No. 21-60897

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.

Appeal from the United States District Court
for the Southern District of Mississippi
No. 1:19-cv-986 (Hon. Louis Guirola, Jr.)

BRIEF FOR APPELLEE U.S. ARMY CORPS OF ENGINEERS

Of counsel:
GREG McDONOUGH
JASON R. CHESTER
U.S. Army Corps of Engineers

BRYNN MORGAN
U.S. Army Corps of Engineers
Mississippi Valley Division

MAURYA KILROY
GLORI E. CROFT
U.S. Army Corps of Engineers
New Orleans District

TODD KIM
Assistant Attorney General
MICHAEL GRAY
RACHEL HERON
Attorneys
Environment and Natural Resources Division
U.S. Department of Justice
Post Office Box 7415
Washington, D.C. 20044
(202) 514-0916
rachel.heron@usdoj.gov

CERTIFICATE OF INTERESTED PERSONS

No. 21-60897

Harrison County, Mississippi, et al.
v.
U.S. Army Corps of Engineers

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of 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.

1. Parties: Appellants are 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.

Appellee U.S. Army Corps of Engineers is a federal government entity.

2. Counsel of Record and Other Persons:

a. Attorneys of record for plaintiffs-appellants: Robert Baxter Wiygul; Waltzer Wiygul & Garside, L.L.C.

In the district court, the following additional attorneys appeared for one or more plaintiffs: Gary McKay Yarborough, Jr.; Yarborough Law Firm, PLLC; Hollis Taylor Holleman; Tim C. Holleman; Boyce Holleman and Associates, P.A.;

Gerald H. Blessey; Gerald Blessey Law Firm; Peter C. Abide; Currie, Johnson & Myers, PA – Biloxi; W.F. Hornsby III; Hornsby Watts, PLLC; Derek R. Cusick; Cusick & Williams.

b. Attorneys for United States of America (on appeal or in the district court): Todd Kim, Andrew C. Mergen, Jennifer Scheller Neumann, Michael Gray, Rachel Heron, Kristofor Swanson, Sally Sullivan, Frederick H. Turner, Stephen R. Graben, Tabitha Bandi Kingma, Greg McDonough, Jason R. Chester, Brynn Morgan, Maurya Kilroy, Glori E. Croft.

c. Other persons: State of Louisiana (represented in the district court by D. Stephen Brouillette, Jr.; Daigle Fisse, PLLC – Covington; David Alexander Peterson; Harry J. Vorhoff; Megan K. Terrell; Plauche & Carr, LLC; Ryan M. Seidemann).

s/ Rachel Heron
RACHEL HERON

Attorney of Record for Appellee
U.S. Army Corps of Engineers

STATEMENT REGARDING ORAL ARGUMENT

The United States Army Corps of Engineers believes that oral argument may be useful to the Court's disposition of this appeal. Argument may help address any questions the Court may have as to why subject-matter jurisdiction is lacking over the claim at issue on appeal and why the decisions which plaintiffs-appellants cite to show otherwise do not apply. Accordingly, the federal government does not oppose the plaintiffs-appellants' request for oral argument.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Court Rules

Regulations

INTRODUCTION

For nearly a century, the United States Army Corps of Engineers has used the Bonnet Carré Spillway to divert excess water out of the main channel of the Mississippi River before it can reach the City of New Orleans during the most severe flood events. Between the spillway's construction and the filing of this lawsuit, the Corps opened the spillway and diverted water out of the river to Lake Pontchartrain 14 times, when the volume of water passing New Orleans otherwise would have exceeded 1,250,000 cubic feet per second. One consequence following those openings—as acknowledged by the Corps and other federal agencies—has been a temporary change in the water chemistry of Lake Pontchartrain, Lake Borgne, and the Mississippi Sound. The potential consequence of *not* opening the spillway and allowing floodwater to overwhelm New Orleans' levees, on the other hand, would be "so appalling that no measures should be spared to prevent it." ROA.2599.

The plaintiff municipalities and commercial organizations (together, "Harrison County") take issue with the Corps' operation of Bonnet Carré. They specifically seek to compel the Corps to prepare a new environmental analysis on the spillway. But it is undisputed that the United States has waived its sovereign immunity to claims to compel federal agency action *only* where a plaintiff can show that the agency had a discrete, mandatory duty to perform that act. Here,

Harrison County claims that the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4331 *et seq.*, and accompanying regulations impose the requisite mandatory duty that the Corps conduct further study of Bonnet Carré. But, as the district court correctly found, Bonnet Carré has been fully constructed and operated under the same criteria for 90 years, and the County has failed to show that the Corps has proposed any further "major Federal action" with regard to the spillway—a prerequisite for finding a duty to supplement under NEPA. The County's jurisdictional argument therefore fails on its own terms, even accepting the County's flawed assumption that the Administrative Procedure Act ("APA") provides jurisdiction over a freestanding claim to compel supplemental NEPA analysis. For these reasons, the district court correctly dismissed Harrison County's claims for lack of jurisdiction. This Court should affirm.

STATEMENT OF JURISDICTION

The claim at issue in this appeal arises under federal law—namely, the APA, 5 U.S.C. § 706(1), and NEPA. Subject-matter jurisdiction in the district court would thus exist under 28 U.S.C. § 1331. But because Harrison County sued the federal government without demonstrating a valid waiver of the United States' sovereign immunity, the district court correctly dismissed the claims for lack of subject-matter jurisdiction. ROA.11094-95; *see* pp. 16-40, *infra*.

The district court entered separate final judgment on the NEPA claim under Federal Rule of Civil Procedure 54(b) on September 13, 2021. ROA.11097-98. Harrison County filed a timely motion to alter or amend the judgment, which the court denied on October 29, 2021. ROA.11144. The County then filed a timely notice of appeal on November 22, 2021. ROA.11145; *cf.* Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether the district court properly dismissed Harrison County's claim to compel the Corps to conduct further environmental analysis for lack of subject-matter jurisdiction.

STATEMENT OF THE CASE

A. The Bonnet Carré Spillway

The Bonnet Carré Spillway is one element of the Mississippi River and Tributaries Project (the "Project"), a series of levees, floodways, and other infrastructure designed to control flooding in the Lower Mississippi River Valley, between Cairo, Illinois, and Venice, Louisiana. ROA.1854, 1857. The river historically has been prone to overflowing its banks through that region—often with damaging and deadly effects—when precipitation and other conditions upstream send more water down the river than the channel can contain. ROA.1854-57.

After the historically devastating Flood of 1927 inundated 26,000 square miles in the region, killing hundreds and displacing thousands, Congress passed the Flood Control Act of 1928. ROA.1855-57; *see generally* Pub. L. No. 70-391, ch. 569, 45 Stat. 534; 33 U.S.C. §702a. The 1928 Act "committed the Federal Government to a definite program of flood control" in the form of levees, floodways, channel stabilization measures, and tributary basin improvements. ROA.1856-58. Those features and others later authorized by Congress make up the Project and are designed to work together to pass a hypothetical major flood known as the "project design flood" through the valley in a controlled way. *Id.*

Among the pieces of infrastructure specifically authorized by the 1928 Act is the Bonnet Carré Spillway. ROA.221-22; *see also* ROA.9587-88, 9590-91, 9610-11. Located about 33 river miles north of New Orleans' Canal Street, the spillway consists of a control structure in the left bank of the Mississippi River near Norco, Louisiana and an upper and lower guide levee extending about 5.7 miles between the river and Lake Pontchartrain. ROA.222. By removing wooden "needles" from the control structure's concrete weir, the Corps, which operates the structure, can open a series of bays that allow water that would otherwise flow downstream to New Orleans to instead pass out of the main channel and follow the guide levees to Lake Pontchartrain and ultimately the Gulf of Mexico. ROA.222-24.

According to a 1927 report to Congress authored by Major General Edwin Jadwin, the spillway is designed to divert up to 250,000 cubic feet per second ("cfs") of water out of the river when the flow past New Orleans would otherwise reach 1,250,000 cfs—a greater flow than the levees around the city are designed to safely contain. ROA.9610-11; *see also* ROA.9588-89, 9608-09.[1] In essence, the Bonnet Carré Spillway's role is to be an off-ramp for excess flow before that flow reaches the population center of New Orleans. *See* ROA.9590-91. Thus, the spillway plays a critical role in the Project's original design, given the Jadwin Report's warning that the consequences of a levee failure along the city front would be "so appalling that no measures should be spared to prevent it." ROA.9599. As that report explained, absent Bonnet Carré and other floodways, levees at New Orleans would need to be increased to unsafe and economically impractical heights to provide comparable protection to the city. ROA.9590-91.

Following passage of the 1928 Act, construction of the Bonnet Carré Spillway promptly commenced. ROA.6517. The spillway's control structure itself was completed in 1931, and the guide levees leading to Lake Pontchartrain were

[1] The Jadwin Report refers to the trigger for opening the spillway both in terms of flow rate (1,250,000 cfs) or water reaching a specific height (20 feet) at the Carrollton gauge near New Orleans. *See* ROA.9610-11. Due to scouring of the channel, a flow of 1,250,000 cfs—which, again, is a higher rate of flow than the downstream levees are expected to safely pass— now corresponds to a lower reading at the gauge. ROA.11056. The Corps relies on the more precise flow-rate measure as the benchmark for operating the spillway. *See id.*; pp. 31-32, *infra*.

completed in 1932. *Id.* While work on other infrastructure within the broader Project continues to the present—particularly, improving downstream levees, *see, e.g.*, ROA.808—the spillway has remained unchanged except for occasional repairs since construction was completed in the 1930s. *See* ROA.6519.

In the near-century that the spillway has been operational, the Corps has consistently hewed to the Jadwin Report's guiding principle that the bays are to be opened when flow past New Orleans would otherwise reach or exceed 1,250,000 cfs. *See* ROA.10299. Indeed, that threshold is recited in the most recent operating manual for the spillway, which was promulgated in 1999. ROA.261-62. Although the Jadwin Report did not purport to predict future river conditions, that report relied on past records to estimate that applying that threshold would result in the spillway being opened relatively rarely, about once every five years. ROA.9610; *see also* ROA.242, 268 (provisions of 1999 manual expecting that the spillway would be opened every 7 to 10 years). In practice, the spillway was opened 14 times between 1932 and 2019, or about once every six years—although six of those openings have occurred in 2008 or later. ROA.10748. On each of those 14 occasions, the spillway was opened when flow past New Orleans was projected to reach or exceed 1,250,000 cfs. ROA.10289, 10299; *see, e.g.*, ROA.445, 9393-95, 9398-9400, 9403-04.

B. The Corps' compliance with the National Environmental Policy Act

Nearly 40 years after construction of the Bonnet Carré Spillway, Congress enacted NEPA. NEPA directs that federal agencies "shall" prepare a "detailed statement" of the environmental impacts of all "major Federal actions" that the agency proposes. 42 U.S.C. § 4332. That detailed statement is known as an environmental impact statement, or "EIS."

At the time relevant to this lawsuit, the Council on Environmental Quality's regulations implementing NEPA defined "major Federal action" to include "actions with effects that may be major and which are potentially subject to Federal control and responsibility," and noted that such actions tend to fall into one of four categories: "[a]doption of official policy," "[a]doption of formal plans," "[a]doption of programs," and "[a]pproval of specific projects." 40 C.F.R. § 1508.18 (effective through Sept. 13, 2020).[2] Those regulations further provided that an agency "shall prepare supplements" to a draft or final EIS if the agency "makes substantial changes in the proposed action that are relevant to

[2] The Council on Environmental Quality's regulations "are entitled to substantial deference." *Sabine River Authy. v. U.S. Dep't of Interior*, 951 F.2d 669, 677 (5th Cir. 1992). Those regulations were amended after Harrison County filed the operative complaint in this lawsuit. *See* 85 Fed. Reg. 43,304 (July 16, 2020). The Council on Environmental Quality has recently proposed amending those regulations again. *See* 86 Fed. Reg. 55,757 (Oct. 7, 2021). Throughout this brief, regulatory citations are to the versions in place when this suit was filed.

environmental concerns," or "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." *Id.* § 1502.9(c) (effective through Sept. 13, 2020). An agency need not prepare a supplement every time new information comes to light, however; instead, the decision to supplement is subject to a "rule of reason" that "turns on the value of the new information to the still pending decisonmaking process." *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 373-74 (1989). More fundamentally, the Supreme Court has made clear that any duty to supplement exists "only if there remains 'major Federal [a]ction' to occur" with regard to the subject of analysis. *Norton v. S. Utah Wilderness Alliance (SUWA)*, 542 U.S. 55, 73 (2004) (internal quotation marks omitted).

NEPA does not apply retroactively to major federal actions that predate the statute's enactment. *Olivares v. Martin*, 555 F.2d 1192, 1197 (5th Cir. 1977). Accordingly, when the Corps prepared a programmatic EIS for the Project in 1976, it emphasized those portions of the Project that then remained to be built. *See* ROA.1857-58 ("this statement covers only that portion of the main stem project that remains to be constructed, remaining appurtenant projects, and Federal operation and maintenance of the main stem project"). Likewise, when the Corps supplemented the Project EIS in 1998, it focused on proposed construction that had yet to occur. *See* ROA.4094; *see also* 83 Fed. Reg. 32,642, 32,642-43 (July 13,

2018) (announcing intent to supplement the 1976 EIS to study options for additional construction and "certain remedial measures" that "need to be undertaken" in particular reaches of the levee system); 85 Fed. Reg. 72,649, 72,650 (Nov. 13, 2020) (notice of availability for supplement).

Nevertheless, the 1976 EIS does discuss completed portions of the project, including the Bonnet Carré Spillway. For Bonnet Carré in particular, the 1976 EIS describes the spillway and its function, inventories the spillway's flora and fauna, and notes the times it has been opened since construction. ROA.1895-97. The 1976 EIS goes on to briefly describe impacts of opening the spillway "observed during and after past operations." ROA.1897. Specifically, the 1976 EIS acknowledges that "[h]erbaceous plants" in the spillway "are usually destroyed and revegetation occurs within 2-3 months" of an opening, with more selective impacts on shrubs and no impacts on trees. *Id.* With regard to animals found in the corridor between the river and Lake Pontchartrain, the 1976 EIS notes that "[o]peration of the spillway appears to enhance crawfish production" in the area, but has been associated with migration of snakes out of the area. ROA.1898.

As for impacts on Lake Pontchartrain and the connecting water bodies of primary interest to Harrison County, the 1976 EIS recognizes that opening the spillway has effects on both water chemistry and wildlife, including commercially harvested oysters:

> Mississippi River waters discharged through the spillway suppress salinity levels in Lake Pontchartrain, Lake Borgne and Mississippi Sound. The areal extent of the influence is dependent upon the volume of water flowing through the structure and the duration of the operation. During periods of low salinity, many estuarine fishes and crustaceans migrate from the Lake Pontchartrain system as the salinity content decreases to a level below their respective tolerances. Accordingly, the number of fresh water organisms increases as the lake becomes favorable for their occupation. Sessile species such as commercial oysters cannot migrate to more favorable waters and many perish. Oyster mortality has been observed in Lakes Pontchartrain and Borgne and Mississippi Sound. However, the influx of river waters enhance oyster production on the oyster beds south of the area of mortality by reducing high salinities and supplying nutrients.

Id. The 1976 EIS then contextualized these effects in light of the historical "flooding of the Pontchartrain – Borgne Basin" that occurred whenever the river naturally flooded its banks, concluding that "[i]n essence, the discharge of Mississippi River water into the Lake Pontchartrain-Borgne-Mississippi Sound system by operation of the Bonnet Carr[é] Spillway influences short and long term benefits and detriments as did natural flooding many years ago." *Id.*

Outside of the 1976 EIS, the Corps and other federal agencies have extensively studied and documented the effects of opening the Bonnet Carré Spillway. Most notably, the Corps and its sister agencies have historically conducted detailed studies (including the collection of monitoring data) after spillway openings. These studies include, among other examples, specific reports on impacts to oysters and the oyster harvesting industry in Lake Borgne and the

Mississippi Sound in 1945 and 1950, ROA.1205-46, 1253-64, and a several-hundred-page 1973 post-flood report that includes an entire section dedicated to the botanical and zoological impacts of opening the Bonnet Carré Spillway and nearby Morganza Spillway. *See generally* ROA.1267, 1623. More recent examples also abound. *See, e.g.*, ROA.7756 (report on benthic community's response to 2008 opening), 7908 (2008 post-opening biological monitoring report), 8256 (2011 post-flood report).

C. This lawsuit

Harrison County filed this APA challenge in 2019. ROA.25. The operative complaint pleads two claims, only one of which is relevant to this appeal: that NEPA requires the Corps to prepare a supplemental environmental analysis of the Bonnet Carré Spillway.[3] ROA.89-92.

---

[3] The second claim, which alleges violations of the Magnuson-Stevens Fishery Conservation and Management Act, remains pending in the district court. ROA.91-92, 11095.

For this Court's awareness, Harrison County pleaded its NEPA and Magnuson-Stevens claims as against both the Corps *and* the Mississippi River Commission, a survey and study body established by Congress in 1879. ROA.89-92; *see generally* 33 U.S.C. §§ 641, 647, 702h. The district court dismissed the claims as against the Commission because the Commission is not an "agency" under the APA. ROA.11078-81. The County has not briefed—and has thus forfeited—any challenge to the dismissal of its claims as against the Commission. *United States v. Bowen*, 818 F.3d 179, 192 n.8 (5th Cir. 2016).

The Corps moved to dismiss Harrison County's NEPA claim for lack of jurisdiction, because—among other reasons not at issue on appeal—the County failed to demonstrate a valid waiver of the federal government's sovereign immunity. ROA.408-19, 11086. As the Corps explained, Harrison County sought to compel federal agency action unlawfully withheld, relying on the APA's waiver of sovereign immunity. ROA.408-10; *see generally* 5 U.S.C. §§ 702, 704, 706(1). To invoke that waiver, a plaintiff must identify a discrete, legally required duty that the agency failed to take. ROA.408-10. Here, Harrison County pointed to nothing in NEPA or its implementing regulations that would oblige the Corps to prepare a new analysis of the agency's ongoing operation of a 90-year-old spillway under the same operational criteria set out in the spillway's foundational documents. *See* ROA.410-19.

Harrison County, for its part, did not dispute that it had to identify a discrete, mandatory duty to invoke the district court's jurisdiction, but maintained that NEPA imposes a duty to analyze the impacts of the completed spillway because other downstream Project features are still under construction. *See* ROA.11087-88. The County also argued that supplemental analysis is required because adherence to the operational criteria has resulted in more frequent spillway openings in the past decade than at other points in the spillway's history. *See id.*

The district court held that Harrison County had failed to show that NEPA imposed a discrete mandatory duty on the Corps which the court could compel. ROA.11088-92. It accordingly dismissed the NEPA claim for lack of jurisdiction and entered separate final judgment on that claim, per Federal Rule of Civil Procedure 54(b). ROA.11094-95. Harrison County then filed a motion to alter or amend the judgment, largely rehashing its earlier arguments, which the district court denied. ROA.11021-26, 11141-44. This appeal followed.

SUMMARY OF ARGUMENT

The United States is subject to suit only if Congress has provided a waiver of the federal government's sovereign immunity, and only in strict compliance with that waiver's terms. Although the APA provides a waiver of sovereign immunity for some claims to compel final agency action unlawfully withheld, that waiver applies only where the plaintiff can show that the agency has a legally required duty to take the discrete action that the plaintiff seeks to compel. Harrison County has acknowledged that it relies on the APA's waiver of sovereign immunity for its claim to compel the Corps to conduct further environmental analysis of the long-completed Bonnet Carré Spillway. But even assuming that a freestanding claim to compel supplemental environmental analysis is actionable, the County has failed to show that any law requires the Corps to conduct new analysis at this time.

Throughout this litigation, Harrison County has maintained that NEPA and its implementing regulations impose such a duty, specifically pointing to regulatory language requiring an agency to "supplement" an EIS when certain kinds of new information come to light. But binding precedent makes clear that any duty to supplement under NEPA exists *only* where there is "major Federal action" still to be taken. The County's opening brief offers two "major Federal actions" that it argues oblige the Corps to perform a supplemental analysis of the spillway, but neither is availing.

First, ongoing construction on parts of the massive Mississippi River & Tributaries Project other than the Bonnet Carré Spillway is not a "major Federal action" requiring further analysis of the spillway itself. Construction of the spillway has been complete for nearly a century, and Harrison County does not allege that the Corps has proposed to take *any* action that would add to or change the spillway—let alone "major" action within the meaning of NEPA. The County's attempt to use construction elsewhere as a hook for analyzing a long-completed structure is unmoored from case law and clashes with the "rule of reason" that governs the decision whether to perform supplemental NEPA analysis.

Second, the Corps' continued operation of the fully constructed spillway is likewise not a "major Federal action." It is well-established that an agency's continued operation of a federal infrastructure project that predated NEPA's

enactment does not so qualify, unless the agency makes significant changes to the way it operates the project that would themselves qualify as new "major Federal action." No such changes exist here, because the Corps continues to apply the same criterion for opening the spillway that it has applied for almost a century. Harrison County's suggestion that the Corps has deviated from that standard is belied by the record. And neither the fact that faithful adherence to that criterion has resulted in more frequent openings during the past decade than at other points in the spillway's history, nor the County's attempt to conflate the Corps' responsibilities under NEPA with its separate duties under the Endangered Species Act, compels a different result.

To be sure, if in the future the Corps proposes to make major changes to either the structure or operation of Bonnet Carré, it may well incur obligations under NEPA at that time. But the statute does not *now* obligate the Corps to perform the analysis that Harrison County seeks. This Court should therefore affirm dismissal of the County's claims.

Because Harrison County's jurisdictional arguments fail on their own terms, this Court need not reach the underlying question whether freestanding claims to compel supplemental environmental analysis are ever actionable under the APA. If the Court does reach that question, it should hold that, because an EIS is not itself a final agency action and is only subject to review where a plaintiff challenges some

discrete final action studied in the EIS, a claim to compel a supplemental EIS is likewise not reviewable unless a plaintiff can point to a discrete final action requiring that supplemental analysis. For the reasons discussed, the County has not done so here.

STANDARD OF REVIEW

This Court reviews de novo a district court's dismissal of a claim for lack of subject-matter jurisdiction. *In re Condor Insurance Ltd.*, 601 F.3d 319, 321 (5th Cir. 2010).

ARGUMENT

The district court properly dismissed Harrison County's claim to compel the Corps to perform supplemental NEPA analysis.

"It is well settled that the United States may not be sued except to the extent that it has consented to suit." *Alabama-Coushatta Tribe of Texas v. United States*, 757 F.3d 484, 488 (5th Cir. 2014) (quoting *Koehler v. United States*, 153 F.3d 263, 265 (5th Cir. 1998)). When the United States has not so consented, or when a plaintiff "has not met the terms of the statute" waiving the United States' sovereign immunity, the plaintiff's lawsuit must be dismissed for lack of subject-matter jurisdiction. *Id.* Such statutory waivers are construed narrowly, "in favor of the sovereign," and the burden of demonstrating that a given lawsuit comports with the relevant waiver is on the plaintiff. *Id.* at 487-88 (quoting *Lane v. Pena*, 518 U.S. 187, 192 (1996)). Where, as here, the plaintiff fails to meet that burden, the claims

are properly dismissed. *E.g.*, *id.*; *Louisiana v. United States*, 948 F.3d 317, 322-24 (5th Cir. 2020).

A. There is no waiver of sovereign immunity for the County's NEPA claim because the County has not shown that the Corps is proposing to take "major Federal action."

Harrison County relies exclusively on the APA's waiver of sovereign immunity as the basis for jurisdiction over its claim to compel the Corps to perform additional NEPA analysis on the Bonnet Carré Spillway. *See* Op. Br. 17-18. The APA waives the United States' sovereign immunity for "[a]n action in a court of the United States seeking relief other than money damages and stating a claim that an agency . . . acted or failed to act." 5 U.S.C. § 702. As discussed further below (pp. 38-40), this waiver applies to "final agency action," except where a specific statute otherwise makes agency activity subject to review. *Id.* § 704; *e.g.*, *Dunn-McCampbell Royalty Interest, Inc. v. Nat'l Park Serv.*, 112 F.3d 1283, 1288 (5th Cir. 1997); *Veldhoen v. U.S. Coast Guard*, 35 F.3d 222, 225 (5th Cir. 1994).

Setting aside for now the issue of finality, it is well-settled in this circuit that the APA's waiver does not confer jurisdiction over every claim that an agency should do something that it is not doing. To the contrary, the waiver applies only when the plaintiff identifies a discrete "'agency action' affecting him in a specific way." *Alabama-Coushatta Tribe*, 757 F.3d at 489 (quoting *Lujan v. National*

Wildlife Federation, 497 U.S. 871, 882 (1990)); *Louisiana*, 948 F.3d at 322-24. As relevant here, "agency action" can include a "failure to act," 5 U.S.C. § 551(13), and courts may "compel agency action unlawfully withheld." *Id.* § 706(1). But such a claim "can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." *SUWA*, 542 U.S. at 64 (emphases in original); *Louisiana*, 948 F.3d at 323; *cf. Dunn-McCampbell*, 112 F.3d at 1288.

Harrison County provides only one possible basis for its posited requirement that the Corps must analyze the environmental impacts of the spillway at this time: NEPA. The County relies in particular on NEPA's implementing regulations regarding when an agency "shall" prepare a supplemental analysis. 40 C.F.R. § 1502.9(c). But the duty to supplement, like the duty to prepare an EIS in the first instance, exists only where the "major Federal action" is ongoing, or there remains some relevant "major Federal action" left for the agency to perform—a settled rule that the County does not, and could not, contest. *SUWA*, 542 U.S. at 73; *e.g.*, *W. Org. of Res. Councils v. Zinke*, 892 F.3d 1234, 1243 (D.C. Cir. 2018); *Ctr. for Biological Diversity v. Salazar*, 706 F.3d 1085, 1094-95 (9th Cir. 2013); *Greater Yellowstone Coal. v. Tidwell*, 572 F.3d 1115, 1122-23 (10th Cir. 2009). Thus, the

existence of some ongoing or proposed "major Federal action" with regard to the spillway is a prerequisite for jurisdiction to exist over the County's claim.[4]

On the above framework, the parties agree. *See* Op. Br. 18. The sole dispute on appeal is whether Harrison County has in fact demonstrated that any relevant "major Federal action" remains to be taken which could ground a duty to prepare new NEPA analysis for the Bonnet Carré Spillway. It has not. The spillway has been fully constructed for 90 years, and the Corps continues to apply the same operational criteria set out in the spillway's foundational design documents. *See* pp. 4-6, *supra*. Thus, there is no ongoing or proposed construction at the spillway nor any changes in operation that could even arguably constitute a "major Federal action." The County's contrary arguments are unpersuasive.

[4] To be clear, an ongoing "major Federal action" is necessary but not sufficient to show that supplementation is required. *See generally Marsh*, 490 U.S. at 378-85; *Louisiana Crawfish Producers Ass'n-West v. Rowan*, 463 F.3d 352, 358 (5th Cir. 2006) (supplementation is not required absent a showing of "substantial changes" or "significant new circumstances or information"); *Coker v. Skidmore*, 941 F.2d 1306, 1310 (5th Cir. 1991) (same). Because the County cannot meet the first hurdle, the district court did not—and this Court need not—decide whether the changed circumstances the County alleges are so significant as to require new analysis. *See Marsh*, 490 U.S. at 378 (considering whether alleged new information required supplementation only after verifying that there remains action to occur). In any event, that subsequent question is normally for the agency to decide in the first instance, subject to arbitrary-and-capricious review. *Id.* at 376.

1. There is no ongoing or proposed new construction that would constitute "major Federal action" requiring the Corps to conduct supplemental environmental analysis on the completed spillway.

For purposes of this appeal, the Corps does not dispute that erecting a structure like Bonnet Carré in the first instance would likely qualify as a "major Federal action." But as discussed above, construction of the spillway has been complete since the 1930s. ROA.6517. NEPA's enactment almost forty years later did not impose a retroactive duty to prepare an EIS on the impact of erecting the spillway. *Olivares*, 555 F.2d at 1197. And Harrison County has pointed to *no* material changes to the structure following NEPA's enactment, nor any changes that the Corps proposes to make going forward. Thus, there is no ongoing or proposed action of any stripe related to construction of the spillway, let alone "major Federal action."

That fact makes the County's reliance on 40 C.F.R. § 1508.18, which at the time the lawsuit was filed defined "major Federal action" to include "continuing activities" and "programs," inapposite. That fact likewise distinguishes this case from *Marsh*, on which the County principally relies. *See* Op. Br. 20-22. In *Marsh*, the Supreme Court held that the Corps could have a duty to supplement an EIS regarding a proposal to build a dam where that dam was only "about one-third

completed." 490 U.S. at 367, 370-74.[5] Here, the spillway that the County wants the Corps to study is *entirely* complete, and has been for decades. This case is therefore not like *Marsh* but *SUWA*, which held that an agency was *not* obliged to supplement an EIS for a land-use plan where that plan had already been completed and approved. 542 U.S. at 73. In that case unlike *Marsh*, the Court explained, there could be no duty to supplement because there was no "major Federal action" left to occur. *Id.*; *see also, e.g.*, *Ctr. for Biological Diversity*, 706 F.3d at 1094-95; *Greater Yellowstone*, 572 F.3d at 1122-23.

Harrison County disagrees that *SUWA* controls—but not because it contends that any work on the spillway itself is proposed or ongoing. The County instead points to the fact that construction on other infrastructure within the Mississippi Rivers and Tributaries Project is ongoing. But, to be clear, the County has not challenged the Corps' authority to take any specific, proposed actions with regard to those Project structures. *See* Op. Br. 20-22; *see also* ROA.11088. Nor does the County argue that the impacts of any such actions *themselves* require further study. *See* Op. Br. 20-22. Rather, the County seeks to use the fact of ongoing work on other infrastructure within the Project as a hook to compel the agency to further analyze the completed spillway. This NEPA does not require.

[5] The Supreme Court ultimately held that it was not arbitrary and capricious for the Corps to conclude that no supplement was required, because the "new" information bearing on the dam was "of exaggerated importance." *Id.* at 385.

To understand why, this Court need look no further than *Marsh*. As discussed, *Marsh* held that the Corps could have an obligation to supplement an EIS regarding a proposal to construct a dam, where new information about the environmental impact of the dam surfaced before construction was complete. 490 U.S. at 370-73. Of note, the dam at issue in that case was one part of "a major project to control the water supply" in Oregon's Rogue River Basin. *Id.* at 363. That project included two other "large dams" which were completed about a decade earlier. *Id.* at 363-64. Although the question was not directly before the Court, nothing in the decision suggests that the ongoing work on the third and final dam would have triggered a duty to supplement the NEPA analyses for the two completed dams.

To the contrary, *Marsh* stressed that the obligation to supplement an EIS is subject to a "rule of reason" and "turns on the value of the new information to the *still pending* decisionmaking process." *Id.* at 374 (emphasis added). The Court likewise explained that a supplemental EIS may be required "[i]f there remains 'major Federal actio[n]' to occur, and if the new information is sufficient to show *that the remaining action* will affect the quality of the human environment in a significant manner." *Id.* (emphasis added). In other words, the duty to supplement is a duty to adequately consider the impacts of action that remains to be performed, not action already complete. That focus is consistent with NEPA's purpose, which

is to consider the impacts of proposed action while the agency still has "a meaningful opportunity to *weigh* the benefits of the project versus the detrimental effects on the environment." *Id.* at 372 (emphasis in original).

Harrison County's proposition that ongoing work elsewhere in the Project triggers an obligation to prepare a supplemental analysis of the completed spillway does not serve NEPA's purpose. Regardless of whether some structures within the Project are currently under construction, any new information yielded by further analysis of the spillway's impacts could have no effect on the construction or design of the spillway itself, which is a *fait accompli*. Nor could that information alter the 1,250,000 cfs threshold for opening the spillway, which was part of the plan set forth in the Jadwin Report adopted in the Flood Control Act of 1928. *See* ROA.9610-11; 33 U.S.C. § 702a. The County's unsupported assertion that "[t]here 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" is therefore incorrect, to the extent the County means that the Corps could make significant changes to the spillway itself, absent a new Congressional authorization. Op. Br. 22.[6]

[6] To the extent the County instead means to suggest that further study of the effects of the spillway could induce the Corps to alter proposed work elsewhere in the Project in a way that would indirectly mitigate those effects, it has forfeited the argument by failing to brief it in any detail. *See Bowen*, 818 F.3d at 192 n.8. In any event, as stated above, the County has not challenged any particular ongoing or

Moreover, even assuming that the Corps has or could obtain Congressional authorization to make significant changes to the spillway at this point, the fact that an agency has the theoretical ability to reconsider a completed project in the future generally is not a sufficient basis for requiring supplemental NEPA analysis. *See, e.g.*, *Greater Yellowstone*, 572 F.3d at 1123. The contrary rule that the County suggests—that re-analysis is required any time an agency has the option of revisiting completed portions of a project, regardless of whether it has concrete plans to do so—would run afoul of *Marsh*'s admonition that the duty to supplement should not be allowed to "render agency decisionmaking intractable." 490 U.S. at 373.

Indeed, such a rule would be particularly paralyzing in the context of massive federal flood-control, hydroelectric, and other projects, which—as here—frequently involve the iterative construction of dozens of distinct but complementary infrastructure projects, spanning hundreds or thousands of square miles, over decades or more. In those circumstances, NEPA's "rule of reason" counsels against reopening study on completed structures every time new structures are authorized, and instead favors the approach that the Corps has taken

---

proposed construction activity in this litigation. Should the County do so in the future, it would be free at that time to make whatever case it can that the ongoing action is so related to operation of the spillway that the effects of opening the spillway must be considered in order to fully understand the impacts of the ongoing action.

for the Project: focusing any supplemental analyses on the impacts of those individual actions that remain to be taken. ROA.1857-58, 4094; *see also* 83 Fed. Reg. at 32,642-63.

To be clear, the Corps does not dispute that the various parts of the Project are designed to work compatibly toward the overall goal of controlling flooding in the Lower Mississippi River Valley, and that as such they are elements of a single (massive) agency program. *See, e.g.*, ROA.3508, 6509, 6518. But they are discrete structures that serve discrete functions within that larger program.

As for Bonnet Carré in particular, the spillway's function is to allow the Corps to divert water from the river before it reaches New Orleans, under certain conditions. The spillway has its own operating manual (which is, admittedly included as a "related manual[s]" in the appendix to the Corps' Lower Mississippi River "master" manual). ROA.3502, 6496. The flood-control effects of operating the spillway are additional to the flood-control benefits of other parts of the Project. *See* ROA.3508, 6509. And, notably, Congress has never directed the Corps to make significant changes to the spillway in response to the ongoing work that Congress has authorized on other parts of the Project for the better part of the last century. *See* ROA.6517-20. To nevertheless treat these varied activities as one, inseparable action would conflict with the settled principle that an agency's overall implementation of a broad program may not be treated as a single agency "action"

for purposes of the APA. *See generally SUWA*, 542 U.S. at 62-64; *Lujan*, 497 U.S. at 890; *Alabama-Coushatta Tribe*, 757 F.3d at 490-91; *Sierra Club v. Peterson*, 228 F.3d 559, 566 (5th Cir. 2000); *see also Village of Bald Head Island v. U.S. Army Corps of Eng'rs*, 714 F.3d 186, 193-94 (4th Cir. 2013) (holding that Corps' performance of a harbor improvement project is not "action" within the meaning of the APA).[7]

For these reasons, it is perhaps unsurprising that Harrison County has pointed to no decision holding that ongoing work on one agency project triggers a duty to perform supplemental analysis on the impacts of a related, completed project. For the same reasons, this Court should not create such a rule here.

2. The Corps' continued operation of the spillway under the same criteria set forth in the Jadwin Report is not "major Federal action."

Harrison County argues in the alternative that the Corps' continued operation of the Bonnet Carré Spillway is an ongoing "major Federal action." This argument also fails.

---

[7] While the County has not squarely argued otherwise, the Corps notes that the agency's decision to prepare a single programmatic EIS discussing various parts of the Project in 1976 tracks this analysis. Agencies have discretion to discuss related activities that are part of a larger program in a single comprehensive EIS; the choice does not signify that the activities could not instead be analyzed individually. *See Mayo v. Reynolds*, 875 F.3d 11, 23 (D.C. Cir. 2017); *United States v. 162.20 Acres*, 733 F.2d 377, 380-81 (5th Cir. 1984); *see also* 40 C.F.R. §§ 1502.20, 1508.28 (effective through Sept. 13, 2020).

The Corps does not dispute that it continues to operate the spillway, in accordance with the Jadwin Plan and the 1999 operating manual, when Mississippi River flows are projected to exceed the 1,250,000 cfs threshold. But, as a matter of law, continued operation of an existing federal project is not "major Federal action" giving rise to a duty to perform new NEPA analysis, absent a change in the relevant operating procedures.[8] *E.g.*, *Idaho Conservation League v. Bonneville Power Admin.*, 826 F.3d 1173, 1175-78 (9th Cir. 2016); *Grand Canyon Trust v. U.S. Bureau of Reclamation*, 691 F.3d 1008, 1021-22 (9th Cir. 2012); *Upper Snake River Chapter of Trout Unltd. v. Hodel*, 921 F.2d 232, 234-35 (9th Cir. 1990); *see also Burbank Anti-Noise Grp. v. Goldschmidt*, 623 F.2d 115, 116-17 (9th Cir. 1980); 40 C.F.R. § 1508.18(b) (noting that relevant federal actions "tend to fall within" four categories, all involving "adoption" or "approval" of a course of action). This rule applies the principle, repeatedly espoused by this Court, that NEPA analysis is not required where an activity "will effect no change in the status quo." *Sabine River*, 951 F.2d at 679 (quoting *Burbank*, 623 F.2d at 116); *see also Sierra Club v. Hassell*, 636 F.2d 1095, 1099 (5th Cir. 1981) (holding that Coast

[8] Contrary to the opening brief's assertion (Op. Br. 23), that principle is indeed "a matter of law," although whether there has in fact been a change in operating procedures in any particular case is, of course, fact-specific.

Guard was not required to prepare EIS before rebuilding a bridge destroyed by a hurricane).[9]

Here, the Corps' continued operation of Bonnet Carré merely perpetuates the same status quo that has been in effect for nearly a century. As previously discussed, per the Jadwin Report, the spillway was designed to be opened when the rate of flow passing New Orleans would otherwise reach 1,250,000 cfs. ROA.9610-11. That threshold is incorporated into the spillway's governing operating manual. ROA.261-62. And in practice, the Corps continues to use that threshold to decide whether it will open the spillway during a given flood event. ROA.10289, 10299; *see, e.g.*, ROA.445, 9205, 9393-95, 9398-9400, 9403-04.

For these reasons, the Corps' ongoing operation of the spillway is functionally indistinguishable from the Bureau of Reclamation's ongoing operation of the Palisades Dam, which the Ninth Circuit held was not a "major Federal

[9] As the district court correctly recognized, *contra* Op. Br. 25-26, the rule is also related to the principle that an agency need not perform a new analysis of later steps in a plan or program, where the impacts of those steps were already considered in an earlier EIS. *See, e.g.*, *W. Org. of Res. Councils*, 892 F.3d at 1243; *Mayo*, 875 F.3d at 16; *Cronin v. U.S. Dep't of Agric.*, 919 F.2d 439, 447-48 (7th Cir. 1990); *Envtl. Def. Fund, Inc. v. Andrus*, 619 F.2d 1368, 1382 (10th Cir. 1980). The inquiry into whether the impacts of later activities are consistent with those already studied is inapplicable where, as here, the agency is continuing to operate a structure that predates NEPA and thus was never subject to the EIS requirement. *See, e.g.*, *Upper Snake River*, 921 F.2d at 234-35.

action" in *Upper Snake River*. 921 F.2d at 235. As the Ninth Circuit explained in that case:

> The Federal defendants in this case had been operating the dam for upwards of ten years before the effective date of [NEPA]. During that period, they have from time to time and depending on the river's flow level, adjusted up or down the volume of water released from the Dam. What they did in prior years and what they were doing during the period under consideration were no more than the routine managerial actions regularly carried on from the outset without change. They are simply operating the facility in the manner intended. In short, they are doing nothing new, nor more extensive, nor other than that contemplated when the project was first operational. Its operation is and has been carried on and the consequences have been no different than those in years past.

Id.; *see also Idaho Conservation League*, 826 F.3d at 1175-78; *Grand Canyon Trust*, 691 F.3d at 1022. So also here. Indeed, a district court rejected previous claims that the Corps was required to prepare an EIS for the Bonnet Carré Spillway on just that ground, more than twenty years ago. *Save Our Wetlands, Inc. v. Flowers*, No. Civ. A. 97-0814, 1998 WL 32761, at *3 (E.D. La. Jan. 28, 1998).

Harrison County's primary argument for distinguishing *Upper Snake River* and cases like it is that the Corps' operation of the spillway from 2016 through 2020 allegedly represents a "significant shift in direction" rather than "routine operations." Op. Br. 22-23. But none of the "significant shift[s]" that the County posits are shifts in the Corps' management strategy at all.

Harrison County first asserts that the Corps has deviated from past practice by operating the spillway "well below" the 1,250,000 cfs threshold in 2019,

because of unsafe river conditions. Op. Br. 25. But the record is clear that the decision to open the spillway twice in 2019 was preceded—both times—by a projection that the flow past New Orleans would otherwise exceed 1,250,000 cfs. ROA.9396-9404.

The County nevertheless emphasizes that the spillway was not closed immediately upon flow falling below the 1,250,000 cfs benchmark, but remained open until the Corps determined it would be safe to begin closing the bays—both for the workers that operate the structure and for the integrity of the downstream levees. *See* ROA.10654, 10664; *see also* ROA.10301-04. But while the Jadwin Report does contemplate that the spillway "will be cut off as soon as" a flood event crosses back below the operational trigger, ROA.9611, the Corps has long understood that Congress provided the agency with flexibility to time closure to protect public safety. As a 1991 memo explains, the 1928 Flood Control Act "requires that the floodway be operated when the discharge flow exceeds 1,250,000 cfs," but that requirement "is qualified . . . by the general authority of the Act, which provides that the Corps has limited discretion to operate the floodway by deviating from the specified discharge in order to protect life and property in New Orleans, the integrity of the [Project] or to otherwise accomplish the purpose of the Act." ROA.11058; *see also* ROA.6509, 10654. The County

therefore has not established any significant change in the Corps' historical practice.

Harrison County next asserts that the Corps has deviated from past practice by opening the spillway for "minor flooding" in recent years. Op. Br. 7, 24. This contention is likewise belied by the record. As stated, the Corps continues to use the 1,250,000 cfs threshold for deciding whether to open the spillway. It is true but immaterial that the threshold now corresponds to a lower reading on the downstream Carrollton gauge than the 20 feet that the Jadwin Report equated with that level of flow. *See generally* p. 5 n.1, *supra*. As the record explains, scouring of the river's channel has increased the river's efficiency and velocity, so that flow can now reach the 1,250,000 cfs trigger—a volume dangerous to the integrity of downstream levees—well before the height of water on the Carrollton gauge reaches 20 feet. ROA.11056; *see also Save Our Wetlands*, 1998 WL 32761, at *2-3 ("the scouring and degrading of the river channel itself over the years may well have made the 20 foot measure an inferior indicator of dangerously high water levels"). The County relies on the declaration of its own expert to support its characterization of such events as "minor." Op. Br. 7; ROA.152-54. In reality, of the 14 floods that have occasioned opening the spillway through 2019, only one has reached a maximum reading of 20 feet on the Carrollton gauge, and that

occurred in 1950. ROA.11051; ROA.11056. All of the rest corresponded with lower readings on that gauge.

Harrison County's remaining assertion that the Corps has shifted direction on operating the spillway relies on the County's view that the frequency of spillway openings has increased since 2016. Op. Br. 23-25. The County is correct that the Corps has opened the spillway four times between 2016 and 2019. ROA.10748. But as discussed above, each time the Corps opened the spillway based on longstanding operating criteria. The County argues that this Court should nevertheless find "major Federal action" here because applying the established criteria to today's weather and other environmental conditions has resulted in more frequent openings than were "within the contemplation of the project when originally approved." Op. Br. 24 (quoting *Westlands Water District v. United States*, 850 F. Supp. 1388, 1415 (E.D. Cal. 1994)). That position finds neither factual nor legal support.

On the facts, the record is not clear that the consequences of applying the operating criteria *are* outside what was contemplated at the spillway's outset. While the Jadwin Report and operating manual express an expectation that the spillway would be opened somewhere between once every five years and once every ten years based on past records, neither document sets any hard and fast rule for how frequently openings may occur. ROA.242, 268, 9611. Moreover,

considered over the lifetime of the spillway, the 14 openings through 2019 work out to about one opening every six years—a rate in line with those documents' predictions. *See* ROA.10748. To be sure, the rate is higher if, as Harrison County does, one considers the four openings from 2016 to 2019 in isolation. But the same is true of other periods in the spillway's history; for example, from 1973 to 1979, there were three openings in seven years. *Id.* At other times, a decade or more has passed with no opening at all. *See id.* Such is the nature of an average.

On the law, even assuming that application of the spillway's longstanding operating criteria to today's conditions *is* resulting in more frequenting openings than originally contemplated, Harrison County has pointed to no case holding that an agency's application of existing operating criteria to new environmental circumstances constitutes a "major Federal action." Indeed, the weight of authority suggests just the opposite. For example, looking again to *Upper Snake River*, the court of appeals in that case rejected an argument that NEPA analysis was required when the Bureau of Reclamation chose to reduce flow through a dam to a level that previously occurred on a sustained basis during only three years of the dam's thirty-plus year history. 921 F.2d at 235-36. As the court explained, "flow rate will vary over time as changing weather conditions dictate," but "[w]hat does not change is the [agency's] monitoring and control of the flow rate to ensure" the project's longstanding objectives. *Id.*; *see also Oregon Nat. Res. Council v. Bureau*

of Reclamation, 52 F.3d 334, at *1 (9th Cir. 1995) (unpublished) (rejecting claim that "historic low[]" water levels maintained in federal reservoir required NEPA analysis where "[i]t is undisputed that water levels . . . have been raised and lowered by the [agency] to meet changing needs and water supplies since the inception of the project.").

The lesson of these decisions is that "the time for an EIS is when an agency undertakes a 'significant shift of direction in operating policy,'" not when it faithfully applies that policy to contemporary conditions. *Idaho Conservation League*, 826 F.3d at 1176. Each of the decisions on which Harrison County relies reflects that rule. *See Upper Snake River*, 921 F.2d at 234-36; *Grand Canyon Trust*, 691 F.3d at 1022; *Raymond Proffitt Found. v. U.S. Army Corps of Eng'rs*, 128 F. Supp. 2d 762, 774 (E.D. Pa. 2000) (declining to dismiss NEPA claim where triable issue existed as to whether agency's revisions to dam operating manual and entry into a new storage agreement deviated from historical operations); *Westlands*, 850 F. Supp. at 1415-16 (declining to dismiss NEPA claim where triable issue existed as to whether agency's decision to reduce water deliveries to irrigation project users in light of new statute marked a "change in normal . . . operations"). Because the Corps continues to apply its longstanding operating criteria for Bonnet Carré, the County's argument that a supplemental EIS is required fails. This is true notwithstanding that the impacts of any single opening

under that policy may be quite significant (but, thanks to the Corps' extensive study of past openings, also quite well understood). *See* pp. 9-11, *supra*.[10]

Harrison County's final argument is that this Court should treat the Corps' continued operation of Bonnet Carré as a "major Federal action" because the Corps has consulted with federal wildlife agencies before opening the spillway, in keeping with the Endangered Species Act's direction that agencies ensure that "any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as 'agency action') is not likely to jeopardize the continued existence of any endangered species or threatened species." 16 U.S.C. § 1536(a)(2). The County suggests that it is arbitrary for the Corps to treat opening the spillway as an "agency action" for purposes of the Endangered Species Act, but not a "major Federal action" under NEPA, seizing on Ninth Circuit language stating that "[t]he standards for 'major federal action' under NEPA and 'agency action' under the

[10] The Corps' NEPA regulation concluding that "routine operation and maintenance actions" generally "do not have significant effects on the quality of the human environment" and are "categorically excluded from NEPA documentation" is not to the contrary. 33 C.F.R. § 230.9. The County surmises that the "[t]he corollary is if such operations do cause significant impacts on the human environment, they are subject to NEPA." Op. Br. 27. But that is the County's own gloss; the regulation itself nowhere states that an activity with significant effects is necessarily a "major Federal action," irrespective of whether that activity merely perpetuates a course of action chosen long before NEPA's enactment. Instead, the regulation merely lists activities that the Corps in its expertise has determined do not have significant effects, without making any finding that the activities would otherwise meet the legal definition of "major Federal action."

[Endangered Species Act] are much the same." Op. Br. 28 (quoting *Marbled Murrelet v. Babbitt*, 83 F.3d 1068, 1075 (9th Cir. 1996)). Not so.

For one thing, the very case that Harrison County cites undermines its argument that an "agency action" under the Endangered Species Act is necessarily "major Federal action" under NEPA. *See Marbled Murrelet*, 83 F.3d at 1075 ("If there is any difference, case law indicates 'major federal action' is the more exclusive standard."). Elsewhere, the Ninth Circuit has been still more explicit that "[a]lthough the 'major federal action' standard under NEPA is similar to the more liberal 'agency action' standard under the ESA . . . the terms are not interchangeable." *Karuk Tribe of California v. U.S. Forest Serv.*, 681 F.3d 1006, 1024 (9th Cir. 2012); *see also Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1086 (9th Cir. 2015) (holding that under the Endangered Species Act—but *not* under NEPA—"an agency's responsibility to reinitiate consultation does not terminate when the underlying action is complete."). [11]

Taking a step back, the Endangered Species Act imposes on agencies a substantive obligation to ensure that "any" actions they take are not likely to

[11] The United States disagrees with *Cottonwood*'s holding that the Endangered Species Act requires consultation even on completed actions. *See Forest Guardians v. Forsgren*, 478 F.3d 1149, 1155-59 (10th Cir. 2007) (reaching contrary conclusion). What matters for purposes of this appeal, however, is that the County's selective quotation from one Ninth Circuit decision is at odds with that circuit's larger body of precedent.

jeopardize protected species. 16 U.S.C. § 1536(a)(2). Because the statute uses the word "any" and "admits of no exception," its use of the phrase "agency action" has been interpreted "broad[ly]." *Pac. Rivers Council v. Thomas*, 30 F.3d 1050, 1054 (9th Cir. 1994). The Corps has at various points chosen to honor that statutory choice by consulting with the relevant wildlife agencies on how it may conduct required spillway openings in a way that will mitigate the harm to protected species impacted by those openings, including what after-the-fact actions it may take to relocate species that are displaced from their normal habitat by operation of the spillway. *See, e.g.*, ROA.9249, 9259, 9305. There is no inconsistency between that choice and the Corps' recognition that, under settled NEPA law, continued operation of the spillway under longstanding operating criteria does not impose a procedural requirement to prepare a supplemental EIS.

* * *

In sum, the Corps constructed the Bonnet Carré Spillway nearly 100 years ago, decades before NEPA's enactment. In the near-century since, the Corps has made no major changes to the spillway's design, nor has its operation of the spillway deviated from the structure's original purpose. The Corps acknowledges that, if it did propose to make significant changes to the spillway's design or operation, it would need to consider whether NEPA requires it to perform supplemental analysis of those changes at that time. But unless such changes are

proposed, there is no "major Federal action" related to the spillway, no mandatory duty on the Corps for the courts to compel, and no jurisdiction to hear Harrison County's NEPA claim.

B. In the alternative, dismissal could be affirmed because there is no jurisdiction over a freestanding claim to compel supplemental NEPA analysis.

For the reasons discussed, Harrison County's arguments in favor of jurisdiction fail on their own terms. The Court can end its analysis there. *See SUWA*, 542 U.S. at 72 ("Before addressing whether a NEPA-required duty is actionable under the APA, we must decide whether NEPA creates an obligation in the first place."). But there is an additional, broader ground for affirming dismissal of the County's claims, should this Court choose to reach it.

As stated, subject to an exception not relevant here, the APA's waiver of sovereign immunity applies where a plaintiff challenges "*final* agency action." 5 U.S.C. § 704 (emphasis added); *Dunn-McCampbell*, 112 F.3d at 1288. It logically follows that, for claims to compel agency action unlawfully withheld under Section 706(1) of the APA, the action to be compelled must itself be "final agency action." As this Court has explained in a challenge to the Forest Service's management of Texas' national forests, "[i]n certain circumstances, agency inaction may be sufficiently final to make judicial review appropriate." *Sierra Club*, 228 F.3d at 568. But an agency's "alleged failure" to comply with a relevant

statute while carrying out its day-to-day functions "does not reflect agency inaction," and does not provide the basis for an action to compel under Section 706(1). *Id.*; *see generally SUWA*, 542 U.S. at 61-65.[12]

Applying that general principle to this case, preparation of an EIS is not, in itself, final agency action. *E.g.*, *Pub. Citizen v. U.S. Trade Representative*, 5 F.3d 549, 552 (D.C. Cir. 1993); *see also Oregon Natural Desert Ass'n v. Bureau of Land Mgmt.*, 625 F.3d 1092, 1118-19 (9th Cir. 2010); *Green Cty. Planning Bd. v. Federal Power Comm'n*, 490 F.2d 256, 258 (2d Cir. 1973); *see generally Veldhoen*, 35 F.3d at 225 ("A final agency action is one that imposes an obligation, denies a right, or fixes a legal relationship."). To the contrary, preparation of an EIS is a preliminary procedural step that must be completed before taking some substantive action. *See* 42 U.S.C. § 4332(C). To be sure, the adequacy of the underlying EIS is subject to review in a challenge to that subsequent substantive action. But it is the substantive action informed by the EIS—not the EIS itself—that provides the APA hook. *See Oregon Natural Dessert Ass'n*, 625 F.3d at 1119

[12] To be clear, this Court has not, to the Corps' awareness, squarely held that Section 706(1) may only be used to compel final action with the meaning of Section 704. *See, e.g.*, *Louisiana*, 948 F.3d at 323 (explaining that action to be compelled under Section 706(1) must be "discrete" and "required," with no mention of finality). And some jurists in other circuits have adopted the contrary position. *See, e.g.*, *W. Org. of Res. Councils*, 892 F.3d at 1248-49 (Edwards, J., concurring) (ultimately concluding that Section 704's "final agency action" requirement is not relevant to claims under Section 706(1)).

("[o]nce the agency *had* completed a NEPA analysis in an EIS, the plaintiffs could challenge the final action reflected in the EIS").

If a freestanding EIS is not final agency action, then a claim to compel preparation of a supplemental EIS—divorced from any challenge to a discrete, substantive action that allegedly requires further environmental analysis—is not a claim to compel final agency action. That is exactly the claim that Harrison County advances here. The County has not challenged any discrete action that the Corps is taking or is planning to take. *See* p. 21, *supra*. Nor has it sued to compel any specific action, other than the preparation of a supplemental EIS itself. It has therefore neither challenged nor sought to compel any "final agency action" under Section 704 of the APA that could provide a basis for jurisdiction under the APA. Dismissal of the County's freestanding NEPA supplementation claim may be affirmed on that basis, should the Court reach the issue.

CONCLUSION

For these reasons, the judgment of the district court dismissing Harrison County's NEPA claim for lack of subject-matter jurisdiction should be affirmed.

Respectfully submitted,

s/ Rachel Heron
TODD KIM
Assistant Attorney General
MICHAEL GRAY
RACHEL HERON
Attorneys
Environment and Natural Resources Division
U.S. Department of Justice
Post Office Box 7415
Washington, D.C. 20044
(202) 514-0916
rachel.heron@usdoj.gov

March 28, 2022
DJ #90-1-4-15932

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on March 28, 2022.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Rachel Heron
RACHEL HERON

Counsel for Federal Appellees

CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because, excluding the parts of the document exempted by Rule 32(f), it contains 9,885 words.

2. This document likewise complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word in 14-point Times New Roman font.

s/ Rachel Heron
RACHEL HERON

Counsel for Federal Appellees