

Yazoo Mississippi Backwater Area Pumps Project: U.S. Environmental Protection Agency Reinstates 404 Veto



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The United States Environmental Protection Agency (“EPA”) reversed a prior decision and restored a Clean Water Act Section 404 veto of the Yazoo Backwater Area Pumps Project (“Project”).

Earth Justice had previously filed a Complaint for Declaratory and Injunctive Relief in the United States Court for the District of Columbia against EPA alleging its failure to veto the Project violated Section 404 of the Clean Water Act.

The Project is a United States Army Corps of Engineers (“Corps”) Civil Works project designed to address flooding concerns in an area situated between the Mississippi and Yazoo Rivers in west-central Mississippi. This area has often been denominated the “Yazoo Backwater Area” (“Area”).

A Project component would include a pumping station that would move surface water out of the Area during high water events on the Mississippi River.

The proposed Project has a history that was originally conceived in 1941. A levee was completed in 1978. However, a remaining portion of the Project was the installation of pumps. Proponents of the Project argued that the pumps are critical to evacuating rainfall that occurs in the Delta which becomes trapped on the land side of the levee and drainage structures.

EPA determined in 2008 that the Project would adversely affect at least 67,000 acres of wetlands and other waters of the United States. Pursuant to Section 404 of the Clean Water Act it had vetoed the Project based on its conclusion that such impacts would result in unacceptable adverse effects on fishery areas and wildlife.

Section 404(c) of the Clean Water Act authorizes EPA to prohibit, restrict, or deny the specification of any defined area in waters of the United States (including wetlands) as a disposal site for the discharge of dredged or fill material whenever it determines, after public noticing opportunity for public hearing, that such discharge into waters of the United States will have an unacceptable adverse effect on:

- Municipal water supplies;
- Shellfish beds and fishery areas (including spawning and breeding areas);
- Wildlife; or
- Recreational areas

EPA had initiated a Section 404(c) review of the Project because its construction would involve activities subject to Clean Water Act jurisdiction.

The Project had been resurrected during the Trump Administration. In 2020 the District Commander of the Corps' Vicksburg District stated:

. . . recurring flooding has demonstrated the need to complete the Yazoo Backwater Area Pump Project feature. . .

The Corps also argued that environmental impacts to wetlands and aquatic resources caused by the Project would be substantially less than originally calculated.

Nevertheless, EPA's 2008 veto (also referenced as a "Final Determination") was still in place. However, the Region 4 Office of EPA in a November 30, 2020, letter to the Corps determined the Project as revised was not subject to the previous 2008 Final Determination. This was based on the federal agency's view that the Project described in the Corps' Draft Supplemental Environmental Impact Statement had a number of differences from the 2008 version.

Earthjustice argued in its January 12th Complaint that EPA was in fact revoking the 2008 Clean Water Act veto. It further argued that such revocation:

- Contravened the explicit terms of the agency's own veto
- Violated the Clean Water Act
- Disregarded core principles of administrative law
- Did not seek public comment nor provide a rational explanation for the reversal

EPA in the November 17, 2021, veto states that three paragraphs in a November 30, 2020, letter transmitting comments on the Draft Supplemental Environmental Impact Statement ("2002 DSEIS") for the Project were in error.

The federal agency states in part:

The November 30, 2020 letter inaccurately describes the scope of EPA's 2008 FD. Based on a comprehensive evaluation of the 2008 FD and the associated record, the 2007 Final Supplemental Environmental Impact Statement (2007 FSEIS), and the 2020 Final Supplemental Environmental Impact Statement, the Agency has concluded that the 2020 Proposed Plan for the Yazoo Pumps Project is 2007 FSEIS Plan 5 and involves discharges into the geographic area covered by the FD.

As a result, EPA concludes that the 2020 Plan for the Project is prohibited by the 2008 FD. A detailed analysis is attached to the EPA letter discussing this issue.

EPA also notes in the November 17th letter that it is:

. . . concerned about the serious impacts from flooding on people and the economy of the lower Mississippi Delta.

Attachment A of the November 17th letter provides a detailed discussion of its reconsideration and includes the following components:

- Discussion of Section 404 of the Clean Water Act
- 2007 Yazoo Pumps Project
- EPA's Section 404(c) review process
- 2008 FD findings
- Compensatory mitigation and reforestation
- Water management feature
- Corps efforts to advance Plan 5 prior to 2020 supplemental environmental impact statement process
- 2020 Yazoo Pumps Project
- Compensatory mitigation and reforestation
- Water management feature
- EPA's November 30, 2020 letter
- Litigation and EPA's review of the record of the 2008 FD, 2007 FSEIS, and 2020 FSEIS

- EPA's reconsideration of portions of the November 30, 2020 letter
- The 2020 Project is located within the "defined area" subject to the prohibition in the 2008 FD
- Discharges from the 2020 Yazoo Pumps Project are prohibited by the 2008 FD

A copy of the letter can be downloaded [here](#).