

**IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION**

**DELBERT HOSEMANN IN
HIS OFFICIAL CAPACITY AS
SECRETARY OF STATE AND TRUSTEE
OF THE PUBLIC TIDELANDS TRUST**

PLAINTIFF

VS.

CAUSE NO. 1:19-cv-989-LG-RHW

**UNITED STATES ARMY CORPS OF
ENGINEERS; GENERAL TODD
T. SEMONITE, in his official capacity as
the Commanding General of the
United States Army Corps of Engineers;
MISSISSIPPI RIVER COMMISSION;
GENERAL R. MARK TOY, in his official
capacity as the President-Designee of the
Mississippi River Commission**

DEFENDANTS

COMPLAINT

COMES NOW Plaintiff, DELBERT HOSEMANN, in his Official Capacity as SECRETARY OF STATE AND TRUSTEE OF THE PUBLIC TIDELANDS TRUST (the “Secretary of State” or “Plaintiff”), and files this its Complaint against Defendants, the UNITED STATES ARMY CORPS OF ENGINEERS (the “Corps”), GENERAL TODD T. SEMONITE, in his Official Capacity as the Commanding General of the United States Army Corps of Engineers, MISSISSIPPI RIVER COMMISSION, and GENERAL R. MARK TOY, in his Official Capacity as the President-Designee of the Mississippi River Commission (collectively referred to as “Defendants”), and states as follows:

I.

NATURE AND FACTS OF THE CASE

1. This is an action seeking declaratory and injunctive relief under the "National Environmental Policy Act" ("NEPA"), 42 U.S.C. §4321, et seq., and the "Administrative Procedures Act", 5 U.S.C. § 551, et seq., ("APA").

2. The remedies and relief sought by this civil action are occasioned by the unprecedented devastation visited upon the Mississippi Sound located in the State of Mississippi (the "Mississippi Sound") both ecologically and economically by Defendants as a result of the diversion of freshwater from the Mississippi River into the waters of the Mississippi Sound.

3. The Mississippi Sound is part of the State of Mississippi's tidelands and is held in trust for the use, enjoyment, and benefit of all the people of Mississippi. Delbert Hosemann is the Secretary of State of the State of Mississippi, and is charged by law with being the trustee for the public trust referenced in this Paragraph, and is further charged with taking all necessary and reasonable action to protect the trust. The Mississippi Public Tidelands Trust includes, but is not limited to, the Mississippi Sound and its submerged lands (or water bottoms). Damage has been done to the waters of the Mississippi Sound and its submerged lands, caused by sediment loading and freshwater intrusion, which resulted in the smothering of natural resources of the public trust.

4. Defendants diverted the Mississippi River into the Mississippi Sound by opening the Bonnet Carré Spillway, which was a federal act¹ reviewable by this Court. Additionally, Defendants took

¹ "Federal act" as used herein shall include, but not be limited to, an agency action under the APA as defined in § 551(13) *infra*, p. 9, as well as a major federal action under NEPA as defined in 40 C.F.R. §1508.18.

such action without the benefit of a current Environmental Impact Statement (“EIS”) that considers the appropriate geographic scope, despite there being significant new circumstances and information relevant to environmental concerns. Additionally, the Corps is required to take a “hard look” at the environmental impacts of the Project with respect to environmental impacts to the Mississippi Sound.² As a result, the opening of the Bonnet Carré Spillway occurred without there being a sufficient consideration of the environmental impact to the Mississippi Sound and Mississippi’s Public Trust. This was not only unlawful, but it is inexcusable.³

5. The most recent EIS completed by Defendants for the Mississippi River and Tributaries Project (the “Project”), which includes the operation of the Bonnet Carré Spillway was conducted in 1976.⁴ The 1976 EIS did not adequately consider the impacts of the Project to the Mississippi Sound. *See* Corps’ Mississippi River and Tributaries Project; MRL and MR&T Levees Map, attached hereto as Exhibit “A”. Furthermore, the EIS is no longer valid, because circumstances have changed significantly such that a supplemental EIS is required.

6. Such changed circumstances include, but are not limited to: extensive impacts to the Mississippi Sound as evidenced by the two Bonnet Carré Spillway openings in 2019; ecological changes to the Mississippi Sound as a result of major events such as Hurricane Katrina and the Deepwater Horizon oil spill; physical changes to the shape and size of the coastline and to the

² *See Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 374 (1989).

³ Additionally, under NEPA, the Corps is required to evaluate the Project’s environmental impacts while considering other relevant environmental laws, including, but not limited to, the Endangered Species Act, the Magnuson-Stevens Fishery Conservation and Management Act, the Marine Mammal Protection Act, and the Coastal Zone Management Act.

⁴ This EIS has been supplemented twice since 1976, but neither supplement considered impacts to the Mississippi Sound.

barrier islands; significant changes to the Mississippi River's geomorphology (specifically in the form of sediment and silt deposits, which have resulted in an elevated river bottom), as evidenced by the Corps's own study;⁵ and an undeniable and indisputable increase in water volumes as evidenced by flood control structures such as the Bonnet Carré Spillway being opened more frequently than ever before. By the Corps's own admission, the Bonnet Carré Spillway has been opened fourteen times since 1937. However, the Bonnet Carré Spillway has been opened five (5) times within the past eight (8) years, and two (2) times during 2019 alone.

7. Under the APA, a federal court possesses the authority to "compel agency action unlawfully withheld or unreasonably delayed," 5 U.S.C. § 706(1). Because NEPA regulations require the completion of a supplemental EIS when there are significant new circumstances or information, Defendants' action in administering the Project (which would include, among other things, the opening and closing of flood control structures such as the Bonnet Carré and Morganza Spillways) without completing a supplemental EIS amounts to an "agency action unlawfully withheld or unreasonably delayed" subject to review and remedial action provided for under §706(1) of the APA.

8. Additionally, the Corps issued an amendment in August 2014 to the instructions in the Water Control Manual for the Morganza Spillway. This amendment provided, among other things, that:

The structure shall be operated such that the stage on the river side of the structure does not exceed 57 feet NGVD29 (56.7 feet NAVD88 [2004.65]) and the Mississippi River discharge below the

⁵ See Mississippi River Hydrodynamic and Delta Management Study (MRHDM) – Geomorphic Assessment, <https://www.mvd.usace.army.mil/Missions/Mississippi-River-Science-Technology/MS-River-Geomorphology-Potamology/Geomorphic-Assessments/> (2014)

floodway does not exceed 1,500,000 cfs on a projected rise, based upon a 10 day forecast. The structure **may** also be operated to minimize flood damages in the lower river reaches, minimize stress in leveed reaches, prevent stages from exceeding the approved flowline (i.e. encroachment on freeboard requirements) and prevent the discharge in the Mississippi River from exceeding 1,250,000 cfs at New Orleans...”⁶

9. Despite having the absolute discretion to open the Morganza Spillway at volumes or flow rates less than 1,500,000 cfs, the Corps, without explanation, justification, or rationale, has willfully and obstinately refused to open the Morganza Spillway, which is *per se* arbitrary and capricious. Failure to do so has resulted in a 100% diversion of all floodwaters directly into the Mississippi Sound.

10. To further inform the Court of the impact of the Corps’ arbitrary and capricious decisions regarding the opening of the Bonnet Carré Spillway, the Mississippi Department of Marine Resources has determined that such decisions have resulted in lost revenues in Mississippi in excess of \$215 Million Dollars (\$215,000,000.00). *See* Executive Summary of 2019 Mississippi Commercial Fishery and Seafood Related Revenue Losses, attached hereto as Exhibit “C”.

II.

JURISDICTION AND VENUE

11. The Court has in personam and subject-matter jurisdiction over the parties and issues involved in this lawsuit. *See, e.g.*, 28 U.S.C. § 1331 (action arises under the Constitution and laws of the United States); 28 USC Sec. 1346(a)(2) (United States as a party defendant); and 28 U.S.C.

⁶ *See* Exhibit B to the Corps’ Water Control Manual for Morganza Floodway, Morganza Control Structure Mississippi River and Tributaries Project, Lower Mississippi River Basin, Louisiana, p. 9, attached hereto as Exhibit “B” (emphasis added).

§ 2201 (declaratory relief), and 28 U.S.C. §1361 (“The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.”). Furthermore, the Administrative Procedures Act, 5 U.S.C. § 701 et seq., provides for the review of agency actions and authorizes grants of injunctive relief when appropriate, including but not limited to the circumstances described in 5 U.S.C. §702 and §706(1).

12. Venue is proper before this Court under 28 USC §1391(e) because the Mississippi Sound is located in the Southern District of Mississippi, and the Mississippi Secretary of State maintains an office in Gulfport, Mississippi. Furthermore, although citizens of Mississippi throughout the entire State of Mississippi are affected by the issues complained of herein, some of the most egregiously affected persons reside in the Gulf Coast area of the State of Mississippi. The Mississippi Secretary of State regulates, controls, and serves as the trustee for the trust referenced herein that includes property located in this Federal District as part of the corpus of the trust.

III.

PARTIES

13. Plaintiff, Delbert Hosemann, acts in his official capacity as the Secretary of the State of Mississippi and Trustee of the Public Tidelands Trust.

14. Defendant, the United States Army Corps of Engineers, is an agency of the United States Government, and is responsible for operating the Bonnet Carré Spillway and the Morganza Spillway. The Corps is sued by and through General Todd T. Semonite, in his official capacity as the Commanding General of the United States Army Corps of Engineers who may be served with process pursuant to Rule 4 of the Federal Rules of Civil Procedure. The Mississippi River

Commission (“MRC”) is sued by and through General R. Mark Toy, the President-Designee of the MRC, in his official capacity, who may be served with process pursuant to Rule 4 of the Federal Rules of Civil Procedure. The MRC, by way of its President, has the responsibility for prosecuting the comprehensive river management program known as the Mississippi River and Tributaries Project.

V.

COUNT I CLAIM UNDER THE DECLARATORY JUDGMENT ACT

15. Plaintiff incorporates by reference the allegations set forth in all preceding paragraphs above as if fully set forth herein in support of Count I of this Complaint.

16. Section 2201 of Title 28 of the United States Code provides that:

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516a(f)(10) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 2201(a).

17. The Secretary of State seeks a declaration of the rights and other legal relations between himself as trustee of the public trust tidelands as well as all beneficiaries of the trust and the Corps and the MRC. At a minimum, Plaintiff seeks a declaration that:

- a. Defendants are administering the Project without the benefit of a current and valid EIS, and

- b. Defendants, as part of their administration of the Project, have and will continue to make very significant decisions that have had and will have very significant environmental impacts to the property of the trust; more specifically the Mississippi Sound; and
- c. Since 1976, when the most recent EIS for the Project was completed, “[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts” that have arisen, triggering the requirement that a Supplemental EIS shall be completed under 40 C.F.R. §1502.9(c)(1)(ii); and
- d. Defendants’ act of not obtaining a Supplemental EIS, and thus valid, EIS, and instead relying on one that is approaching fifty years old, while at the same time administering the Project, which involves decisions of the magnitude described herein is a clear violation of applicable law, *per se* arbitrary and capricious, and warrants an order of this Court compelling Defendants to comply with the law of the United States; and
- e. Defendants unquestionably have the legal authority to open the Morganza Control Structure (also known as the Morganza Spillway) to mitigate the freshwater inundation of the Mississippi Sound by diverting at least some volume of flood water into the Atchafalaya Floodway, thereby alleviating the severity of the impact to the Mississippi Sound. That despite this authority, the Defendants have refused to utilize the Morganza Spillway, without justification or explanation, and that such action or inaction is arbitrary and capricious.

18. A substantial controversy exists between the Parties who have adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment defining the rights and obligations of the parties and in anticipation of future conduct as described in this Complaint.

19. A declaratory judgment will settle the controversy, serve a useful purpose in clarifying the legal relations at issue, is not being used for the purpose of any sort of procedure or fencing, does not involve any sort of friction between federal or state courts and will not improperly encroach upon state jurisdiction and there is no alternative remedy which is better or more effective under the circumstances.

VI.

COUNT II - CLAIM FOR INJUNCTIVE RELIEF UNDER THE APA

20. Plaintiff incorporates by reference the allegations set forth in all preceding paragraphs above as if fully set forth herein in support of Count II of this Complaint.

21. The APA authorizes suit by "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 7021, et seq. "[A]gency action" is defined in § 551(13) to include "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, *or failure to act.*" (Emphasis added.) The APA provides relief for a failure to act in § 706(1): "The reviewing court shall . . . compel agency action unlawfully withheld or unreasonably delayed."

22. Sections 702, 704, and 706(1) of the APA all insist upon an "agency action," either as the action complained of (in §§ 702 and 704) or as the action to be compelled (in § 706(1)). The

definition of that term begins with a list of five categories of decisions made or outcomes implemented by an agency—“agency rule, order, license, sanction [or] relief.” § 551(13). All of those categories involve circumscribed, discrete agency actions, as their definitions make clear: “an agency statement of . . . future effect designed to implement, interpret, or prescribe law or policy” (rule); “a final disposition . . . in a matter other than rule making” (order); a “permit . . . or other form of permission” (license); a “prohibition . . . or taking [of] other compulsory or restrictive action” (sanction); or a “grant of money, assistance, license, authority,” etc., or “recognition of a claim, right, immunity,” etc., or “taking of other action on the application or petition of, and beneficial to, a person” (relief). §§ 551(4), (6), (8), (10), (11).

23. The terms following those five categories of agency action are not defined in the APA: “or the equivalent or denial thereof, or failure to act.” § 551(13). The final term in the definition, “failure to act,” is properly understood as a failure to take an agency action—that is, a failure to take one of the agency actions (including their equivalents) earlier defined in § 551(13). A “failure to act” is not the same thing as a “denial.” The latter is the agency's act of saying no to a request; the former is simply the omission of an action without formally rejecting a request—for example, the failure to promulgate a rule or make some decision by a statutory deadline. The important point is that a “failure to act” is properly understood to be limited, as are the other items in § 551(13), to a discrete action. *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 63, 124 S. Ct. 2373, 159 L. Ed. 2d 137 (U.S. 2004).

24. A second point central to the analysis of the present case is that the only agency action that can be compelled under the APA is action legally required. This limitation appears in § 706(1)'s authorization for courts to “compel agency action unlawfully withheld.” In this regard, the APA

carried forward the traditional practice prior to its passage, when judicial review was achieved through use of the so-called prerogative writs--principally writs of mandamus under the All Writs Act, now codified at 28 U.S.C. § 1651(a). *Norton*, 542 U.S. at 63. Thus, a claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take. *Id.*, at 64.

25. The limitation to required agency action rules out judicial direction of even discrete agency action that is not demanded by law (which includes, of course, agency regulations that have the force of law).

26. Federal law contemplates that when there have been "significant new circumstances or information," a supplement to the EIS is mandatory. 40 C.F.R. §1502.9(c). The language in §1502.9 makes such supplement compulsory if such significant circumstances exist. Therefore, because there has been such a significant change in circumstances and information, as described in Paragraph 6 above, the Corps's and the MRC's failure to complete a supplemental EIS to evaluate the environmental impacts to the Mississippi Sound is a legally required action being unlawfully withheld.

27. Federal Courts are familiar with and regularly entertain challenges to Federal Agencies which take action without first receiving the results of required studies. Though deferential, judicial review under the APA is designed to "ensure that the agency considered all of the relevant factors and that its decision contained no clear error of judgment." *Arizona v. Thomas*, 824 F.2d 745, 748 (9th Cir. 1987) (internal citation and quotation omitted). "The deference accorded an agency's scientific or technical expertise is not unlimited." *Brower v. Evans*, 257 F.3d 1058, 1067

(9th Cir. 2001). An agency's decision is arbitrary and capricious if it has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983); see also *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971) (reviewing court may overturn an agency's action as arbitrary and capricious if the agency failed to consider relevant factors, failed to base its decision on those factors, and/or made a "clear error of judgment"), overruled on other grounds by *Califano v. Sanders*, 430 U.S. 99, 105, 97 S. Ct. 980, 51 L. Ed. 2d 192 (1977)).

28. The Corps's and MRC's failure to comply with 40 C.F.R. §1502.9(c)'s mandate is a discrete agency inaction or failure to act which mandates a judicial decree under the APA requiring The Corps and the MRC to complete a Supplemental EIS. Such Supplemental EIS must include considerations of the environmental impacts of the Project on the Mississippi Sound, including the significantly new circumstances and information relevant to environmental concerns and bearing on the Project and its impacts that have arisen since the 1976 EIS was completed.

29. This Court should enjoin Defendants to conduct a Supplemental EIS immediately or within a time prescribed by law.

30. Additionally, Defendants acted in an arbitrary and capricious manner by, without explanation or justification, refusing to open the Morganza Spillway.

31. This Court should enjoin Defendants to open the Morganza Spillway, at the appropriate time, such that some volume of water is diverted to the Atchafalaya Floodway, so that the

Mississippi Sound does not continue to bear the complete, unmitigated burden of river diversion.

VII.

COUNT III REQUEST FOR PRELIMINARY INJUNCTIVE RELIEF

32. Plaintiff incorporates by reference allegations set forth in all preceding paragraphs above as if fully set forth herein in support of Count III of this Complaint.

33. A preliminary injunction is an extraordinary remedy that should only issue if the movant shows: (1) a substantial likelihood of prevailing on the merits; (2) a substantial threat of irreparable injury if the injunction is not granted; (3) the threatened injury outweighs any harm that will result to the non-movant if the injunction is granted; and (4) the injunction will not disserve the public interest.

34. Plaintiff has a substantial likelihood of prevailing on the merits because:

- a. The completion of a Supplemental EIS is mandatory under 40 C.F.R. §1502.9(c)(1)(ii).
- b. There are significant new circumstances and information relevant to environmental concerns and bearing on the Project and its impacts.
- c. There has been a significant change in circumstances in the manner described above, which is most prominently demonstrated by the undeniable increase in water flowage and accompanying spillway openings, which clearly has impacts to the Mississippi Sound.
- d. The most recent EIS for this Project was completed in 1976, almost a half century ago.

e. Defendants unquestionably have the legal authority to open the Morganza Control Structure (also known as the Morganza Spillway) to mitigate the freshwater inundation of the Mississippi Sound by diverting at least some volume of flood water into the Atchafalaya Floodway, thereby alleviating the severity of the impact to the Mississippi Sound.

f. The relief prayed for is within this Court's authority to grant.

35. If the injunction is not granted, a substantial threat of irreparable injury exists in the form of massive freshwater inundation to a saltwater body, namely the Mississippi Sound. Such freshwater inundation will not only upset the delicate ecological balance of the Sound, but will also inflict serious economic damage to the people and businesses that derive their livelihoods from the Sound. It will also impair the trustee's ability to perform his duty to protect, promote, manage, and ultimately hold for the use and benefit, the property that comprises the corpus of the trust. The most recent example of serious injury occurred this year when the Bonnet Carré Spillway was opened twice in one year for a total of 123 days, while the Morganza Spillway remained locked down and completely shut.

36. The threatened injury outweighs any harm that will result to the non-movant if the injunction is granted, because movant is simply seeking to compel Defendants to become compliant with NEPA regulations by completing a supplemental EIS, and by ordering Defendants to open the Morganza Spillway to divert some volume of flood waters through the Atchafalaya Floodway, a flood control structure in and of itself.

37. The injunction will serve the public interest because it seeks nothing more than to require Defendants to comply with environmental laws of the United States, which were implemented to

protect, among other things, the natural resources that the public enjoys. Beyond that, there is a fundamental public interest that is served by Defendants, agencies of the United States government, being held to follow the very laws that they were created to enforce. Additionally, it will result in the opening of the Morganza Spillway, should the need arise, so that the Mississippi River flood waters can be diverted in part through the Atchafalaya Floodway thereby lessening the disproportionate burden that has been borne historically by the Mississippi Sound.

WHEREFORE PREMISES CONSIDERED, Plaintiff demands declaratory and injunctive relief of and from Defendants, as follows:

1. A declaratory finding and judgment consistent with Count I, Paragraph 13, Subparagraphs (a) through (e);
2. An Order of this Court compelling Defendants to perform a Supplemental Environmental Impact Statement to address the environmental impacts of the Mississippi River and Tributaries Project on the Mississippi Sound in light of the significantly changed circumstances and information that have arisen since the completion of the original EIS in 1976. Additionally, an Order of this Court compelling Defendants to utilize the Morganza Spillway to the greatest extent possible such that the Mississippi Sound does not bear the complete and unmitigated burden of Mississippi River diversion;
3. An Order of this Court granting a preliminary injunction that functions to enjoin Defendants to open the Morganza Spillway to mitigate the freshwater inundation of the Mississippi Sound by diverting at least some volume of flood water into the Atchafalaya Floodway, thereby alleviating the severity of the impact to the Mississippi Sound.

4. Such other relief as may be appropriate under the circumstances.

Respectfully submitted, this the 30th day of December, 2019.

DELBERT HOSEMANN, IN HIS OFFICIAL
CAPACITY AS SECRETARY OF STATE
AND TRUSTEE OF THE PUBLIC TIDELANDS
TRUST

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