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Operation of Bonnet Carre´ Spillway/National Environmental Policy Act: Federal Appellate Court Addresses Whether Army Corps of Engineers Should Have Prepared a Supplemental EIS

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A group of Mississippi municipalities and associations filed a lawsuit in the United States District Court (S.D. Miss.) against the United States Army Corps of Engineers (“Corps”) for allegedly violating the National Environmental Policy Act (“NEPA”). See *Harrison County, Mississippi et al. v. U.S. Army Corps of Engineers*, 2023 WL 2644024, (March 27, 2023).

Plaintiffs alleged that the Corps failed to supplement its 1976 NEPA Environmental Impact Statement (“EIS”) amidst changing environmental conditions associated with the Bonnet Carre´ Spillway (“Spillway”).

The Corps moved for summary judgment on the grounds of sovereign immunity. The motion was granted.

The dispute involves the Mississippi River and Tributaries Project (“MR&T”). In 1927 relentless rains led to an overflow of the Mississippi River. This event is known as the Great Flood of 1927.

The flood resulted in the drowning of hundreds of people and displacement of thousands. The MR&T was intended to help address flooding. The Spillway is a component of the MR&T. It consists of a system of mechanisms to divert river water destined for New Orleans into Lake Pontchartrain.

The Spillway freshwater diversion into Lake Pontchartrain has had negative environmental and economic impacts. The injection of freshwater has caused disruptions to oysters, sea turtles, and shrimp while also leading to algae blooms, seafood warnings, and beach closures. These concerns are exacerbated by a recent increase in the frequency with which the Spillway has been used.

The Spillway is stated to have become more vital in recent years because of an increase in river flow. Nevertheless, the plaintiffs argued that these environmental changes and the frequency of using the Spillway required a supplemental EIS.

The District Court granted summary judgment on the plaintiff’s claim. It found that the plaintiffs could not avoid the application of sovereign immunity.

The Fifth Circuit Court of Appeals (“Fifth Circuit”) held the case turned on the question of sovereign immunity. It noted that an agency could consent to a suit through statute and waive immunity. The plaintiff must assert that an agency failed to take a mandated discrete action.

The application of immunity turned on whether the Corps was required to prepare a supplemental EIS. If not, the Court would lack jurisdiction due to the application of immunity. If yes, the Court would have jurisdiction. Therefore, the Court considered whether NEPA requires the Corps to prepare a supplemental EIS due to the changing conditions surrounding the Spillway.

NEPA requires federal agencies to include environmental values and issues in their decision-making processes. This federal mandate is accomplished by agency consideration of environmental impacts of proposed actions and reasonable alternatives to those actions. The statute requires federal agencies in certain instances to prepare a detailed EIS. The requirement to produce this document is only triggered in the event of a major federal action that will significantly affect the environment.

NEPA differs from action enforcing environmental statutory programs such as the Clean Air Act or Clean Water Act. It does not impose substantive mandates. Instead, it is limited to requiring federal agencies to meet procedural requirements such as preparation of an EIS in certain defined instances. As a result, NEPA does not require a certain alternative or meet a particular standard. Nevertheless, an agency that fails to adhere to the procedural requirement can be enjoined.

Agencies are required to prepare supplemental EISs when a:

- “major Federal action remains to occur,” and the agency makes substantial changes to the proposed action that are relevant to environmental concerns or
- there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed actions or its impacts

The Court considered whether there was a “major Federal action” still outstanding with the Spillway. In other words, was the Corps contemplating a major Federal action?

The caselaw has provided that the need to prepare a supplemental EIS involved some planned action. The question was whether there was some pending decision making. The plaintiffs only identified new environmental information.

The Spillway has been operated for 90 years. The Corps continued to use the same operational criteria set out in the foundational design documents. The Fifth Circuit explained that “new plans by an agency require supplemental EIS; new circumstances do not.”

The increase in river flow and usage of the Spillway was deemed due to the environment – not the federal agency changes to the Spillway systems. Therefore, the Corps was not obligated to prepare a supplemental EIS. Since this is not an agency duty under these circumstances, they did not fail to take the necessary action and are not liable under the Administrative Procedures Act. Sovereign immunity would apply, and the Court, therefore, lacked jurisdiction.

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