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

REPLY BRIEF OF APPELLANTS

SUBMITTED BY:

Robert Baxter Wiygul
Waltzer Wiygul & Garside, L.L.C.
1011 Iberville Drive
Ocean Springs, MS 39564

TABLE OF CONTENTS

Contents Page(s)

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. INTRODUCTION 1

II. THE PROJECT AT ISSUE IS THE MISSISSIPPI RIVER AND TRIBUTARIES PROJECT, AND IT REMAINS UNCOMPLETED AND SUBECT TO THE NATIONAL ENVIRONMENTAL POLICY ACT 3

III. THE CORPS HAS CHANGED THE "STATUS QUO" IN OPERATING THE BONNET CARRÉ ELEMENT OF THE MISSISSIPPI RIVER AND TRIBUTARIES PROJECT 8

CONCLUSION 15

CERTIFICATE OF SERVICE 16

CERTIFICATE OF COMPLIANCE 16

TABLE OF AUTHORITIES

Cases

Al Otro Lado, Inc. v. Mayorkas, 2021 U.S. Dist. LEXIS 167128 (S.D. Cal. Sep. 2, 2021) 14

Catron County Bd. of Comm'rs v. United States Fish & Wildlife Serv., 75 F.3d 1429, 1434 (10th Cir. 1996) 14

Grand Canyon Trust v. U.S. Bureau of Reclamation, 691 F.3d 1008, 1020-22 (9th Cir. 2012) 12

Idaho Conservation League v. Bonneville Power Admin., 826 F.3d 1173, 1176 (9th Cir. 2016) 12

Louisiana Wildlife Fed'n, Inc. v. York, 761 F.2d 1044, 1051 (5th Cir. 1985) 1

Marbled Murrelet v. Babbitt, 83 F.3d 1068, 1075 (9th Cir. 1996) 12

Marsh v. Oregon Natural Resources Council, 490 U.S. 360 (1980) 4

Mayo v. Reynolds, 875 F.3d 11 (D.C. Cir. 2017) 11

Oregon Natural Desert Association v. Bureau of Land Management, 625 F.3d 1092, 1118-19 (9th Cir. 2010) 14

Rattlesnake Coalition v. United States EPA, 509 F.3d 1095, 1104 (9th Cir. 2007) 14

Sabine River Auth. v. U.S. Dep't of the Interior, 951 F.2d 669, 679 (5th Cir. 1992) 12

TVA v. Hill, 437 U.S. 153, 188, n. 34 (1978) 5

Upper Snake River Chapter of Trout Unltd. v. Hodel, 921 F.2d 232 (9th Cir. 1990) 8

W. Org. of Resource Councils v. Zinke, 892 F.3d 1234 (9th Cir. 2018) 13

Westlands Water District v. United States, 850 F.Supp. 1388, 1415 (E.D.Cal.1994) 5

Wisconsin v. Weinberger, 745 F.2d 412, 418 (7th Cir. 1984) 1, 5, 10

Statutes

5 U.S.C. § 706(1) 1, 13, 15

42 U. S. C. § 4321 5

Regulations

40 C.F.R. § 1502(9)(c) 7, 15

40 C.F.R. § 1506.12 11

50 C.F.R. § 1502.9(c) 1

ARGUMENT

I. INTRODUCTION

The Corps' recitation of the law is lengthy, but at bottom it reveals that there is no dispute that when the appropriate criteria are met, the duty to prepare a supplemental National Environmental Policy Act analysis under 50 C.F.R. § 1502.9(c) is a mandatory one and can serve as the basis for a waiver of sovereign immunity under 5 U.S.C. § 706(1).

The Corps' recitation of the facts also makes it clear that there is no real dispute on key underlying factual issues.

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 is the extent to which the 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 does not seriously dispute that the massive effects of the recent spate of Mississippi River and Tributaries Project (hereafter sometimes the "MR&T") operations on Mississippi natural resources were not envisioned by the Mississippi River and Tributary Project's 1976 EIS. The Corps simply quotes a single paragraph from the 1976 EIS that generally mentions oyster mortality and displacement of shrimp

and fish. Appellee Br. at 9-10.[1] The Federal Defendants do not mention, but also do not contest, that there has never been any analysis of disruption of breeding cycles of shrimp, hazardous algae blooms caused by nutrient pollution, closure of beaches, conversion of the western Mississippi Sound to an essentially freshwater environment, or the massive losses to commercial and recreational fisheries.[2]

The principal factor to be considered in determining if supplemental NEPA analysis is necessary – whether the new information presents a picture of environmental consequences not considered in the original EIS – is thus essentially uncontested. The new information from the most recent openings clearly "provides a seriously different picture of the environmental landscape such that another hard look is necessary." *Louisiana Wildlife Federation, supra* (quoting *Wisconsin v. Weinberger*).

The Corps also does not contest that the Bonnet Carré Spillway is an "integral and inseparable part" of the Mississippi River and Tributaries Project, which functions as an integrated system of river management.[3] This point is indisputable in the record and confirmed by the Corps own witnesses and documents. The Corps has never performed NEPA analysis on the Bonnet Carré Spillway alone; in fact as the Corps

[1] The Corps also seems to argue that the damage caused by the Mississippi River and Tributaries Project is essentially the same as natural flooding. This assertion is not actually relevant to whether there has been a major federal action, but it is also completely incorrect. The Corps now controls when and for how long the Mississippi River discharges directly into Lake Pontchartrain. In addition, the original flooding regime has been drastically altered by the Corps itself.

[2] The Corps states that it and other entities have carried out studies of the impacts of the spillway. Appellee Br. at 10-11. This reinforces that there information on impacts that was never presented to the public in a National Environmental Policy Act document.

[3] *E.g.* ROA.220, 10379.

concedes the 1976 EIS on which it relies looked at all parts of the Mississippi River and Tributaries Project. Appellee Br. at 9.[4]

Finally, the Corps does not contest that the MR&T has never been completed, and that in fact some of the work to be completed is deficient levees downstream of the Bonnet Carré Spillway, which the operation of the spillway and other parts of the project are meant to protect. Op. Br. at 20-21.

Thus there are really only two questions in this appeal. First, is there major federal action left for the Corps to perform on the project at issue? Second, is the change in operations and impacts of the project at issue in recent years new information that shows a change in the "status quo?"

II. THE PROJECT AT ISSUE IS THE MISSISSIPPI RIVER AND TRIBUTARIES PROJECT, AND IT REMAINS UNCOMPLETED AND SUBECT TO THE NATIONAL ENVIRONMENTAL POLICY ACT

On the first of these questions, the Corps asserts that the project at issue is the Bonnet Carré Spillway. Appellee Br. at 20-21. This is of course contrary to the Corps analysis of the MR&T as a single project in the 1976 EIS, and its own consistent statements and testimony that all of the elements of the MR&T function together. The Mississippi River and Tributaries Project is a single project and the Corps has always treated it as such, including for National Environmental Policy Act purposes.

[4] The Corps argues in a footnote that its comprehensive (at the time) 1976 Environmental Impact Statement was just a discretionary decision to analyze all the parts of a larger project at once. Appellee's Br., fn 7. This again does not comport with the Corps' numerous other statements recognizing the fact that the MR&T operates as an integrated whole.

The Corps further asserts that *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1980) should be interpreted as holding that only impacts of actions remaining to be performed on a project must be considered for NEPA supplementation, and that any part of the project already constructed need not be considered. Appelle Br. at 22. According to the Corps this is because there were two other completed dams in the project in that case, and "nothing in the decision suggests" that ongoing work would have triggered supplemental NEPA analysis for the effects of the remaining two dams. As even the Corps acknowledges, any such question was not addressed in the Supreme Court. Appellee Br. at 22. What aspects of the project needed to addressed in a NEPA document would have depended on the cumulative and connected impacts of the parts of the project. The Corps' interpretation of *Marsh* is at best imputing a conclusion that is convenient for the Corps to the Supreme Court.

In fact, the Corps' interpretation is contrary to the holding in *Marsh* and numerous other cases, including those from this Court, which look to the basic purposes of NEPA to determine whether supplementation is necessary. In *Marsh* the Supreme Court noted that NEPA does not specifically address supplemental environmental impact statements, but that the purpose of the act sometimes made them necessary:

> Preparation of such statements, however, is at times necessary to satisfy the Act's "action-forcing" purpose. NEPA does not work by mandating that agencies achieve particular substantive environmental results. Rather, NEPA promotes its sweeping commitment to "prevent or eliminate damage to the environment and biosphere" by focusing Government and public attention on the

> environmental effects of proposed agency action. 42 U. S. C. § 4321. By so focusing agency attention, NEPA ensures that the agency will not act on incomplete information, only to regret its decision after it is too late to correct. See *Robertson*, ante, at 349. Similarly, the broad dissemination of information mandated by NEPA permits the public and other government agencies to react to the effects of a proposed action at a meaningful time. *Ante*, at 349-350. It 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. As we explained in *TVA v. Hill,* 437 U.S. 153, 188, n. 34 (1978), although "it would make sense to hold NEPA inapplicable at some point in the life of a project, because the agency would no longer have a meaningful opportunity to *weigh* the benefits of the project versus the detrimental effects on the environment," up to that point, "NEPA cases have generally required agencies to file environmental impact statements when the remaining governmental action would be environmentally 'significant.'"

490 U.S. at 390-91.

The duty to supplement is of course subject to a "rule of reason," which turns on the value of the new information to the still pending decisionmaking process." *Id.* at 392. The rule of reason articulated in *Marsh* is consistent with this Court's principle that "[t]he principal factor an agency should consider in exercising its discretion whether to supplement an existing EIS because of new information is the extent to which the 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, supra. See also* Westlands Water District v. United States, 850 F.Supp. 1388, 1415 (E.D.Cal.1994)(question is "whether the proposed agency action and its environmental effects were within the contemplation of the original project when adopted or approved.").

As explained previously, the Corps does not seriously argue that the environmental impacts of recent operations of the Mississippi River and Tributaries Project were considered in any Environmental Impact Statement. Instead, the Corps argues that there is nothing further it can do about the "construction or design of the spillway itself." Appellee Br. at 23. But that is of course not the point.

When it is closed the Bonnet Carré Spillway itself closed does not cause the kinds of natural resource damage at issue. It is only its operation as an "integral and inseparable" part of the Mississippi River and Tributaries Project, along with the levees, the Morganza Spillway and other mechanisms, that causes the damage to the fisheries and other resources of the Lake Pontchartrain Estuary and the Mississippi Sound. The construction (or lack of it) and operation of those other elements directly drive the operation of the Bonnet Carré Spillway, and thus alternatives to the present regime of construction and operation are clearly still meaningful options for the Corps. These include using the Morganza Floodway to divert some Mississippi River flood flows and decrease those going through the Bonnet Carré Spillway,[5] repairing deficient levees,[6] or repairing now non-functional backwater areas.[7] These are exactly the kinds of alternatives that fit within the "action forcing" purpose of NEPA discussed in *Marsh*.

[5] AR.10728(Corps could analyze alternatives for MR&T water management under its existing authority).
[6] AR.10647(Bonnet Carré Spillway operated to protect deficient levees).
[7] AR.10708, p. 13 of 16. In a footnote the Corps asserts that the Plaintiffs have waived any claims that the Corps still has a "meaningful opportunity to weigh the benefits of the project versus the detrimental effects on the environment." In fact the briefing both below and here identified actions such as repairing deficient levees or using different operating regimes that would give the Corps a

The Corps also argues that requiring the massive damage caused by MR&T operations to go through NEPA analysis would render agency decisionmaking intractable. Appellee's Br. at 24-25. There is no danger of this outcome given the rule of reason that is applied to determine whether supplemental NEPA is necessary. A federal agency has no obligation to revisit environmental impacts unless there are "*significant* new circumstances or information bearing on the proposed action or its impacts." 40 C.F.R. § 1502(9)(c)(emphasis supplied). This is basically what *Marsh* and the other cases say. No new analysis is required if no such significant circumstances or information exists, but if it does, then looking at it clearly carries out the purposes of NEPA because it allows the agency to determine how its actions could change.

The fact that the Mississippi River and Tributaries Project is itself massive, Appellee's Br. at 24, has no bearing on whether the National Environmental Policy Act applies. Massive projects are precisely those for which environmental impacts can be massive and less damaging alternatives should be considered to carry out the purposes of NEPA.

The 2019 operations of the Mississippi River and Tributaries Project caused natural resource damage on a regional scale. There are alternatives that the Corps could consider. Any "rule of reason" that allows the massive disruption of natural systems

---

meaningful opportunity to reduce or mitigate the damage from MR&T operations. Of course, the District Court did not address this issue, instead holding that there was no "proposed action" identified. To the extent that the Court finds this to be an issue, it is an issue for the District Court on remand.

and the people who depend on them to go unexamined for better alternatives is not a rule of reason at all. The Corps position is contrary to the law and should be rejected.

III. THE CORPS HAS CHANGED THE "STATUS QUO" IN OPERATING THE BONNET CARRÉ ELEMENT OF THE MISSISSIPPI RIVER AND TRIBUTARIES PROJECT

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*."[8] The Corps has abandoned that position here, acknowledging that this depends on whether there has been a change in the status quo, which is a factual matter. Appellee's Br. at 27. The Corps asserts, regardless of the changes that have taken place in the frequency, timing and impacts of operations of the Bonnet Carré element of the Mississippi River and Tributaries Project, that its operation "merely perpetuates the status quo that has been in effect for nearly a century."

This "status quo," according to the Corps, is the 1,250,000 cubic feet per second operational trigger set out in the Jadwin Report and the Bonnet Carré Spillway operating manual. Thus, according to the Corps, this case is indistinguishable from *Upper Snake River Chapter of Trout Unltd. v. Hodel*, 921 F.2d 232 (9th Cir. 1990). In fact this case is readily distinguishable on the facts from *Upper Snake River*.

In that case the Court stated that the agency was "doing nothing new, nor more extensive, nor other than that contemplated when the project was first operational." *Id.*

[8] ROA.418(emphasis supplied).

at 235. Here, the spillway was left open well below the 1,250,000 cubic feet per second operational trigger, which contradicts the Jadwin report and the Bonnet Carré Spillway operating manual. Even the Corps acknowledges that the Jadwin Report stated that the spillway would be cut off as soon as it went back below this trigger. Appellee's Br. at 30. In addition, the Corps' contention that the spillway is strictly operated according to the 1,250,000 cfs criterion is contradicted by the record. The Corps has stated that "it is relatively well accepted that the [Bonnet Carré] Spillway may be operated due to high river stage, *even in the absence of the discharge trigger."*[9]

Further, there has never been a period with the frequency of openings seen in the past ten years and particularly the past four years. One Corps employee characterized openings since 2008 as "more routine."[10] Even more important, however, is that the length of Bonnet Carré Spillway openings has increased. Another Corps employee noted, over the 76 years prior to 2006 the Bonnet Carré Spillway was operated for 333 days. In just 13 years from 2006 to 2019, it was operated for 240 days.[11] Multiple openings in a single year were never anticipated or discussed in any operating plan or National Environmental Policy Act document, nor were openings lasting into late summer.

[9] AR.10646(emphasis supplied). The Corps also stated in this analysis that a strict flow trigger is likely unattainable. AR.10647.
[10] AR.10725.
[11] AR.10731.

The Corps argues that the 5-10 year frequency of openings stated in the Jadwin report and other Corps documents was never a "hard and fast rule" and thus it is "unclear" that the massive impacts of recent openings are any different than what was originally contemplated. Appellee's Br. at 32. If in fact it is unclear, then the matter should be remanded for fact findings, but there is really no question that the now routine and lengthier openings were never contemplated or examined in any NEPA document.

Whether there was a "hard and fast rule" is also irrelevant. The basic question is whether the current routine, lengthier openings were contemplated when the project was first operational, and whether they were considered in a NEPA document. Or in the terms this Court used, whether this "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, supra.*

At bottom, although the Corps professes that the operational standards from the Jadwin report and its operations manual are the "status quo," what it really asserts is that the status quo is whatever the Corps decides is necessary to operate the Bonnet Carré Spillway and other elements of the Mississippi River and Tributaries Project. As the Corps puts it, "the Corps has long understood that Congress provided the agency with flexibility to time closure to protect public safety." The Corps acknowledges that it has used this flexibility to protect the integrity of downstream levees – the same levees

that it has acknowledged are not up to design standards and are part of the work still to be performed on the Mississippi River and Tributaries Project.

To be clear, the Plaintiffs confirm that operating the Mississippi River and Tributaries Project to protect public safety and the City of New Orleans is necessary and that the Corps should act to do so. The fact of having discretion to consider different alternatives to protect safety does not, however, absolve the Corps of responsibility for carrying out National Environmental Policy Act review of the impacts of changing its management regimes. The Corps may, for example, consider using the Morganza Floodway to reduce the amount of water directed through the Bonnet Carré Spillway. The fact that the Corps has discretion to change operations actually supports a finding that the Corps can consider other alternatives to its operations of the Bonnet Carré element of the MR&T. To the extent that the Corps is arguing that it is acting in an emergency capacity, the Council on Environmental Quality has provided specific procedures for use in emergency situations. *See* 40 C.F.R. § 1506.12.

The various other cases cited by the court below or the Corps do not support exempting the changes in Corps operations from NEPA supplementation. The District Court below relied on *Mayo v. Reynolds,* 875 F.3d 11 (D.C. Cir. 2017) for the proposition that discretionary actions cannot be considered "major." The Corps does not defend this reading of the case, but rather acknowledges that *Mayo* actually stands for the proposition that later steps do not require a supplemental analysis where their impacts

have already been studied in an EIS. Appellee Br. at 28 n. 9. The regional impacts at issue here have never been considered in an EIS.

The other cases cited by the Corps typically involve situations in which the relevant agency prepared an Environmental Assessment, or the impacts alleged to trigger supplemental NEPA had already been considered and found insignificant. *See Sabine River Auth. v. U.S. Dep't of the Interior*, 951 F.2d 669, 679 (5th Cir. 1992)(EA prepared and concluded that easement prevented change in status quo, and actually protected the environment); *Idaho Conservation League v. Bonneville Power Admin.,* 826 F.3d 1173, 1176 (9th Cir. 2016)(challenged management was considered in a 1995 EA, and was short term decision with no significant environmental impact). *See also Grand Canyon Trust v. U.S. Bureau of Reclamation*, 691 F.3d 1008, 1020-22 (9th Cir. 2012)(agency exercised no discretion in annual operating plans, described as "routine and required annual reporting.").

The Corps further argues that operating the Bonnet Carré Spillway component of the Mississippi River and Tributaries Project is an "action" for purposes of the federal Endangered Species Act, but not a "major federal action" for purposes of the National Environmental Policy Act. The Corps cites *Marbled Murrelet v. Babbitt*, 83 F.3d 1068, 1075 (9th Cir. 1996) for the proposition that "[i]f there is any difference, case law indicates "major federal action" is the more exclusive standard." However, the Corps provides no principled reason that on the facts of this case an action for purposes of

the Endangered Species Act should not be a major federal action for purposes of the National Environmental Policy Act.

Finally, the Corps suggests as an alternative argument that there is no jurisdiction over what it refers to as a "freestanding claim" for National Environmental Policy Analysis. Br. at 38. The gist of the argument seems to be that a failure to comply with NEPA is not a final agency action, and that a "failure to act" claim 5 U.S.C. § 706(1) requires a "final agency action." This grossly overreaching argument is wrong for several reasons.

First, as the Corps acknowledges in a footnote, this Court has never adopted such a position, and in fact no court has ever adopted such a position. The few cases that have considered the argument have rejected it. As explained in a concurring opinion in *W. Org. of Resource Councils v. Zinke*, 892 F.3d 1234 (9th Cir. 2018):

> The Secretary argues that "the decision not to prepare a supplemental EIS is not a 'final agency action' as that term is defined in section 704 and is therefore not by itself subject to direct judicial review." Sec'y's Br. 13. However, this is irrelevant to any assessment of the viability of a claim under § 706(1). The Secretary also contends that "[a] completed EIS is . . . not, by itself, final agency action that is subject to review, so the failure to complete one is not a 'failure to act' that may be independently reviewed under the APA in the absence of some challenge to a substantive final agency action for which an EIS or supplemental EIS should have been prepared." *Id.* at 14-15 (emphasis removed). This argument finds no support in the language of § 706(1) and it completely distorts the [Supreme] Court's holding in [*Norton v. Southern Utah Wilderness Alliance*].
>
> In an apparent effort to overcome the obvious frailties in its argument, the Department makes much of the fact that an EIS is merely "a *procedural* prerequisite to a decision by the agency to undertake a 'major Federal action.'" *Id.* at 15 (emphasis added). According to the Secretary, "[a]s a procedural prerequisite to some other final agency action, an EIS is not directly reviewable

> under the APA, but is subject to review on the review of the final agency action." *Id.* at 16.
>
> The fact that the preparation of an EIS may be a "procedural" matter is irrelevant to whether Appellants have raised a viable claim under § 706(1). The Secretary seems not to comprehend that "procedural rights" claims may be viable without regard to whether they result in any enforceable substantive rights.

Id. at 1248-49(Henderson, J. concurring). *See also Al Otro Lado, Inc. v. Mayorkas*, 2021 U.S. Dist. LEXIS 167128 (S.D. Cal. Sep. 2, 2021)("the Court finds no 'final agency action' is necessary for Plaintiffs' § 706(1) claim and rejects Defendants' arguments as to the same.").

Second, the Corps' claim that "preparation of an EIS is not in itself a final agency action" is incorrect. Appellee's Br. at 39. *E.g.*, *Rattlesnake Coalition v. United States EPA,* 509 F.3d 1095, 1104 (9th Cir. 2007)("We have held that an agency's decision not to issue an EIS concludes the agency's procedural inquiry into the environmental impact of a proposed project and therefore constitutes a final agency action, regardless of whether the agency has decided to fund the project."); *Catron County Bd. of Comm'rs v. United States Fish & Wildlife Serv.,* 75 F.3d 1429, 1434 (10th Cir. 1996)("The Secretary's alleged failure to comply with NEPA constitutes "final agency action" . . .").

In fact, even *Oregon Natural Desert Association v. Bureau of Land Management,* 625 F.3d 1092, 1118-19 (9th Cir. 2010), which the Corps relies on, actually cites numerous cases for the proposition that the EIS itself *or* a record of decision are final agency action and appealable.

This issue was not, of course, raised in the Court below. And while jurisdiction may be raised at any time, the Court should recognize this argument as an attempt to radically alter the long-standing understanding of the function of Section 706(1) of the Administrative Procedure Act. Should the Court determine to take it up, it would be appropriate to order full supplemental briefing.

CONCLUSION

In short, the Mississippi River and Tributaries Project is a single, ongoing project. Its operation has caused massive environmental damage in the past few years, which has never been addressed in a National Environmental Policy Act analysis. This damage constitutes "significant new circumstances or information bearing on the proposed action or its impacts," 40 C.F.R. § 1502(9)(c), and forms the basis for a mandatory duty. The failure to perform such a mandatory duty is actionable and the Court has jurisdiction under 5 U.S.C. § 706(1). Further, the changes in operation of the Bonnet Carré Spillway element of the MR&T in recent years constitute a change in the status quo, which also triggers NEPA requirements. Any "rule of reason" worthy of the name would require that the damage inflicted by the MR&T be assessed, and alternatives considered. Any other outcome is directly contrary to the purposes of the National Environmental Policy Act.

SUBMITTED BY:
S/Robert Baxter Wiygul
Waltzer Wiygul & Garside, L.L.C.
1011 Iberville Drive
Ocean Springs, MS 39564

CERTIFICATE OF SERVICE

I certify that on April 14, 2022, the foregoing document was served, via the Court's CM/ECF Document Filing System, upon the following registered CM/ECF users:

Frederick Turner	frederick.turner@usdoj.gov
Rachel Heron	rachel.heron@usdoj.gov
Ryan Seidemann	seidemannr@ag.louisiana.gov
D. Stephen Brouillette, Jr.	sbrouillette@daiglefisse.com

S/Robert Baxter Wiygul

CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of FED. R. APP. P. 32(a)(7)(B) because, excluding the parts of the document exempted by FED. R. APP. P. 32(f), and 5th CIR. R32.1: this document contains 4771 words.

2. This document complies with the typeface requirements of FED. R. APP. P. 32(a)(5), and 5th CIR. R32.1 and the type-style requirements of FED. R. APP. P. 32(a)(6) because: this document has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in type style Garamond font size 14.

S/Robert Baxter Wiygul