., Miccosukee Tribe of Indians of Fla. v. United States*, No. 08-21747-CIV, 2008 WL 11332080, at *12 (S.D. Fla. Nov. 14, 2008) (alleged NEPA violation gave rise to irreparable harm when paired with likelihood of harm to endangered snail kite); *Sierra Club v. Norton*, 207 F. Supp. 2d 1310 (S.D. Ala. 2002) (alleged NEPA violation gave rise to irreparable harm when paired with likelihood of harm to endangered beach mouse habitat); *Sierra Club v. Martin*, 933 F. Supp. 1559, 1570 (N.D. Ga. 1996), *rev'd on other grounds*, 110 F.3d 1551 (11th Cir. 1997) (alleged NEPA violation gave rise to irreparable harm

when paired with likelihood of harm to migratory birds); *Fund For Animals v. Norton*, 281 F. Supp. 2d 209, 222 (D.D.C. 2003) (alleged NEPA violation gave rise to irreparable harm when paired with likelihood of harm to mute swans); *Fund For Animals v. Clark*, 27 F. Supp. 2d 8, 14 (D.D.C. 1998) (alleged NEPA violation gave rise to irreparable harm when paired with likelihood of harm to bison on federal parklands); *see also Fla. Wildlife Fed'n v. U.S. Army Corps of Engineers*, 404 F. Supp. 2d 1352, 1357 (S.D. Fla. 2005) (alleged NEPA violation gave rise to irreparable injury when paired with likelihood of wetlands fill); *Protect Key W., Inc. v. Cheney*, 795 F. Supp. 1552, 1563 (S.D. Fla. 1992) (“Irreparable harm results where environmental concerns have not been addressed by the NEPA process.”).

This Court should do the same. If year-round hopper dredging kills sea turtles and other wildlife—which it very likely will—no amount of subsequent NEPA analysis will bring them back to life, and OHM and its members’ interests in observing, studying, photographing, protecting, and enjoying these animals will be irreparably harmed. *See* Decl. of Catherine Ridley ¶¶ 21–23 (attached as Ex. 19), Decl. of Rebecca Bell ¶¶ 7, 12 (attached as Ex. 20); Decl. of Kristina Carroll ¶¶ 6, 18 (attached as Ex. 21); Decl. of Carolyn Janssen ¶¶ 6, 10 (attached as Ex. 22); Norton Decl. ¶¶ 21–22; *see also, e.g., Humane Soc’y of the U.S. v. Hodel*, 840 F.2d 45, 52 (D.C. Cir. 1988) (finding harm where action would “deplet[e] the supply of animals and birds that refuge visitors seek to view”); *Fund for Animals, Inc. v. Lujan*, 962 F.2d 1391, 1396 (9th Cir. 1992) (finding that “the diminished opportunity of the Fund’s members to view the northern bison herd in Yellowstone establishes standing to challenge the 1990 bison management plan”). This is precisely the type of injury that preliminary injunctions are meant to address. *See Amoco*, 480 U.S. at 545; *see also U.S. v. Jenkins*, 714 F. Supp. 2d 1213, 1221–22 (S.D.G.A. 2008) (“[A] court may more readily find that an environmental injury is irreparable”).

III. The balance of equities tips in favor of issuing a preliminary injunction.

Given the high likelihood of irreparable environmental injury, the balance of equities tips in favor of granting a preliminary injunction. As the Supreme Court has recognized, “[I]f [an environmental] injury is sufficiently likely, ... the balance of harms will usually favor the issuance of an injunction to protect the environment.” *See Amoco*, 480 U.S. at 545.

OHM recognizes that regular removal of sediment is necessary to maintain safe and economically productive shipping channels. However, OHM’s requested preliminary injunction is narrowly tailored to restrict only hopper dredging outside of traditional winter dredging windows until the Corps conducts a legally sufficient environmental review under NEPA. Dredging with another type of dredge or dredging during traditional maintenance dredging windows until the completion of the NEPA process will not cause any safety concerns or shipping delays in Brunswick Harbor. Indeed, the Corps has successfully maintained Brunswick Harbor for decades while abiding by traditional winter dredging windows. In addition, it is not uncommon for maintenance dredging to be delayed due to protected species considerations. *See* 1997 SARBO (noting that projects at Kings Bay, Brunswick Harbor, Savannah Harbor, and Morehead City Harbor were discontinued before completion due to sea turtle take); DNR Mem. at 4 (noting that projects at Brunswick and Savannah Harbors were discontinued before completion due to sea turtle take).

Although delaying dredging or using a different dredge type may be inconvenient or add expense, those considerations should not outweigh the high likelihood of irreparable harm to a federally threatened species or the public interest in ensuring that the Corps complies with federal environmental laws. *See Miccosukee Tribe of Indians of Fla. v. United States*, No. 08-21747-CIV, 2008 WL 11332080, at *13 (S.D. Fla. Nov. 14, 2008) (granting preliminary

injunction and noting that any injury to the Corps would largely “be attributable to the Corps itself, [because] it could have avoided this lawsuit (and others like it) by scrupulously following all relevant federal laws”).

IV. An injunction is in the public interest.

A preliminary injunction would be in the public interest. “The public interest, as identified by Congress in passing NEPA and the ESA, favors informed agency decision-making and the protection of endangered species.” *Sierra Club v. Norton*, 207 F. Supp. 2d 1310, 1342 (S.D. Ala. 2002); *see also Nat’l Wildlife Fed’n v. Marsh*, 721 F.2d 767, 786 (11th Cir. 1983), *abrogated on other grounds by Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360 (1989) (“Issuance of the injunction will serve the public interest, given the substantial issues involved both as to the proper use of federal funds and protection of the environment.”).⁶

Both of these interests are present here. First, there is a strong public interest in preserving Georgia’s coastal wildlife, as shown in the attached declarations. *See generally* Ridley Decl.; Norton Decl.; Bell Decl.; Carroll Decl.; Janssen Decl. This interest is also reflected by the

⁶ *See also Miccosukee Tribe of Indians of Fla. v. United States*, No. 08-21747-CIV, 2008 WL 11332080, at *12 (S.D. Fla. Nov. 14, 2008) (“Ensuring that federal laws are followed certainly cannot be said to be adverse to the public interest, especially when the balance of the harms favors granting an injunction so that such federal law violations can be remedied.”); *Sierra Club v. Martin*, 933 F. Supp. 1559, 1572 (N.D. Ga. 1996), *rev’d on other grounds*, 110 F.3d 1551 (11th Cir. 1997) (finding that “the public has an interest in preventing Defendants from acting in manners inconsistent with the applicable law,” as well as an “interest in preserving vital aspects of the environment” and holding that public interest weighed in favor of granting preliminary injunction because “birds that will be killed cannot be replaced”); *Florida Key Deer v. Stickney*, 864 F. Supp. 1222, 1241 (S.D. Fla. 1994) (“Good administration of [a] statute is in the public interest and that will be promoted by taking timely steps when necessary to prevent violations even when they are about to occur or prevent their continuance after they have begun.”) (internal quotations and citations omitted); *cf. Poarch Band of Creek Indians v. Hildreth*, 656 F. App’x 934, 944 (11th Cir. 2016) (holding that compliance with federal statutory scheme serves the public interest).

strong opposition of the Georgia DNR in its role as a “public trustee[] of the coastal waters and habitats for succeeding generations,” O.C.G.A. § § 12-5-321. According to the state:

The recovery of Georgia’s loggerhead turtle population is considered a high priority for the state. As such, Georgia DNR has spent considerable time and energy recovering Georgia’s loggerhead sea turtle population.... Unrestricted hopper dredging in Georgia will result in significant mortality of marine wildlife and the possible extirpation of species including loggerhead turtles....

DNR Mem. at 9, 11.

Second, there is a significant public interest in requiring the Corps to comply with NEPA and other federal laws. *See Wilderness Watch v. Mainella*, 375 F.3d 1085, 1094 (11th Cir. 2004) (describing purpose of NEPA); *Johnson v. U.S. Dep’t of Agric.*, 734 F.2d 774, 788 (11th Cir. 1984) (“Congressional intent and statutory purpose can be taken as a statement of public interest.”). That interest is particularly compelling here, where the Corps did not even attempt to prepare an environmental review.

V. The Court should not require OHM to post a bond under Fed. R. Civ. P. 65(c).

Although Rule 65(c) allows the posting of a bond, it is “well-established” in the Eleventh Circuit that “the amount of security required by the rule is a matter within the discretion of the trial court ... [and] the court may elect to require no security at all.” *BellSouth Telecommunications, Inc. v. MCIMetro Access Transmission Servs., LLC*, 425 F.3d 964, 971 (11th Cir. 2005). In public interest actions such as this one, courts routinely require no security or only nominal security. *See S. Appalachian Biodiversity Project v. U.S. Forest Serv.*, 162 F. Supp. 2d 1365, 1367 (N.D. Ga. 2001) (requiring no bond); *State of Ala. ex rel. Baxley v. Corps of Engineers of U. S. Army*, 411 F. Supp. 1261, 1275 (N.D. Ala. 1976) (requiring nominal \$1 bond); *Natural Resources Defense Council v. Morton*, 337 F. Supp. 167 (D.D.C.1971), *aff’d on other grounds*, 458 F.2d 827 (1972) (requiring nominal \$100 bond). As many courts have noted,

to do otherwise would effectively “close the courthouse door in public interest litigation by imposing a burdensome security requirement on plaintiffs who otherwise have standing to review governmental action.” *Baxley*, 441 F. Supp. at 1275; *Nat. Res. Def. Council, Inc. v. Morton*, 337 F. Supp. 167, 168 (D.D.C. 1971) (“To require the plaintiffs in the case at bar to post security in the amount requested by the Government to cover the alleged losses would have the effect of denying three nonprofit environmental organizations from obtaining judicial review of the defendant’s actions under NEPA.”). This is particularly true in cases like this one, where OHM has established a high likelihood of success on the merits.

CONCLUSION

Given the clear violation of NEPA and the high likelihood of irreparable harm from abandoning historic dredging windows, the Court should enter a preliminary injunction enjoining the Corps or its agents from proceeding with hopper dredging in Brunswick Harbor outside of traditional winter dredging windows until the Corps has conducted a legally sufficient environmental review as required by NEPA.

Respectfully submitted this 3rd day of May, 2021.

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CERTIFICATE OF SERVICE

I certify that on May 3rd, 2021, I electronically filed the foregoing *Motion for Preliminary Injunction* with the Clerk of Court using the CM/ECF system. I also served a copy with the complaint by certified mail to the following recipients:

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