

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

DAVID EPSTEIN, BRENDA LACKINGS,)
THOMAS RYAN, ELIZABETH AND)
WILLIAM SEWELL,)

Plaintiffs, individually)
and on behalf of a class)
of similarly situated)
individuals)

CIVIL ACTION NO. _____

VERSUS)

SECTION _____

THE UNITED STATES ARMY CORPS)
OF ENGINEERS,)
Defendant)

**CLASS COMPLAINT FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY
INJUNCTION, AND PERMANENT INJUNCTION**

NOW INTO COURT, through undersigned counsel, come Plaintiffs, David Epstein, Brenda Lackings, Thomas Ryan, and Elizabeth and William Sewell, individually and on behalf of a class of similarly situated individuals, who in this Class Complaint for Temporary Restraining Order, Preliminary Injunction, and Permanent Injunction, respectfully aver as follows:

INTRODUCTION

1.

The dirt, noise and inconvenience caused by construction of the enormous Southeast Louisiana Urban Flood Control Project (the "SELA Project" or "Project") are apparent to all who visit the historic neighborhoods of New Orleans where the Project is currently under construction. Less obvious, however, are the millions of dollars in damages to historic properties caused by the Project construction. Pile-driving and other heavy construction equipment are

causing vibrations similar to earthquakes that are seriously damaging, and in some cases destroying, the foundations of properties adjacent to the Project. Ground water pumping or “de-watering” is lowering local water-tables, causing ground subsidence, and sinking buildings.

2.

The Project is currently under construction in nationally recognized historic districts where many properties are over 100 years old. Property owners are unable to normally access their historic homes and businesses due to miles of open trenches and closed streets, and are prevented from the quiet use and enjoyment of their properties due to the incessant cacophony, dust, dirt and debris emitted by the Project. Building-shaking vibrations last all day long, rendering some homes uninhabitable. Foundations are broken, floors are sinking, interior and exterior walls are shearing, roofs are collapsing and leaking, sewer mains are broken, and doors and windows no longer operate. Hundreds, possibly thousands, of historic properties are adversely affected.

3.

The public was told by the U.S. Army Corps of Engineers (the “Corps”) and its local sponsor the Sewerage and Water Board of New Orleans (“SWB”) on their joint SELA website the following information about the Project:

“We do expect some minimal inconveniences such as noise, traffic rerouting and parking limitations. In order to reduce these inconveniences we will: Limit canal construction to 2 to 4 block areas...”

These were gross misrepresentations. Years before construction began, the Corps specifically anticipated substantial construction-caused damage to homes and businesses and *never* advised the public of this fact. Further, the Corps permitted its Contractors to commence

work on all of the drainage canals *simultaneously*, excavating at once the neutral grounds of Jefferson Avenue, Napoleon Avenue, Louisiana Avenue, and South Claiborne Avenue, leaving miles of closed streets, open and incomplete canals, and worksites littered with equipment and materials. This has effectively paralyzed the historic neighborhoods in these areas for years.

4.

The Project is chaotic and out of control; the Corps has not required its Contractors to proceed with construction sequentially or logically. Rather, Contractors have abandoned work on some portions of the Project to work on others; work has been inexplicably delayed for months at other locations; streets and trenches have been excavated and resurfaced only to have the same process at the same location repeated numerous times; inappropriate equipment and/or insufficient and inadequately trained personnel have been the excuse for delays at other locations. Completion deadlines have been missed and extended over the years, exacerbating the damage to historic properties.

5.

The Corps failed to inform the public that it *knew* significant damage to homes and businesses was going to occur as a result of the SELA Project years ahead of time. In 2007, millions of dollars in damages were paid by the SWB to residents for exactly the same kind of Project inflicting exactly the same kind of damage in an area of the Broadmoor National Historic District. Yet, the Corps failed to properly analyze and address these potential damages in the Programmatic Agreement (“PA”) that it executed in 2010 concerning this Project, even though the purpose of the PA is to prevent and mitigate adverse effects on historic properties and neighborhoods vulnerable to the SELA Project construction. Furthermore, once the Project

began and the damages to historic properties and neighborhoods became apparent, the Corps still took no reasonable steps to prevent, minimize, or mitigate these damages, and Plaintiffs' damages have ensued.

6.

While no one would disagree that flood protection will greatly benefit New Orleans and that some discomfort for the benefit of the greater good is acceptable, the price being imposed upon the Plaintiffs is unbearable and unreasonable. Their quality of life is in shambles. Historic homes and businesses are in ruins. Owners are expected to shoulder these damages alone. No one accepts responsibility or offers help. The damage continues unabated with no end in sight.

7.

Plaintiffs are now forced to seek Court intervention to obtain the relief that the Corps should have provided through properly conducting the National Historic Preservation Act ("NHPA") review process, implementing the SELA Project construction consistent with NHPA principles, and abiding by the terms of the PA to address and remedy the damages caused to Plaintiffs' historic properties and neighborhoods by the Project.

JURISDICTION

8.

This Court has jurisdiction over Plaintiffs' claims pursuant to 28 U.S.C. § 1331 (federal question); 28 U.S.C. § 1346(a) (claims against the United States); 28 U.S.C. §§ 2201-02 (declaratory relief); 54 U.S.C. § 300101, *et seq.* (the National Historic Preservation Act "NHPA"); 5 U.S.C. § 551, *et seq.* (the Administrative Procedures Act "APA"); 28 U.S.C. § 2412 (the Equal Access to Justice Act "EAJA"); and all other applicable federal laws and regulations.

VENUE

9.

Venue is proper in this district pursuant to 28 U.S.C. § 1391(b), (e).

PARTIES

10.

Plaintiffs are individuals domiciled in Orleans Parish, Louisiana, within the Eastern District of Louisiana. At all material times, Plaintiffs have owned and/or resided in historic properties located within the following federally and locally recognized historic districts of the City of New Orleans: Broadmoor, Carrollton, Central City, Garden District, Irish Channel, and Uptown (collectively herein the “Historic Districts”).

11.

Plaintiffs and their historic properties and neighborhoods have suffered and will continue to suffer irreparable and substantial damages caused by the following phases of the SELA Project which are currently under construction: (1) Jefferson Avenue Canal, Phase 1, South Claiborne Ave. to Dryades St.; (2) Jefferson Avenue Canal, Phase 2, Dryades St. to Constance St.; (3) Louisiana Avenue Canal, South Claiborne Ave. to Constance St.; (4) Napoleon Avenue Canal, Phase 2, Carondelet St. to Constance St.; (5) Napoleon Avenue Canal, Phase 3, Carondelet St. to Constance St.; (6) South Claiborne Avenue Canal, Phase 1, Monticello Ave. to Leonidas St.; and (7) South Claiborne Avenue Canal, Phase 2, Mazant St. to Piety St.

12.

Plaintiffs' properties constitute "Historic Properties" and/or "Contributing Elements," as defined in the PA, in the Historic Districts in which they are located. Many of these properties are also located within the Area of Potential Effect ("APE") and the Construction Impact Zone ("CIZ"), the areas identified by the Corps in the PA where the potential exists for indeterminate damage to properties or structures as a result of construction and/or soil vibrations from the SELA Project. Plaintiffs' properties, have in fact, suffered irreparable damages and will continue to suffer irreparable damages from the SELA Project's construction vibrations, as well as from other construction work and practices arising from and related to the Project.

13.

Named Plaintiff, David Epstein, is the owner and resident of the house, property, and all improvements located at 5627 Prytania St., New Orleans, Louisiana. Mr. Epstein's historic property at this address has suffered and will continue to suffer irreparable damages as a result of the reckless and destructive construction practices of the Corps and Contractors on the SELA Project.

14.

Named Plaintiff, Brenda Lackings, is the owner and resident of the house, property, and all improvements located at 8819 South Claiborne Ave., New Orleans, Louisiana. Ms. Lackings' historic property at this address has suffered and will continue to suffer irreparable damages as a result of the reckless and destructive construction practices of the Corps and Contractors on the SELA Project.

15.

Named Plaintiff, Thomas Ryan, is the owner and resident of the house, property, and all improvements located at 1106 Napoleon Ave., New Orleans, Louisiana. Mr. Ryan's historic property at this address has suffered and will continue to suffer irreparable damages as a result of the reckless and destructive construction practices of the Corps and Contractors on the SELA Project.

16.

Named Plaintiffs, Elizabeth and William Sewell, are the owners and residents of the house, property, and all improvements located at 2603 Jefferson Ave., New Orleans, Louisiana. The Sewells' historic property at this address has suffered and will continue to suffer irreparable damages as a result of the reckless and destructive construction practices of the Corps and Contractors on the SELA Project.

17.

Plaintiffs are specific and intended third party beneficiaries to the Programmatic Agreement ("PA") entered into by the Corps and other entities for the planning, implementation, and construction of the SELA Project.

18.

Plaintiffs constitute interested and affected members of the "public" under 36 C.F.R. § 800.2, and are within the zones of interest created by federal laws that are applicable to the SELA Project's initiation, construction, and continuance, including the NHPA and its implementing regulations.

19.

Plaintiffs have objected to the methods by which the SELA Project is being carried out in their historic neighborhoods and in proximity to their historic properties, including but not limited to, direct written and oral communications to and with the Corps and the SWB. The Corps has largely ignored these communications and taken no actions to avoid, minimize, or mitigate damages to Plaintiffs.

20.

Made defendant is the United States Army Corps of Engineers (the “Corps”), a division of the United States government under the direct jurisdiction of the United States Army, which is amenable to suit in accordance with applicable federal laws and regulations. The Corps is responsible for the SELA Project, including avoiding, minimizing, and mitigating damages to Plaintiffs’ historic properties caused by the Project. The Corps has neglected its legal responsibilities under relevant agreements and law to prevent and/or mitigate the irreparable damages caused to Plaintiffs’ historic properties by the Contractors hired by the Corps to carryout the Project.

CLASS ALLEGATIONS

21.

The named-Plaintiffs bring this Complaint on their own behalf and on behalf of all individuals who own and/or reside in “Historic Properties” and/or “Contributing Elements,” as defined in the PA, within the Historic Districts, APE, and/or CIZ, and who have suffered and continue to suffer irreparable damages to their historic properties and neighborhoods as result of the SELA Project and the Corps’ failure to abide by the PA and NHPA to avoid, minimize, and mitigate these damages.

22.

The class is so numerous that joinder of all members is impractical. There are thousands of Historic Properties and Contributing Elements in the Historic Districts, APE, and/or CIZ, which are owned and/or resided in by thousands of individuals who are suffering irreparable damages as a result of the SELA Project.

23.

There are numerous questions of law and fact common to the class, including but not limited to: (1) the Corps' breach of its legal responsibilities pursuant to the NHPA and the PA; (2) the Corps' knowledge that its Contractors' work practices on the SELA Project have caused unnecessary and irreparable damages to Plaintiffs and their historic properties; (3) the Corps' failure to halt the Contractors' damaging work practices on the SELA Project despite having both actual and constructive knowledge of the damages inflicted on Plaintiffs due to these work practices; (4) the Corps' misrepresentation to the public that "minimal inconveniences" were expected, and failure to limit canal construction to two to four block areas as represented on the SELA website and in other public materials; (5) the Corps' failure to consider and address potential damages caused to Plaintiffs' historic properties by the Contractors' work on the SELA Project other than damages caused by vibrations; (6) the Corps' failure to implement sufficient vibration monitoring for the SELA Project as required by the PA; (7) the Corps' failure to impose damage mitigation policies and procedures upon the Contractors to address the damages suffered and to be suffered by Plaintiffs and their historic properties; and (8) whether Plaintiffs are third party beneficiaries to the PA.

24.

The named Plaintiffs' claims against the Corps for the violation of its legal obligations pursuant to the NHPA and PA are typical of the claims of the class, as the class consists of individuals who have suffered damages to their historic properties and otherwise as a result of the same violations by the Corps.

25.

The named Plaintiffs will fairly and adequately represent the interests of the class, as named Plaintiffs possess a strong personal interest in the subject matter of the lawsuit and are represented by counsel with experience in federal court, complex litigation, and property damage claims. Counsel have the legal knowledge and resources to fairly and adequately represent the interests of all class members.

26.

The Corps has refused to act on grounds generally applicable to the class. Its policies, practices, and omissions have affected all class members. Accordingly, final injunctive and declaratory relief is appropriate to the class as a whole.

STANDING

27.

Plaintiffs will be irreparably injured by the Corps' continued failure to enact and enforce policies and procedures upon the Contractors, who work on the SELA Project under the Corps' legal control and responsibility, to avoid, minimize, and/or mitigate damages to Plaintiffs' historic properties and neighborhoods, which are being progressively damaged by the SELA Project. Plaintiffs' injuries will be redressed by a favorable decision of this Court.

FACTS

28.

The Corps' failure to enact and enforce damage reduction policies and procedures upon its Contractors working on the SELA Project, pursuant to the Corps' authority and responsibility under the PA and applicable law, will cause Plaintiffs irreparable injury, loss, and damages for the reasons that follow:

29.

In 1996, the U.S. Congress authorized the Southeast Louisiana Urban Flood Control Program ("SELA") to alleviate flooding in Orleans Parish and surrounding areas through the construction of canals and pumping stations.

30.

In 1997, the Corps and SWB, with the Louisiana Coastal Protection and Restoration Authority ("LCPRA") as a partnering agency, entered into a Project Cooperation Agreement to administer SELA in Orleans Parish.

31.

In 2009, the Corps and LCPRA executed a Project Partnership Agreement ("PPA") whereby the Corps was obligated to design and construct three phases of the SELA project in Orleans and Jefferson parishes, including the Project and construction at issue herein.

32.

In 2010, the Corps, LCPRA, and the Louisiana State Historic Preservation Office ("LSHPO") executed the Programmatic Agreement ("PA") for the SELA Project to identify and minimize potential adverse effects of this Project on historic properties and districts.

33.

The PA recognized that the SELA Project would entail the following construction activities: “sheet pile driving, excavation and hauling, dismantling and removal of existing drainage structures including old concrete pipes and culverts, placement of new drainage infrastructure such as new concrete culverts, pipes, grates, gates and slope pavement, bridge construction, and existing pump station expansion and new pump station installation.”

34.

In the PA, the Corps concludes that the SELA Project may have an adverse effect on seven different National Register Historic Districts. The PA identifies the APE for “indeterminate damage to properties...as a consequence of construction vibrations” and the Construction Impact Zone (“CIZ”) “where potential exists for soil vibration associated with project-related activities.” Plaintiffs’ historic properties are within these National Register Historic Districts, the APE, and/or the CIZ.

35.

Pursuant to the PA, the Corps agreed to implement the SELA Project in a manner “to take into account any adverse effects...on historic properties within the historic districts....”

36.

In the “Construction Monitoring” provision of the PA, the Corps is to require the Contractors to “perform all work in a manner which will limit vibrations at the structure nearest to the site of construction activity to a maximum of 0.25 inches per second.” “Vibrations [are to] be recorded by monitoring devices which will be monitored by contract personnel during construction.” The Corps is required to implement “stop work protocols” as part of its agreement with vibration monitoring firms.

37.

The “Construction Monitoring” provision of the PA further requires the Corps to develop an informational brochure for the general public regarding the vibration-monitoring program and disseminate this brochure. This brochure is to contain “contact information for expressions of public concern through... [the Corps].”

38.

The PA contains a “Discoveries” provision, under which if the Corps determines that the SELA Project affects a previously unidentified historic property or affects a known historic property in an unanticipated manner, the Corps is authorized to stop a Contractor from working and require the Contractor “to take all reasonable measures to avoid or minimize harm to the property....”

39.

Following execution of the PA, the Corps awarded multi-million dollar contracts to the following Contractors to construct the SELA Project: B&K Construction Co. (Jefferson Ave. Canal, Phase 1, and South Claiborne Avenue Canal, Phase 2); Cajun Constructors, LLC (Jefferson Avenue Canal, Phase 2, and South Claiborne Avenue Canal, Phase 1); and Boh Bros. Construction Co., LLC (Louisiana Avenue Canal and Napoleon Avenue Canal, Phases 2 and 3) (herein collectively the “Contractors”).

40.

The Corps’ SELA website states in part, under a Section entitled “How Will the SELA Project Affect Me and My Family?”, the following:

“We do expect some minimal inconveniences such as noise, traffic rerouting and parking limitations. In order to reduce these inconveniences we will: Limit canal construction to 2 to 4 block areas...”

Contrary to the “minimal inconveniences” listed above, the Corps specifically anticipated that Project construction would cause significant structural damage to homes and businesses, knowing this based upon its prior experience from the Broadmoor Project, and yet *never* advised the public of this information. Further, the Corps permitted the Contractors to commence work on all of the Project phases *simultaneously*, which resulted in excavating at once the neutral grounds of Jefferson Avenue, Napoleon Avenue, Louisiana Avenue, and South Claiborne Avenue. These excavations left miles of open trenches, incomplete canals, and worksites littered with equipment and material, effectively paralyzing the Plaintiffs’ historic neighborhoods for years.

41.

To date, the Contractors’ work on all canals and phases of the SELA Project is at varying stages of construction, but largely all work is still under progress. Contractors have abandoned work on some portions of the Project to work on others; work has been inexplicably delayed for months at other locations; streets and trenches have been excavated and resurfaced only have the process repeated at the identical location numerous times; insufficient equipment and/or personnel have been the excuse for delays at other locations. Completion deadlines for the SELA Project have been missed and extended over the years, exacerbating the damage to Plaintiffs’ historic properties.

42.

Plaintiffs' historic properties have suffered irreparable harm and will continue to suffer irreparable harm as a result of the unreasonable and reckless construction methods and practices employed by the Contractors on the SELA Project. These construction methods and practices have resulted in and will continue to result in: (1) earthquake-like vibrations from pile driving, other drilling and excavation, and movement of over-sized construction equipment and trucks; (2) widespread soil subsidence and sinking from water drainage, dewatering, and excavation with resultant catastrophic damage to structures; (3) emission of excessive dust, dirt, particles, chemicals, and other substances from construction activities; (4) constant and/or excessive cacophony from construction and construction-related activities; and (5) blocking and limiting visual and physical access to Plaintiffs' historic properties due to construction, construction equipment and supplies, work trailers and vehicles, employees' personal vehicles, port-a-potties, signage, and barricades. Furthermore, the Contractors have failed to appropriately or sufficiently implement damage avoidance or mitigation procedures to address the foregoing problems arising from the construction of the SELA Project. Finally, the Contractors have failed to work on schedule due to insufficient and/or idle workers and equipment, as well as other issues unclear to Plaintiffs at this time.

43.

The Contractors' unreasonable and reckless construction practices have caused Plaintiffs and their historic properties to suffer irreparable damages and will cause further irreparable damages, including but not limited to: (1) physical destruction, damages, and/or alterations to the Plaintiffs' historic properties, such as (a) structurally compromised, damaged, and/or weakened foundations, supports, walls, roofs, joists, beams, slabs, and/or piers; (b) damage to doors, walls,

ceilings, floors, support posts, floor joists, roofs, porches, balconies, patios, windows, plumbing and plumbing fixtures, electrical connections and fixtures, HVAC systems and components, HVAC ducts and vents, insulation, caulking, molding, counters, cabinets, shelves, window dressings, and all furnishings; (c) damages secondary to construction-related damages such as water damage from leaking roofs, walls, windows, pipes, and insulation, flooding of the properties, and fallen or broken art, pictures, paintings, china, crystal, porcelain, glass, and other possessions and valuables; (2) changes to the character of the Plaintiffs' historic properties' use and physical features that contribute to the historic significance of these properties, such as the aforementioned physical damages, the inability of Plaintiffs to fully and properly utilize their historic properties for their intended purpose, and damages to the historically significant designs of these properties; (3) introduction of visual, atmospheric, and/or audible elements that diminish the integrity of the significant historic features of Plaintiffs' historic properties, such as the excessive dust, dirt, and chemicals emitted around and on the properties, the incessant noises arising from the construction activities, and the construction activities and materials which diminish the visual aspects of these properties; (4) Plaintiffs' use and enjoyment of their historic properties are irreparably and substantially impaired by the noise, visual blight, and safety risks resulting from the construction and construction-related activities of the SELA Project; and (5) Plaintiffs have suffered emotional and mental distress and anguish as a result of their constant exposure to the construction of the SELA Project and living in homes damaged by this construction.

44.

The Corps has actual and constructive knowledge of the significant and irreparable damages caused by the Contractors to the Plaintiffs and their historic properties, but the Corps has failed to act pursuant to its responsibility under the NHPA and PA to stop the Contractors' harmful work practices and require the Contractors to conduct their work on the Project in a way that avoids, minimizes, and mitigates damages to Plaintiffs' historic properties.

45.

Despite the Corps' legal responsibility for the SELA Project, including the prevention and mitigation of damages to historic properties caused by the Contractors, a representative of the Corps in an October 2015 town hall meeting claimed that the Corps does not have direct legal control over the Contractors to require the Contractors to carryout their work in a way to reduce adverse effects on Plaintiffs' historic properties.

46.

The Corps failed to properly consider and enact procedures to prevent reasonably anticipated damages caused to Plaintiffs' historic properties in its Section 106 review under the NHPA. Further, the Corps has failed to consider and enact procedures to prevent unanticipated damages caused to Plaintiffs' historic properties. Although these anticipated and unanticipated damages are wreaked upon Plaintiffs' historic properties, the Corps has taken no actions to reconsider its previous analysis of damages and allows the Contractors to carry out construction practices on the SELA Project which have inflicted and will continue to inflict irreparable damages to Plaintiffs' historic properties.

47.

The irreparable damages caused and to be caused to Plaintiffs and their historic properties by the Contractors' work on the SELA Project will continue indefinitely if the Corps continues to ignore its legal obligations to address and remedy these damages. Accordingly, Plaintiffs respectfully request that the Court order what the Corps refuses to do – **require the Corps to implement measures to ensure no further irreparable damages are inflicted upon Plaintiffs' historic properties by the unreasonable and reckless work practices currently employed by the Contractors on the Project.**

NHPA

48.

Pursuant to the NHPA, the federal government's policy is to "use measures, including financial and technical assistance, to foster conditions under which our modern society and our historic property can exist in productive harmony and fulfill the social, economic, and other requirements of present and future generations." 54 U.S.C. § 300101. In furtherance of this policy, the NHPA requires a federal agency, when it has "direct or indirect jurisdiction" over a project, to consider the effects of the project on historic properties. 54 U.S.C. § 306108; 36 C.F.R. § 800.1(a).

49.

Section 106 of the NHPA provides the steps by which a federal agency satisfies its NHPA requirements, specifically, by identifying historic properties potentially affected by the project, assessing these effects, and "seek[ing] ways to avoid, minimize or mitigate any adverse effects on historic properties." 36 C.F.R. § 800.1(a).

50.

“The views of public are essential to informed Federal decisionmaking in the section 106 process. The agency official shall seek and consider the views of the public in a manner that reflects the nature and complexity of the undertaking and its effects on historic properties, the likely interest of the public in the effects on historic properties....” 36 C.F.R. § 800.2(d)(1).

51.

The federal agency must determine and document the area of potential effects (“APE”) and the historic properties within the APE for the project. 36 C.F.R. § 800.4. The APE is “the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties....” 36 C.F.R. § 800.16(d).

52.

Next, the federal agency is required to apply the criteria of adverse effects of the undertaking on the historic properties within the APE, including considering the views of the public. 36 C.F.R. § 800.5 (a). “Criteria of adverse effects” are defined as “when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property’s location, design, setting, materials, workmanship, feeling, or association....” *Id.* “Adverse effects may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative.” *Id.* The NHPA sets forth numerous examples of adverse effects, including but not limited to, “[p]hysical destruction of or damage to all or part of the property,” “[c]hange of the character of the property’s use or of physical features within the property’s setting that contribute to its historic significance,” and

“[i]ntroduction of visual, atmospheric or audible elements that diminish the integrity of the property’s significant historic features.” *Id.*

53.

To comply with the NHPA, the federal agency must “develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects on historic properties.” 36 C.F.R. § 800.6 (a). The federal agency must include the public in the evaluation of adverse effects and take public views into account in developing alternatives or modifications to address adverse effects. *Id.* at (a)(4).

54.

A federal agency may develop a programmatic agreement to govern actions to be taken when historic properties are discovered during the implementation of an undertaking. 36 C.F.R. § (a)(1). A programmatic agreement governs “the implementation of a particular program or the resolution of adverse effects from certain complex project situations or multiple undertakings.” 36 C.F.R. § 800.14(b). A programmatic agreement may be used only in certain identified situations, including when effects on historic properties are similar and repetitive or regional in scope and when nonfederal parties are delegated major decisionmaking responsibilities. *Id.* The federal agency must involve the public and interested individuals in developing a programmatic agreement. *Id.* at (b)(2). A programmatic agreement “shall govern the undertaking and all of its parts.” 54 U.S.C. § 306114.

55.

A programmatic agreement executed pursuant to a federal agency’s obligation under Section 106 of the NHPA is interpreted and enforced pursuant to contract law principles.

56.

The NHPA creates a private right of action under which citizens may sue a federal agency to enforce the provisions of the Act. 54 U.S.C. § 307105.

**CLAIM FOR RELIEF
(Violation of the PA)**

57.

Plaintiffs repeat and re-allege all foregoing allegations.

58.

Plaintiffs are third party beneficiaries to the PA because it was specifically enacted for the direct benefit of Plaintiffs as the owners and/or residents of historic properties located within the Historic Districts, APE, and/or CIZ. The purpose of the PA is to identify historic properties and districts subject to damage as a result of the SELA Project and enact measures to avoid, minimize, and mitigate any such damages to Plaintiffs' historic properties and neighborhoods. Furthermore, the PA acknowledges the right of the public and thus, the Plaintiffs, to express concerns regarding construction-related vibrations from the SELA Project.

59.

The PA specifically anticipates and acknowledges that damages to Plaintiffs' historic properties as a result of "construction vibrations" and "soil vibrations" are likely to occur, but fails to acknowledge the irreparable damages caused by other actions of the Contractors working on the SELA Project, including but not limited to soil subsidence and sinking, emission of construction materials and chemicals, excessive noise, obstructed access and views, and delays in construction. Accordingly, these additional damages were "unanticipated" by the Corps at the

time the PA was executed and should have been addressed by the Corps as set forth in the “Discoveries” provision of the PA, yet the Corps has failed to do so.

60.

The Corps is on notice that activities from the SELA Project are adversely affecting previously unidentified properties that may be eligible for inclusion in the NRHP, yet the Corps has failed to carry out its obligations under the PA to “require the contractor[s] to stop construction in the vicinity of the discovery and [] require the contractor[s] to take all reasonable measures to avoid or minimize harm to the property until the [Corps] concludes consultation with the SHPO.” Thereafter, the Corps is required to “modify the scope of work as necessary to implement the recommendations,” but likewise has failed to do so.

61.

The Corps has violated the terms of the PA because the Corps has direct and constructive knowledge that the work practices of the Contractors working on the SELA Project have “affect[ed] a known historic property in an unanticipated manner,” but the Corps has failed to carry out its obligations under the PA to “require the contractor[s] to stop construction in the vicinity of the discovery and [] require the contractor[s] to take all reasonable measures to avoid or minimize harm to the property until the [Corps] concludes consultation with the SHPO.” Thereafter, the Corps is required to “modify the scope of work as necessary to implement the recommendations,” but likewise has failed to do so.

62.

The Corps has breached its obligation under the PA to conduct construction-vibration monitoring, as the Contractors hired by the Corps have not properly carried out vibration-monitoring practices, and the Corps is aware of the Contractors’ failure to implement vibration-

monitoring as required by the PA. Furthermore, the Corps has failed to stop work on those occasions where construction caused vibrations to exceed the limit of 0.25 inches per second as set forth in the PA.

63.

Because the Corps has violated the terms of the PA and these violations have resulted in irreparable damages to Plaintiffs and their historic properties, the Court should issue an injunction requiring the Corps to implement the stop work provision in the Discoveries provisions of the PA and prohibit further work by the Contractors on the SELA Project until the Corps complies with its obligations under the PA to avoid, minimize, and mitigate damages to Plaintiffs' historic properties. Further, given the Corps' refusal to fulfill its responsibilities to Plaintiffs under the PA, Plaintiffs request that the Court appoint a special master to oversee the Corps' actions in halting the Contractors' work on the Project and developing policies and procedures for the Contractors to follow which would mitigate or minimize the damages inflicted upon Plaintiffs' historic properties. Unless and until such an injunction is issued, Plaintiffs will be irreparably harmed.

RELIEF REQUESTED

WHEREFORE, Plaintiffs respectfully request that this Honorable Court grant the following relief:

A. Immediately issue a temporary restraining order in the form and substance of the preliminary injunction prayed for below;

B. Certify a class of Plaintiffs pursuant to Federal Rule of Civil Procedure 23;

C. Adjudge and declare that the Corps has violated the NHPA and the PA in its failure to prevent the Contractors from inflicting unnecessary, significant, and irreparable damages to Plaintiffs and their historic properties during the construction of the SELA Project;

D. Preliminarily and permanently enjoin the Corps from allowing the Contractors to proceed with work on the SELA Project in the Historic Districts until the Corps fulfills its obligations pursuant to the NHPA and PA to implement construction measures to avoid, mitigate, and minimize the damages to Plaintiffs' historic properties;

E. Appoint a special master pursuant to Federal Rule of Civil Procedure 53 to oversee the Corps' stop work order to the Contractors and the Corps' consideration and implementation of damage avoidance, mitigation, and minimization procedures in the Contractors' work on the SELA Project;

F. Award Plaintiffs their attorneys' fees, costs, expert witness fees, disbursements, and incidental expenses;

G. Award such other and further legal and equitable relief as the Court may deem appropriate.

Respectfully submitted:

BRUNO & BRUNO, LLP

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CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

David Epstein, Brenda Lackings, Thomas Ryan, Elizabeth and William Sewell

(b) County of Residence of First Listed Plaintiff Orleans (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

Joseph M. Bruno, Daniel A. Meyer, Bruno & Bruno, LLP
855 Baronne Street, New Orleans, Louisiana 70112

DEFENDANTS

U.S. Army Corps of Engineers

County of Residence of First Listed Defendant Orleans (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff
3 Federal Question (U.S. Government Not a Party)
2 U.S. Government Defendant (checked)
4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- Citizen of This State PTF 1 DEF 1
Citizen of Another State PTF 2 DEF 2
Citizen or Subject of a Foreign Country PTF 3 DEF 3
Incorporated or Principal Place of Business In This State PTF 4 DEF 4
Incorporated and Principal Place of Business In Another State PTF 5 DEF 5
Foreign Nation PTF 6 DEF 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Table with 5 columns: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES. Includes various legal categories like Insurance, Personal Injury, Real Estate, etc.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding (checked)
2 Removed from State Court
3 Remanded from Appellate Court
4 Reinstated or Reopened
5 Transferred from Another District
6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): National Historic Preservation Act
Brief description of cause: Injunctive claims under the National Historic Preservation Act

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ CHECK YES only if demanded in complaint: JURY DEMAND: Yes No (checked)

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE Engelhardt DOCKET NUMBER 15-3117

DATE SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I.(a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
- (b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)
- (c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".
- II. Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
 United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.
 United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
 Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
 Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerk(s) in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.
- V. Origin.** Place an "X" in one of the six boxes.
 Original Proceedings. (1) Cases which originate in the United States district courts.
 Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.
 Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
 Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
 Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
 Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service
- VII. Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
 Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
 Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.
- Date and Attorney Signature.** Date and sign the civil cover sheet.

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA**

**DAVID EPSTEIN, BRENDA LACKINGS,
THOMAS RYAN, ELIZABETH AND
WILLIAM SEWELL,**

**Plaintiffs, individually
and on behalf of a class
of similarly situated
individuals**

VERSUS

**THE UNITED STATES ARMY CORPS
OF ENGINEERS,
Defendant**

CIVIL ACTION NO. _____

SECTION _____

NOTICE OF COLLATERAL PROCEEDING

NOW INTO COURT, through undersigned counsel, come named-Plaintiffs, David Epstein, Brenda Lackings, Thomas Ryan, and Elizabeth and William Sewell, individually and on behalf of a class of similarly situated individuals, who, pursuant Local Rule 3.1 provide this Notice of Collateral Proceeding. The above-captioned matter involves subject matter that comprises a material part of the subject matter of another case pending before this Court, *Elizabeth Sewell, et al. v. Sewerage and Water Board of New Orleans*, Case No. 15-3117, Section “N” (3). These cases both involve the damage inflicted upon property owners and residents of historic neighborhoods in New Orleans, Louisiana, by the construction and construction-related activities of the Southeast Louisiana Urban Flood Control Program (“SELA”) helmed by the U.S. Army Corps of Engineers and the Sewerage and Water Board of New Orleans.

Respectfully submitted:

Bruno & Bruno, LLP

/s/ Joseph M. Bruno, Sr.

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AND

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Pro Hac Vice (Application Pending)

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Fax: (831) 624-5509

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I do hereby certify that on this 18th day of December 2015, I electronically filed the foregoing with the Clerk of Court by using the Court's CM/ECF system.

/s/ Daniel A. Meyer

Daniel A. Meyer

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

David Epstein, Brenda Lackings, Thomas Ryan, Elizabeth and William Sewell

Plaintiff(s)

v.

U.S. Army Corps of Engineers

Defendant(s)

Civil Action No.

SUMMONS IN A CIVIL ACTION

To: (Defendant's name and address)

THE UNITED STATES ARMY CORPS OF ENGINEERS
7400 Leake Avenue
New Orleans, Louisiana 70118

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Joseph M. Bruno
Daniel A. Meyer
Bruno & Bruno, LLP
855 Baronne Street
New Orleans, Louisiana 70112

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date:

Signature of Clerk or Deputy Clerk

Civil Action No. _____

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____
was received by me on *(date)* _____ .

I personally served the summons on the individual at *(place)* _____
_____ on *(date)* _____ ; or

I left the summons at the individual's residence or usual place of abode with *(name)* _____
_____, a person of suitable age and discretion who resides there,
on *(date)* _____ , and mailed a copy to the individual's last known address; or

I served the summons on *(name of individual)* _____ , who is
designated by law to accept service of process on behalf of *(name of organization)* _____
_____ on *(date)* _____ ; or

I returned the summons unexecuted because _____ ; or

Other *(specify)*:

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____ 0 _____ .

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc: