No. 21-60897

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Harrison County, Mississippi; Hancock County, Mississippi; City of Biloxi, Mississippi; City of D'Iberville, Mississippi; City of Waveland, Mississippi; Mississippi Hotel and Lodging Association; Mississippi Commercial Fisheries United, Incorporated; City of Pass Christian, Mississippi; City of Diamondhead, Mississippi,

Plaintiffs - Appellants

v.

United States Army Corps of Engineers,

Defendant - Appellee

On Appeal from
United States District Court for the Southern District of Mississippi

1:19-CV-986

BRIEF OF APPELLANTS

SUBMITTED BY:

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of 5th CIR Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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STATEMENT REGARDING ORAL ARGUMENT

Counsel for the Appellants submits that oral argument will be helpful to the Court due to the technical nature of the issues in this appeal.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

JURISDICTIONAL STATEMENT

The district court and this Court have jurisdiction of this matter pursuant to 28 U.S.C. § 1331, because it involves questions of federal law. The causes of action in the petition arise under the National Environmental Policy Act, 42 U.S.C. § 4321, et seq, and the defendant is the U.S. Army Corps of Engineers. Further, the district court had jurisdiction to determine its own jurisdiction. *United States v. Ruiz*, 536 U.S. 622, 628 (2002).

This Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291 in that the order of the district court dated September 13, 2021 certified the dismissal of the Appellants' National Environmental Policy Act Claims as a final judgment pursuant to Fed. R. Civ. P. 54(b).

STATEMENT OF THE ISSUES

1. Whether the district court used the correct standard in finding that there was no proposed major federal action identified with respect to the Mississippi River and Tributaries Project, and that the U.S. Army Corps of Engineers had no duty to supplement a 1976 Environmental Impact Statement.

2. Whether the district court used the correct standard in determining that changes in the frequency and length of operations of the Bonnet Carre Spillway element of the Mississippi River and Tributaries Project, which were accompanies by widespread

environmental damage, did not constitute major federal action requiring preparation of a supplemental Environmental Impact Statement.

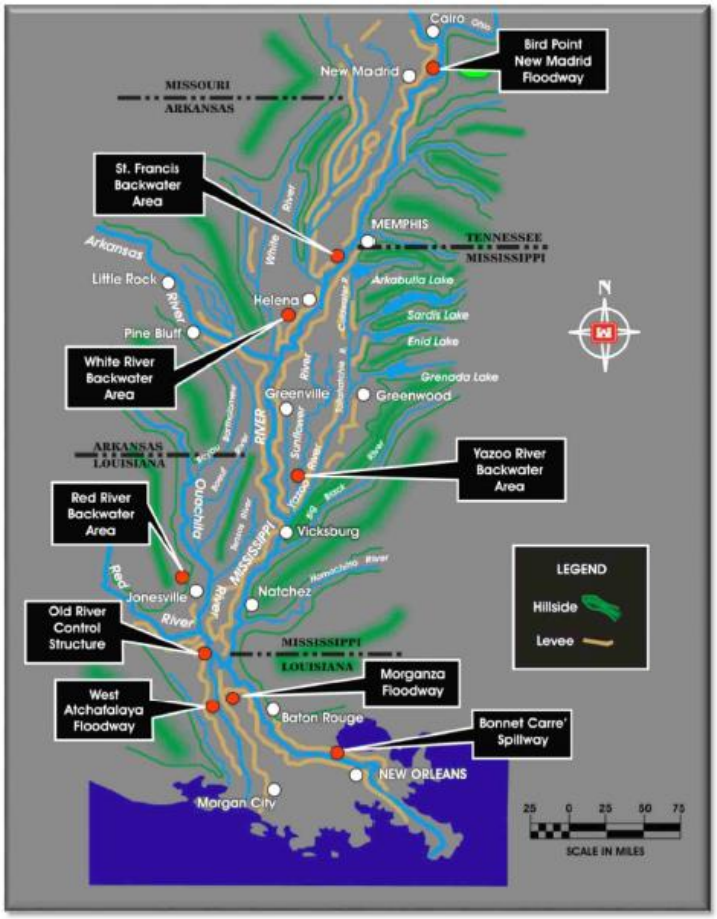
STATEMENT OF THE CASE

A. The Bonnet Carré Spillway is an integral element of the Mississippi River and Tributaries Project, a major federal project that is still under construction.

The Mississippi River drains over a million square miles comprising 41% of the continental United States. The federal project at issue in this case is the Mississippi River and Tributaries Project, referred to in this brief by its usual acronym of "the MR&T." The MR&T is a still-uncompleted series of spillways, floodways, levees, channel training measures and backwater areas that, working together, are intended to safely pass a major flood referred to as the Project Design Flood.[1] The MR&T was designed in response to the historic flood of 1927, and was originally outlined in a document called the Jadwin Report[2] and adopted by Congress in the 1928 Flood Control Act, 33 U.S.C. § 701(a). Some of the major completed elements of the MR&T are shown in the diagram below.

[1] ROA.230.
[2] ROA.9585.

Figure 1. Mississippi River and Tributaries Project Map.



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The MR&T proposed a system in which the upstream spillways, floodways and backwater areas were to be operated to remove enough floodwater from the Mississippi to leave a 1,250,000 cfs flow at New Orleans.[3] This 1,250,000 cfs flow was the amount that the levees at New Orleans could safely pass, and "20 on the Carrollton gauge" was the river stage which equated to a flow of 1,250,000 cubic feet per second.

[3] ROA.9610-11.

The 1,250,000 cfs flow and its corresponding river stage of 20 on the Carrolton gauge were the points at which it was contemplated that the Bonnet Carré Spillway element of the MR&T would be operated.[4] Upstream structures such as the Morganza Floodway would insure that no more than 1,500,000 cfs reached the Bonnet Carré Spillway, and the Bonnet Carré Spillway was designed to remove 250,000 cfs.[5] The Corps' operating manual for the Spillway, the Bonnet Carré Water Control Manual, confirms that the BCS will be operated so that the "remaining 1,250,000 cfs will continue down the river to the Gulf."[6] The Manual further states that "Bonnet Carré will normally be operated when the flow in the Mississippi River below Morganza reaches 1,250,000 cfs on a rising hydrograph or to preserve a desired level of freeboard on deficient levees throughout the New Orleans area."[7]

The record clearly establishes that along with the upstream and downstream elements the Bonnet Carré Spillway is operated as an "integral and inseparable part" of the MR&T.[8] The Corps' Water Control Manual for the Bonnet Carré Spillway confirms that the different parts of the MRT are an integrated system: "The Old River Control Structure, the Morganza Floodway, and the Bonnet Carré Spillway will be operated to divert sufficient floodwater to minimize flood damages in the lower river reaches and

[4] *Id.*
[5] ROA.220
[6] ROA.230.
[7] ROA.262.
[8] ROA.10379.

prevent the discharge in the Mississippi River from exceeding 1,250,000 cfs at New Orleans."[9]

The record also clearly establishes that the MR&T of which the Bonnet Carré Spillway is an integral part is an ongoing project and has never been completed. The Mississippi River Commission and the Corps of Engineers both directly confirmed in their depositions that the MR&T project is still under construction to allow it to safely pass the Project Design Flood.[10] The Mississippi River Commission stated that as of 2018 the "authorized work" remaining to complete the MR&T is approximately $8.4 billion.[11] Some of this unfinished work includes the deficient downstream levees that the Bonnet Carré Spillway element of the MR&T is operated to protect. The record also demonstrates that other elements of the MR&T, in particular the Old River Control Complex and so-called "backwater areas," are not functioning as intended and could potentially result in more frequent operations of the Bonnet Carré Spillway.[12]

B. The Bonnet Carré Spillway element of the Mississippi River and Tributaries Project is now operated more frequently and in conditions that were never contemplated at the time of its approval.

The documentation from the time that the MR&T was established stated the expectation that conditions requiring operation of the Bonnet Carré Spillway would

[9] ROA.220.
[10] ROA.10384, 10390, 10591.
[11] ROA.808.
[12] ROA.10678, 10708.

occur infrequently, on an average of once every five years.[13] A 1927 report on spillways, also by Major General Jadwin, states that it is anticipated that the Bonnet Carré Spillway "will be used infrequently and for comparatively short periods . . . ," and "the period of operation will be short, and at long intervals . . . ."[14] More recently the Bonnet Carré Spillway Manual indicates it is expected to open about once every ten years.[15]

The contemplated operation of the Bonnet Carré Spillway element of the MR&T "only infrequently and for short periods" has not come to pass. The Bonnet Carré Spillway has been opened fifteen times since its construction, but six of those have been in the past eleven years, with four in the period 2018-2020. [16] The Bonnet Carré is as a practical matter the only "relief valve" on the MR&T that is in common usage, and it is being used at a frequency that was never contemplated when it was approved.

This is in part a consequence of the fact that precipitation in the upper and middle Mississippi has increased 5-15% since 1895, and the amount of rain in the heaviest downpours has increased by an even higher percentage. In the past few years communities along the Mississippi have experienced successive 100, 200 and 500 year floods.[17] The jurisdictional discovery showed that the Corps is aware of the increase in

[13] ROA.10071.
[14] ROA.10063, 10071.
[15] ROA.268.
[16] ROA.11074
[17] ROA.183, citing **USGCRP**, 2017: *Climate Science Special Report: Fourth National Climate Assessment, Volume I, Chapter 7* [Wuebbles, D.J., D.W. Fahey, K.A. Hibbard, D.J. Dokken, B.C. Stewart, and T.K. Maycock (eds.)]. U.S. Global Change Research Program; available at https://science2017.globalchange.gov/chapter/7/ (last visited January 3, 2020) and Mississippi

precipitation and flooding. As one example, in a 2019 study of the operations of the Old River Control Complex, another element of the MR&T, the Corps cites a Louisiana State University study that "surmised that Mississippi River flow is expected to increase in the future as global temperatures rise and hydrologic cycles intensify. Additionally, rapid urbanization in the river basin will create conditions that foster the emergence of mega floods."[18]

At the same time, as floods have become more frequent, changes in the river have led to higher stage elevations for a given river flow. This change in the "stage-discharge relationship" has resulted in the Bonnet Carré Spillway being opened at river levels that are considered only "minor flooding," rather than at the major flood levels it was originally designed to protect against. The 1,250,000 cfs flow trigger for the Bonnet Carré Spillway, which originally correlated with a reading of 20 on the Carrollton river gauge is now reached at approximately 17 feet on that gauge.[19] One Corps employee noted "Before I started working at Bonnet Carré' Spillway on 26 November 2006, the structure was operated for 333 days, or just over 1% of the time of its existence. Since my arrival here, the Bonnet Carré' Spillway has been operated a total of 240 days, or just over 5%."[20]

River Cities and Towns Initiative*, 2016 Policy Platform of the Mayors along the Mississippi River*. See also ROA.152-53 (declaration of Dr. Robert Criss).

[18] ROA.10681.

[19] ROA.152-54 (declaration of Dr. Robert Criss).

[20] ROA 21-60897.10731.

The Bonnet Carré Spillway also was kept open when flows were below 1,250,000 cfs in 2019 because river conditions made it unsafe to close.[21]

Along with these changes in the river, nitrate and phosphorus nutrient pollution in the river have increased dramatically since the early 20th century. As a Corps document on the 2019 opening of the Bonnet Carré Spillway noted, "[w]ater quality issues include eutrophication from the addition of river water containing elevated levels of nitrogen, an increase in the abundance of phytoplankton communities in the basin, potential algal blooms, and water column oxygen depletion."[22]

C. The period 2018-2026 saw an unprecedented number of openings of the Bonnet Carré Spillway element of the Mississippi River and Tributaries Project, and caused widespread environmental and economic damage.

2018 and 2019 were unprecedented years for the Bonnet Carre element of the MR&T. The spillway was opened in consecutive years. It was opened twice in a single year, and was opened for a total of 122 days, the longest period on record.[23] The spillway also remained open until early August, the latest on record.

The damage to natural resources in Louisiana and the Mississippi Sound, was enormous. The Mississippi Department of Marine Resources and the University of Southern Mississippi documented oyster mortality of up to 100% on Mississippi reefs, shrimp landings down by 50%, and persistent freshwater influence in the western

[21] ROA.10342-46.
[22] ROA.10859-60.
[23] ROA.11074

Mississippi sound into August 2019.[24] In support of the state's request for a federal fisheries disaster declaration the Mississippi Department of Marine Resources estimates fisheries damages in the hundreds of millions of dollars.[25] Mississippi's oyster production was on the road to recovery after being damaged in the massive 2011 Bonnet Carré Spillway opening, but was wiped out again by the back to back 2019 openings. Toxic algae blooms and seafood warnings caused a ripple effect to seafood that was not even affected.[26] Local governments – which are also coastal landowners – lost tax revenue and incur response costs.[27] Red flags and warning signs were posted on the Mississippi beaches.[28]

The Corps itself was well aware of mortality of spat and seed size oysters in the Mississippi sound, low recruitment (i.e., the process by which individuals are added to a population) of brown shrimp, and displacement of white shrimp.[29] Corps "talking points" state "it appears that the additional freshwater may be adversely impacting marine mammals. Sea turtles may also be feeling the effects increased freshwater input into the local ecosystem."[30]

D. The scale of damage caused by recent operations of the Bonnet Carré Spillway has never been considered in a National Environmental Policy Act document.

[24] ROA.10868.
[25] ROA.136-37
[26] ROA.120
[27] ROA.102
[28] ROA.113
[29] ROA.10859-60.
[30] *Id.*

Nothing on the scale of the 2019 damage has ever been considered in a National Environmental Policy Act document. A 1976 EIS for the Mississippi River and Tributaries Project contained 1.5 pages of discussion of the natural resource impacts of operation of the Bonnet Carré Spillway, and that discussion focused largely on the impact within the spillway area itself. Two paragraphs deal with Lake Borgne and the Mississippi Sound. A single sentence notes that "many estuarine fishes and crustaceans migrate from the Lake Pontchartrain system as the salinity content decreases to a level below their respective tolerances." Three sentences deal with oyster mortality but assert that the Spillway also enhances oyster production in other areas.[31]

The 1976 EIS does not discuss reductions in the crab and shrimp fisheries, impacts to recreational fishing and charter boats, beach closures, possible marine mammal and sea turtle mortality, introduction of nutrient pollution from Mississippi River water, and hazardous algae blooms. These are all impacts that were observed in 2019.

The Corps has never updated the 1976 EIS to assess Bonnet Carré Spillway impacts. The Corps does acknowledge that opening the Bonnet Carré Spillway is a federal "agency action" under the Endangered Species Act, which requires federal agencies to consult with the U.S. Fish and Wildlife Service on "agency action" that may affect listed threatened or endangered species.[32]

[31] ROA.356-57.
[32] ROA.915 et seq (ESA consultation document on Bonnet Carre Spillway operations).

E. Procedural History

This lawsuit was filed in December 2019. The Plaintiffs cited the failure of the Corps of Engineers to carry out its duties under the National Environmental Policy Act to prepare a supplemental Environmental Impact Statement or an Environmental Assessment on the continued construction and operation of the Mississippi River and Tributaries Project and specifically the operation of the Bonnet Carré Spillway for extended periods.[33] The basis for the Court's jurisdiction was the "failure to act" provisions of 5 U.S.C. § 706(1).

The Corps of Engineers did not file an answer, but instead moved to dismiss for lack of jurisdiction under Fed. R. Civ. Pro. 12(b)(1).[34] After the original motion was briefed, the district court granted the plaintiffs' motion for jurisdictional discovery.[35] Discovery was carried out through the fall of 2020 and spring of 2021.

Following completion of discovery, the parties submitted supplemental briefing on the motion to dismiss for lack of jurisdiction. On September 13, 2021 the district court entered an order granting the Corps' motion to dismiss for lack of jurisdiction. The premise of the trial court's order with respect to the issues raised in this appeal[36] was that the Plaintiffs had not identified any proposed construction on the Mississippi

[33] ROA.25-50.
[34] ROA.199.
[35] ROA.9423.
[36] The trial court held that certain issues regarding a change in the river stage at which the Bonnet Carre Spillway was opened was barred by the statute of limitations.

River and Tributaries Project that could be considered "proposed action" requiring supplementation of the 1976 MR&T Environmental Impact Statement, and that the operations of the Bonnet Carré Spillway were "within the range originally available" to the Corps.[37] The district court entered an order of dismissal and certified it as a final judgment, finding that there was no just reason for delay.[38] The plaintiffs' motion to alter or amend was denied on November 1, 2021, and a notice of appeal was timely filed on November 22, 2021.[39]

SUMMARY OF THE ARGUMENT

The district court erred in granting the U.S. Army Corps of Engineers motion to dismiss for lack of subject matter jurisdiction. The Administrative Procedure Act, 5 U.S.C. § 706(1) provides a waiver of sovereign immunity in this case, because the Corps failed to carry out a discrete agency action it was required to take. The National Environmental Policy Act and its implementing regulations, 40 C.F.R. § 1509(d), require the Corps to prepare a Supplemental Environmental Impact Statement on its projects when there is major federal action left to occur, and there is significant new information relevant to the project and environmental concerns. In this case the record shows that the Mississippi River and Tributaries Project is not a completed federal project, and that there is significant new information in the form of widespread damage

[37] ROA.11071. The district court also dismissed the Mississippi River Commission as a defendant. That decision is not appealed.
[38] ROA.11097
[39] ROA.11145

of increased operations of the Bonnet Carré Spillway element of the MR&T. Even if the Bonnet Carré Spillway element of the MR&T is considered a completed project, the increased frequency of openings is a change in direction with impacts that have never been considered in an Environmental Impact Statement, and supplementation is mandatory.

ARGUMENT

A. Standard Of Review

The Court reviews de novo a dismissal for lack of subject matter jurisdiction. *E.g., Rothe Dev. v. United States DOD*, 666 F.3d 336, 338 (5th Cir. 2011).

B. The National Environmental Policy Act and the Environmental Impact Statement requirement.

The National Environmental Policy Act, 42 U.S.C. §§ 4321–4370, is our "basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). NEPA requires that federal agencies "take a 'hard look' at the environmental consequences before taking action." *Baltimore Gas and Elec. Co. v. Natural Resources Defense Council,* 462 U.S. 87, 97 (1983). NEPA's "look before you leap" principle ensures that an agency, "in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts." *Robertson v. Methow Valley Citizens Counc.,* 490 U.S. 332, 349 (1989). Equally important, NEPA's disclosure requirements foster meaningful public participation in the decision-making process. *Id.*

To fulfill this goal, the statute and its implementing regulations require federal agencies to prepare a document called an Environmental Impact Statement for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1501.4.

Projects that have not been completed, such as the Mississippi River and Tributaries Project, remain subject to the National Environmental Policy Act. "Action" is defined by regulation to "include new and continuing activities," and may include agency plans and programs. 40 C.F.R. § 1508.18. Notable for this case is that "[t]he standards for 'major federal action' under NEPA and 'agency action' under the Endangered Species Act are much the same. "*Marbled Murrelet v. Babbitt,* 83 F.3d 1068, 1075 (9th Cir.1996).

An Environmental Impact Statement must "provide full and fair discussion of significant environmental impacts" associated with a federal decision and "inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment." 40 C.F.R. § 1502.1. The document must include a discussion of the direct, indirect, and cumulative impacts for each reasonable alternative, 40 C.F.R. § 1508.25(c), and must identify "any adverse environmental effects which cannot be avoided should the proposal be implemented." 42 U.S.C. § 4332(2)(C)(ii).

1. <u>Supplementation of Environmental Impact Statements is mandatory when there is major federal action left to occur and there are significant new circumstances relevant to environmental concerns</u>.

The implementing regulations for NEPA specifically address the situation in which an Environmental Impact Statement must be supplemented:

> (d) Supplemental environmental impact statements. Agencies:
>
> (1) Shall prepare supplements to either draft or final environmental impact statements if a major Federal action remains to occur, and:
>
> (i) The agency makes substantial changes to the proposed action that are relevant to environmental concerns; or
>
> (ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

40 C.F.R § 1509(d).

Marsh v. Or. Nat. Res. Council, 490 U.S. 360 (1989) is a seminal case on the duty to prepare a supplemental EIS. In *Marsh* the Supreme Court noted NEPA's sweeping commitment to "prevent or eliminate damage to the environment and biosphere" and stated "[i]t would be incongruous with this approach to environmental protection, and with the Act's manifest concern with preventing uninformed action, for the blinders to adverse environmental effects, once unequivocally removed, to be restored prior to the completion of agency action simply because the relevant proposal has received initial approval." *Id.* at 371. *See also Dubois v. United States Department of Agriculture,* (supplemental EIS is premised on assuring that the public is informed, and the agency takes a "hard look" at environmental consequences of proposed actions).

The Supreme Court explained that an agency like the Corps must follow a "rule of reason" taking into account NEPA's purpose of preventing uninformed action:

> In this respect the decision whether to prepare a supplemental EIS is similar to the decision whether to prepare an EIS in the first instance: If there remains "major Federal actio[n]" to occur, and if the new information is sufficient to show that the remaining action will "affec[t] the quality of the human environment" in a significant manner or to a significant extent not already considered, a supplemental EIS must be prepared.

Marsh v. Or. Nat. Res. Council, 490 U.S. 360, 375 (1989).

2. Changes in operations of completed projects require a supplemental environmental impact statement if there are changes in operations that were not contemplated at the time of approval.

Completed federal projects also remain subject to the supplemental EIS requirement. This is a fact-specific inquiry into whether there has been a "significant shift in direction of operating policy," *Grand Canyon Trust v. U.S. Bureau of Reclamation,* 691 F.3d 1008, 1022 (9th Cir. 2012), and "whether the proposed agency action and its environmental effects were within the contemplation of the original project when adopted or approved." *Raymond Profitt Foundation v. U.S. Army Corps of Engineers*, 128 F. Supp. 2d 762, 773 (Penn. 2000)(citing *Westlands Water District v. United States,* 850 F.Supp. 1388, 1415 (E.D.Cal.1994)).

The inquiry requires "a determination of whether plaintiffs have complained of actions which may cause significant degradation of the human environment," *Westlands Water District v. United States, supra. See also Idaho Conservation League v. Bonneville Power Administration,* 826 F.3d 1173, 1176 (9th Cir. 2016)("Thus, this short-term decision, which was found to have no significant environmental impact, could not have

constituted a major federal action because it wasn't a significant or long-term change in operating policy. In short, it did not change the status quo.").

This Court has stated that "[t]he principal factor an agency should consider in exercising its discretion whether to supplement an existing EIS because of new information presents a picture of the likely environmental consequences associated with the proposed action not envisioned by the original EIS'." *Louisiana Wildlife Fed'n, Inc. v. York,* 761 F.2d 1044, 1051 (5th Cir. 1985) (quoting *Wisconsin v. Weinberger,* 745 F.2d 412, 418 (7th Cir. 1984).

The Corps' NEPA regulations reinforce that completed projects remain subject to the EIS requirement, stating that "major changes in the operation and/or maintenance of completed projects" normally require an EIS. 33 C.F.R 230.6(c). The Corps regulation at 33 C.F.R. § 230.7(d) further provides that changes in environmental impacts not considered in a project EIS or Environmental Assessment normally require an Environmental Assessment:

> Actions normally requiring an EA, but not an EIS, are listed below:
>
> * * *
>
> (d) *Construction and Operations and Maintenance.* Changes in environmental impacts which were not considered in the project EIS or EA. Examples are changes in pool level operations, use of new disposal areas, location of bank protection works, etc.

3. 5 U.S.C. § 706(1) provides a waiver of sovereign immunity when a federal agency like the Corps of Engineers fails to carry out a mandatory duty to act.

The Administrative Procedure Act provides a waiver of sovereign immunity, including in cases in which there is a claim of "agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). § 706(1) requires a failure to assert a discrete agency action that the agency is required to take. *Norton v. Southern Utah Wilderness Alliance,* 542 U.S. 55, 64 (2004)

C. The District Court erred in finding that the Corps of Engineers did not have a mandatory duty to supplement the 1976 Environmental Impact Statement for the Mississippi River and Tributaries Project.

1. The Mississippi River and Tributaries Project is not a completed project, and there is major federal action left to occur.

40 C.F.R. § 1502.9 raises two questions at issue here: does "major federal action remain to occur," and are there "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts"?

The Corps argument below and the district court's decision did not contest the latter of these two questions. The record demonstrates that in 2019 as well as previous years operation of the Mississippi River and Tributaries Project caused massive damage to the Mississippi Sound and the people who rely on it.[40] The Corps also did not in any significant way contest that damage on the scale documented in this record was not considered in the 1976 Mississippi River and Tributaries Environmental Impact Statement, and in fact has never been considered in any Environmental Impact

[40] *See supra* pp. 9-10.

Statement. There plainly were "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts."

Rather, the Corps based its argument on the contention that regardless of unexamined environmental impacts there was no "proposed action" therefore "no major federal action remains to occur" with respect to the Mississippi River and Tributaries Project.[41] The Corps relied on *Norton v. Southern Utah Wilderness Alliance,* 542 U.S. 55 (2004), which held that once a federal land management plan was approved, there was no further "federal action left to occur" under 40 C.F.R. § 1502.9. The Corps argued that the MR&T is "functionally identical" to the land use plan analyzed in SUWA and its progeny.[42] Thus the Corps argued that it has no mandatory duty under NEPA and its implementing regulations to consider these impacts in a supplemental NEPA document, and without a mandatory duty there is no waiver of sovereign immunity under 5 U.S.C. § 706(1).

The court based its decision that the continued construction and operation of the MR&T was not major federal action on the finding that "the plaintiffs have not identified any construction that could be considered 'proposed action' requiring supplementation of the EIS."[43] The district court appears to have effectively defined

[41] ROA.199, 412-417
[42] ROA.416
[43] ROA 11088

"proposed action" to be a proposed plan to build some subpart of the MR&T that has not been built yet.

The Corps and the court below read the Supreme Court and other caselaw incorrectly, and in a way that does not carry out the National Environmental Policy Act's purpose of informing the public and "preventing uninformed action" by entities like the Corps. NEPA's implementing regulations clearly establish that major federal actions include "continuing activities" and "programs." The Mississippi River and Tributaries Project clearly fits within this definition. The Supreme Court in *Marsh v. Oregon Natural Resources Defense Council* focused on whether there was "major federal action left to occur" on the proposed action to determine whether new information would trigger the requirement of a Supplemental Environmental Impact Statement. 490 U.S. at 392-93.

The evidence presented to the district court established that the Mississippi River and Tributaries Project is not a completed project and is still under construction. The Mississippi River Commission stated that as of 2018 the "authorized work" remaining to complete the MR&T is approximately $8.4 billion.[44] The deposition testimony establishes this same point.

Charles Camillo, the designee for the Mississippi River Commission, was succinct:

[44] ROA.808

Q: Is construction ongoing within the MR&T?

A: Yes ma'am. . . . . yeah, I'll just leave it at that. Yes ma'am.

Q: And so the MR&T is kind of an ongoing type of a project, right?

A: The – the – MR&T – yeah, we are still building towards the - -the – we are still building the components of the MR&T that would allow us to – to convey the project design flood.[45]

Corps of Engineers designee Joseph Windham also conceded when asked if deficient levees downstream of the Bonnet Carré Spillway were part of the unfinished parts of the Mississippi River and Tributaries Project:

Q. Good. All right. So are there any deficient levees? In other words, levees that are not up to their design standards downstream of the Bonnet Carré Spillway?

A. Yeah.

Q. Okay. Where are those?

A. I don't know exactly, you know, but there are sections below the Bonnet Carré Spillway.

* * *

Q. Okay. All right. So in these levees at New Orleans, these are some of the ones that are unfinished parts of the Mississippi River and Tributaries Project because they're not up to design grade yet; is that correct?

A. Yes.[46]

[45] ROA.10591
[46] ROA.10334,10390.

Work related to deficient levees downstream was actually proposed during the pendency of the case.[47] The "proposed action" is the Mississippi River and Tributaries Project as a whole, and the evidence is clear that this project is not complete. In fact, there are parts of the system that may not even function as they were designed to function.[48] Under *Marsh*, there is still federal action left to take, and the mandatory duty in 40 C.F.R. § 1502.9 applies.

In this situation the Corps' reliance on *Norton v. SUWA* and its progeny is misplaced. That case involved a federal land use management plan that was a completed single action. It distinguished *Marsh* specifically because "the dam construction project that gave rise to environmental review was not yet completed." 542 U.S. at 73. Here, as in *Marsh,* the project has not been completed and is still under construction. There is still adequate opportunity for the Corps of Engineers to consider how it could change the project to mitigate the damage to the Mississippi Sound and the citizens of Mississippi from the project. The trial court's erred in finding that there is no "proposed action," since the incomplete MR&T is itself the proposed action.

2. <u>The Corps' recent operation of the Bonnet Carré Spillway element of the Mississippi River and Tributaries Project was not contemplated by the project when adopted</u>.

Under the language of the regulation and the Supreme Court precedent, the fact that there was "federal action left to take" on the MR&T is determinative, given that

[47] R.990(referencing 83 Fed. Reg. 32642 (July 13, 2018)
[48] ROA.10678,10708,10383

the fact of "significant new circumstances" is not really contested. However, the 2016-2020 operations of the Bonnet Carré Spillway element of the MR&T Project also showed a "significant shift in direction" that was not just "routine operations."

In the trial court the Corps argued that "operating a spillway, like Bonnet Carré, is not a 'major federal action' within the meaning of NEPA *as a matter of law*."[49] This is not correct. As set out above, whether operations of a completed federal project constitute a major federal action is a fact-specific inquiry. This inquiry turns on whether there is a "significant shift in direction of operating policy," *Grand Canyon Trust v. U.S. Bureau of Reclamation,* 691 F.3d 1008, 1022 (9th Cir. 2012), and "whether the proposed agency action and its environmental effects were within the contemplation of the original project when adopted or approved." *Raymond Profitt Foundation v. U.S. Army Corps of Engineers*, 128 F. Supp. 2d 762, 773 (Penn. 2000)(citing *Westlands Water District v. United States,* 850 F.Supp. 1388, 1415 (E.D.Cal.1994)). It also requires "a determination of whether plaintiffs have complained of actions which may cause significant degradation of the human environment," *Westlands Water District v. United States, supra.*

The trial court did not adopt the Corps' position that operating the Bonnet Carré element of the MR&T was exempt from the National Environmental Policy Act as a matter of law. The district court stated, however, that the Corps' increase in frequency

[49] ROA.418(emphasis supplied)

of openings (which had accelerated in the six years prior to filing of the suit) was "within the range originally available to it," and "merely followed the operating standards established by Major General Jadwin in 1927 and reaffirmed in the Water Control Manual in 1984 and 1999." The trial court further stated that "[t]he increase in operation of the Bonnet Carré is merely a response to changing conditions – varying precipitation levels and other environmental changes."[50]

In making these findings, the trial court applied the wrong standard. With respect to the frequency of openings, the question is not whether there was a hard and fast requirement that the Corps operate the Bonnet Carré Spillway element of the MR&T no more than once every six years, or whether the fact that the spillway is now opened in conditions of minor flooding was in the Corps' estimation required by changing conditions. Rather, the question is whether the opening regime the Corps follows now was "within the contemplation of the project when originally approved." *Westlands Water District v. United States,* 850 F.Supp. 1388, 1415 (E.D.Cal.1994). *See also Upper Snake River Chapter of Trout Unlimited v. Hodel*, 921 F.2d 232, 235 (9th Cir. 1990)(change in operations not "other than that contemplated when the project was first operational"). The record demonstrates that it was not.

Multiple statements in the record about the expected frequency of opening of the Bonnet Carré Spillway element of the Mississippi River and Tributaries Project

[50] ROA.11090

show that openings on the frequency of the past six years, and certainly back-to-back or multiple annual openings of the spillway, were not contemplated.[51]

It is also clear from the record that the original contemplation of the Corps and Congress was that the Bonnet Carré Spillway element of the MR&T would be operated to leave 1,250,000 cubic feet per second of water in the Mississippi River at New Orleans. It is clear that the spillway was operated well below this point in 2019, in part because river conditions in that year made it unsafe to close the spillway at 1,250,000 cfs.[52] The trial court cited *Mayo v. Reynolds*, 875 F.3d 11, 20-21 (D.C. Cir. 2011) for the proposition that "[t]he 2019 delay in closing the Bonnet Carré Spillway due to unsafe conditions was a discretionary action on the part of the Corps that cannot be considered 'major . . ."[53]

Mayo actually deals with a situation in which a step implementing a previously studied action *has already been contemplated and analyzed in a previous NEPA document*, a new assessment may not be required:

> Once an agency has taken a "hard look" at "every significant aspect of the environmental impact" of a proposed major federal action, *Balt. Gas, 462 U.S. at 97* (quoting *Vt. Yankee, 435 U.S. at 553*), it is not required to repeat its analysis simply because the agency makes subsequent discretionary choices in implementing the program. As discussed above in part I.A, an agency may rely on an already-performed, "thorough and comprehensive" NEPA analysis. *New York v. U.S. Nuclear Regulatory Comm'n (New York II),* 824 F.3d 1012, 1019, 423 U.S. App. D.C. 1 (D.C. Cir. 2016)

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[51] *Supra* pp.6-7.
[52] ROA.10342-46
[53] ROA.11090

> And an agency is not required to make a new assessment under NEPA every time it takes a step that implements a previously studied action. *See Marsh*, 490 U.S. at 373. So long as the impacts of the steps that the agency takes were contemplated and analyzed by the earlier NEPA analysis, the agency need not supplement the original EIS or make a new assessment. *See Nat'l Comm. for the New River*, 373 F.3d at 1330. The 2007 EIS was clearly sufficient to cover elk hunting during the ensuing fifteen years under the 2007 Plan absent a material change causing unforeseen environmental consequences.

875 F.3d at 20-21.

Here there clearly have been "material changes causing unforeseen environmental consequences. The Corps does not seriously dispute that there have been serious environmental impacts on a regional scale from the recent record-breaking and back-to-back openings, and that these have never been considered in a NEPA document.

The fact that these temporal, flow and other changes in operations cause significant environmental harm that has never been analyzed in a NEPA document in itself demonstrates a significant change which establishes major federal action. NEPA's implementing regulations state that the term '[m]ajor reinforces but does not have a meaning independent of significantly.' 40 C.F.R. § 1508.18. Courts have found that short term decisions with no environmental impact do not constitute major changes in operating policy. *Idaho Conservation League v. Bonneville Power Administration, supra* at 1176. The reverse proposition also holds true: a change that causes significant impacts that have never been considered is a major federal action. This is consistent with this Court's holding that "[t]he principal factor an agency should consider in exercising its

discretion whether to supplement an existing EIS because of new information presents a picture of the likely environmental consequences associated with the proposed action not envisioned by the original EIS'." *Louisiana Wildlife Fed'n, Inc. v. York,* 761 F.2d 1044, 1051 (5th Cir. 1985).

This distinguishes the present case from *Save Our Wetlands v. Flowers,* 1998 WL 32761 (E.D. La. Jan. 28, 1998), a previous case examining whether operation of the Bonnet Carré Spillway required a NEPA document. In that case the trial court found that the plaintiff had not made a showing of possible environmental effects sufficiently different from those previously considered. *Id.* at 3.

The logic of assessing whether there are significant unexamined environmental impacts to determine whether an action is "routine operations" is supported by the Corps own NEPA regulations. Under those regulations, "routine operations" at completed projects are categorically excluded from NEPA because they "do not have significant impacts on the human environment." 33 C.F.R. § 230.9. The corollary is if such operations do cause significant impacts on the human environment, they are subject to NEPA.

In this case, the jurisdictional discovery has shown that operations occur on a very different frequency and length than contemplated in the original project or considered in the 1976 EIS. Environmental damage on a regional scale is linked to those changes. The question is not whether changing environmental conditions led the Corps to those changes, it is whether the changes were within the contemplation of the project

when originally approved, and whether the consequences are beyond those set out in the 1.5 page analysis in the 1976 MR&T Environmental Impact Statement.

It is also worth noting that neither the trial court or the Corps addressed the fact that the Corps has routinely carried out consultation under the Endangered Species Act on Bonnet Carré Spillway operations. "The standards for 'major federal action' under NEPA and 'agency action' under the ESA are much the same. "*Marbled Murrelet v. Babbitt,* 83 F.3d 1068, 1075 (9th Cir.1996). Neither the Corps or the court gave any reason why the operation of the Bonnet Carré Spillway element of the MR&T is an "agency action" which triggers Endangered Species Act review, but not a "major federal action" for NEPA purposes.

As a practical matter, there is no serious question that the kinds of impacts caused by the operation of the MR&T project warrant treatment in an Environmental Impact Statement. If decimated oyster beds, closed beaches and toxic algae blooms on a regional scale do not warrant some thought on the part of the Corps to alternative strategies, it is hard to imagine what would. Considering alternative means of dealing with flooding on the Mississippi that might have lesser impacts, such as raising levees or using other spillways, would not threaten public safety or cause waste of public resources. Construing "major federal action" in a way that permits these kinds of impacts to go unaddressed does not carry out Congress' intent in the National Environmental Policy Act and is not required by the language of the statute, the implementing regulations or the caselaw.

CONCLUSION

The Plaintiffs respectfully submit that the Court should reverse the decision of the trial court, and render the matter for entry of an order finding that the trial court has jurisdiction to hear the case.

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CERTIFICATE OF SERVICE

I certify that on February 25, 2022, the foregoing document was served, via the Court's CM/ECF Document Filing System, upon the following registered CM/ECF users:

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