Major Federal Inaction: *Harrison County v. U.S. Army Corps of Engineers* and the Bonnet Carré Spillway

INTRODUCTION

Since the 1970s, the National Environmental Protection Act (NEPA) has required agencies to take a "hard look" at infrastructure's impact on the environment.[1] However, as the climate crisis progresses, understanding the environment's impact on infrastructure plays a key role in effective climate adaptation.[2]

In *Harrison County v. U.S. Army Corps of Engineers* (*Harrison County*), Mississippi counties, cities, and associations asked the Fifth Circuit to compel the U.S. Army Corps of Engineers (Corps) to prepare a supplemental environmental impact statement (EIS) analyzing the impacts of climate change on the Bonnet Carré Spillway (the Spillway) near New Orleans.[3] Increased incidents of extreme flooding in recent years have required the Corps to use the Spillway more regularly to divert water from the Mississippi River, resulting in severe environmental and economic impacts from the inundation of freshwater into local saltwater ecosystems.[4] The plaintiffs argued NEPA regulations required a supplemental EIS as increased usage of the Spillway constituted a "major federal action" operating under "significant new circumstances" caused by climate change.[5]

To decide *Harrison County*, the Fifth Circuit addressed the legal question of whether the Corps' increased operation of the Spillway constituted a "major federal action," despite no proposed or actual change to its operating procedures.[6] The Fifth Circuit correctly answered no.[7] Case law indicated that agencies do not have an obligation to prepare a supplemental EIS for completed

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1. Marsh v. Or. Nat. Res. Council, 490 U.S. 360, 374 (1989).
2. *See* Thierry Giodano, *Adaptive Planning for Climate Resilient Long-Lived Infrastructures*, 23 UTIL. POL'Y 80, 81 (2012); *Climate Resilient Infrastructure and Operations*, OFF. FED. CHIEF SUSTAINABILITY OFFICER, https://www.sustainability.gov/federalsustainabilityplan/resilience.html (last visited Apr. 23, 2024).
3. Harrison Cty. v. U.S. Army Corps Eng'rs, 63 F.4th 458, 460 (5th Cir. 2023).
4. *Id.*
5. *Id.* at 463; 40 C.F.R § 1502.9(d)(1)(ii).
6. *Harrison Cty.*, 63 F.4th at 463.
7. *Id.* at 466.

projects.[8] While the decision aligns with precedent, *Harrison County* is out of step with the urgent need for the Corps to incorporate climate change into its decision making. The case is a bright warning sign that NEPA's prospective framing makes it an insufficient tool for compelling agencies to prepare climate analyses on existing infrastructure projects.

I. LEGAL BACKGROUND

A. Administrative Procedure Act § 706(1)

Section 706(1) of the Administrative Procedure Act (APA) allows plaintiffs to challenge agency actions and seek judicial review.[9] It gives the explicit mandate that courts "shall decide questions of law [and] interpret constitutional and statutory provisions" relevant to the challenge.[10] If a court finds an agency action to be "unlawfully withheld or unreasonably delayed," § 706(1) requires the court to compel the agency to remedy its inaction.[11] However, to prove agency inaction, a plaintiff must point to a discrete non-discretionary action that the agency failed to perform.[12]

B. Duty to Prepare a Supplemental Environmental Impact Statement under NEPA

NEPA requires that federal agencies take a "hard look" at the environmental impacts of a project before taking action.[13] To do so, agencies prepare an EIS for all "major federal actions" which significantly impact the environment.[14] An EIS must provide information on an action's significant environmental impacts and reasonable alternatives that would limit adverse effects.[15] NEPA regulations state that major federal actions "tend" to include the approval of specific projects, such as construction or management activities, and the adoption of policy, plans, or programs.[16]

While an initial EIS is often sufficient, certain circumstances require a supplemental EIS. NEPA requires agencies to prepare a supplemental EIS when a "major federal action is incomplete or ongoing" and "substantial new circumstances or information" related to the action or its impacts arise.[17] Consequently, the Supreme Court has established that a federal agency must prepare a supplemental EIS if (1) a major federal action remains to occur, and (2) new information shows that the "remaining action" will negatively affect the

8. *See id.*
9. 5 U.S.C. § 706 (2001).
10. *Id.*
11. *Id.*
12. Norton v. S. Utah Wilderness All. [hereinafter SUWA], 542 U.S. 55, 64 (2004).
13. Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, 462 U.S. 87, 97 (1983).
14. 42 U.S.C. § 4332(2)(C) (2000).
15. 42 C.F.R. § 1501.2 (2024).
16. 40 C.F.R. § 1508.1(w)(1) (2024).
17. 40 C.F.R. § 1502.9(d)(1) (2024).

environment in "a significant manner or to a significant extent not already considered."[18]

There is no cause of action under NEPA itself, but plaintiffs can use the statute to establish a non-discretionary duty required to bring a claim under APA § 706(1).

II. CASE BACKGROUND

Nearly 100 years ago, relentless rains caused the Mississippi River to overflow, drowning hundreds of people and displacing thousands from their homes in Arkansas, Mississippi, and Louisiana. The Great Flood of 1927 pushed Congress to pass the Flood Control Act of 1928.[19] This legislation established the Mississippi River and Tributaries Project ("MR&T"), which authorized the Corps to implement a system of public works in the lower Mississippi River Valley that provided "unprecedented flood risk management."[20] Construction on the MR&T is still in progress with about $8.4 billion of authorized work left to complete.[21]

The plaintiffs' claims in *Harrison County* focus on damages related to the Corps' use of the Bonnet Carré Spillway, a key component of the MR&T's flood mitigation system constructed in 1931.[22] When the Mississippi River experiences major flooding, the Spillway redirects excess flows from the river to the nearby Lake Pontchartrain and then into the Gulf of Mexico, bypassing New Orleans.[23] Since 1927, the Corps' operating manual has provided that the Spillway should only be used when the Mississippi River is flowing faster than 1.25 million cubic feet per second (cfs).[24]

While this reduces flood risk for the people of New Orleans, releasing freshwater into Lake Pontchartrain and the Gulf of Mexico damages numerous environmental and economic interests. Impacts include disruptions to sea life, toxic algae blooms, seafood warnings, and beach closures.[25] The negative impacts have become more frequent as climate change increases the frequency of extreme storms and flooding.[26] In the last twenty years, people living along the Mississippi River have experienced successive 100-, 200-, and 500-year

18. Marsh v. Or. Nat. Res. Council, 490 U.S. 360, 374 (1989) (alterations in original).

19. *See* Pub L. No. 70-391 (codified at 33 U.S.C. § 702(a)).

20. *Mississippi River and Tributaries Project*, U.S. ARMY CORPS ENG'RS, https://www.mvd.usace.army.mil/About/Mississippi-River-Commission-MRC/Mississippi-River-Tributaries-Project-MR-T/ (last visited Apr. 7, 2024).

21. Harrison Cty. v. U.S. Army Corps Eng'rs, 63 F.4th 458, 463 (5th Cir. 2023).

22. *Id.* at 460.

23. *Bonnet Carré Spillway*, U.S. ARMY CORPS ENG'RS 2 (Oct. 2014), https://www.mvn.usace.army.mil/Portals/56/docs/PAO/Brochures/BCspillwaybooklet.pdf.

24. *Harrison Cty.*, 63 F.4th at 461.

25. *Id.* at 460.

26. *See* CHIA-YU WU & EHAB MESELHE, UTILIZING UPPER DIVERSION IN RIVER WATER MANAGEMENT CASE STUDY: 2019 MISSISSIPPI FLOODS, PHASE I 5-6 https://news.tulane.edu/sites/default/files/EDF-Bonnet%20Carre%20Report%20-%20Phase%20I%202020-June%208-1.pdf (last visited Feb. 18, 2024).

floods.[27] While the Corps designed the Spillway to be a stop-gap measure used about once every five years, it has recently become more vital to the Mississippi River's flood infrastructure.[28] On average, the Spillway has been opened every six years over an eighty-nine year period.[29] However, six of the fifteen openings during this period happened over the past ten years, and four openings occurred between 2018 and 2020.[30]

The economic and environmental impacts of more frequent and prolonged openings are devastating to local communities and industries. In 2011, the Spillway opening decimated oyster populations, resulting in an estimated loss to commercial oyster fisheries of up to $46 million.[31] Communities lost hundreds of jobs in the years following because of the resulting downturn.[32] The prolonged 2019 Spillway opening forced Mississippi to pay out $6.57 million in assistance to commercial fisheries, seafood dealers, and others in the fishing industry.[33]

III. PROCEDURAL HISTORY

A. Claims

The plaintiffs in *Harrison County* were a group of municipalities and associations that experienced negative impacts related to recent Spillway openings.[34] They sued the Corps under APA § 706(1), alleging that the agency failed to supplement the MR&T's 1976 EIS to account for the negative environmental and economic impacts of the increased frequency and duration of Spillway openings.[35] The plaintiffs sought declaratory relief acknowledging the Corps' failure to prepare the supplemental EIS and an order requiring the agency to do so with "all due haste."[36]

To successfully sue the Corps under APA § 706(1), the plaintiffs had to demonstrate that the Corps had a non-discretionary duty to perform a supplemental EIS. NEPA regulations state that the agency "shall" prepare a supplemental EIS when a major federal action "is incomplete or ongoing" and

27. MISSISSIPPI RIVER CITIES & TOWN INITIATIVE, 2016 POLICY PLATFORM OF THE MAYORS ALONG THE MISSISSIPPI RIVER 2 (2016), https://static1.squarespace.com/static/5845a70859cc6819f2dfdb9e/t/585c1af6d1758e618c86dc12/1482431226742/2016+Policy+Platform.pdf.

28. *Harrison Cty.*, 63 F.4th at 461.

29. *Id.* (citing the district court's detailed review of the Spillway's history).

30. *Id.* (citing the district court's detailed review of the Spillway's history).

31. BENEDICT C. POSADAS, ECONOMIC IMPACTS OF THE OPENING OF THE BONNET CARRÉ SPILLWAY ON THE MISSISSIPPI OYSTER FISHERY 1 (2017), http://extension.msstate.edu/sites/default/files/publications/publications/p3038.pdf.

32. *Id.*

33. *2019 Mississippi Bonnet Carre Spillway Fisheries Disaster Recovery Program to Pay Out $6.57M to Eligible Commercial Fishermen and Seafood Dealers*, MISSISSIPPI DEP'T MARINE RES., (Nov. 1, 2013) https://dmr.ms.gov/2019-mississippi-bonnet-carre-spillway-fisheries-disaster-recovery-program-to-pay-out-6-57m-to-eligible-commercial-fishermen-and-seafood-dealers/.

34. *Harrison Cty.*, 63 F.4th at 461.

35. *Id.*

36. *Id.*

there are "substantial new circumstances or information" relevant to the action.[37] The plaintiffs argued that the increased usage of the Spillway was an ongoing major federal action impacted by the "significant new circumstances" of climate change.[38] Therefore, the Corps failed to perform its non-discretionary duty to prepare a supplemental EIS.[39]

To frame the Spillway as an ongoing major federal action, the plaintiffs made two claims in the alternative. First, they claimed that the Spillway played an essential part of the remaining $8.4 billion of authorized construction on MR&T's flood infrastructure system.[40] As a central part of the system, a supplemental EIS on the Spillway could influence Corps' decision-making on other in-progress aspects of the flood mitigation system that could reduce the usage of the Spillway.[41] Second, even if the Spillway was not ongoing in context of the MR&T, the Corps' increased use of the Spillway made its operation significantly different compared to when originally approved. [42] As a result, the Spillway itself required a new EIS to account for unanticipated changes in the frequency of operation.[43]

In response, the Corps shifted attention away from the plaintiffs' focus on the broader MR&T project. It zoomed in to focus specifically on the Spillway, emphasizing that the project had been fully constructed for over ninety years and still uses the same operational criteria established in its 1927 design documents and contemplated in the 1976 EIS.[44] The Corps argued that without a failure to perform a discrete duty, the agency's sovereign immunity required the court to dismiss the plaintiffs' APA §706(1) claims.[45]

B. District Court Decision

The Southern District of Mississippi granted the Corps' motion to dismiss the plaintiffs' NEPA claims with prejudice.[46] The court found that "no major federal action remains to occur" because the challenged action was completed pursuant to an adequate NEPA process.[47] Further, the agency had not deviated from the operating procedures contemplated by the 1976 EIS.[48] It reasoned that the Corps was "merely" responding to annual weather changes, and the court "cannot review the Corps' routine day-to-day operation" of the Spillway.[49] Thus,

37. 40 C.F.R. § 1502.9(d)(1) (2024).
38. *Harrison Cty.*, 63 F.4th at 463.
39. *Id.* at 461.
40. *Id.* at 463.
41. *Id.* at 464.
42. *Id.* at 465.
43. *Id.*
44. *Id.* at 463.
45. *Id.* at 461.
46. Watson Jr. v. U.S. Army Corps Eng'rs, No. 19-CV-00989, 2021 U.S. Dist. LEXIS 273695, at *17 (S.D. Miss. Sept. 13, 2021) (order granting the Corps' motion to dismiss).
47. *Id.* at *12.
48. *Id.* at *14.
49. *Id.*

the plaintiffs could not show the Corps had a duty to prepare a supplemental EIS, allowing the agency to maintain sovereign immunity.[50]

C. Fifth Circuit Decision

On appeal, the Fifth Circuit's *de novo* review found that this case's outcome "hinge[d] on a single factual question—namely, does the 'major Federal action' remain outstanding to necessitate the Corps' preparation of a supplemental EIS?"[51] Like the district court, the Fifth Circuit rejected both of the plaintiffs' attempts to characterize the increased use of the Spillway as an ongoing action.[52] It considered the Spillway to be a finalized "fixture" that had been "operational and materially unchanged for more than 90 years."[53] The court also agreed with the Corps argument that the increased frequency of openings did "not mark a shift in managerial philosophy or planning," only a change in the implementation of existing procedures.[54] The 1.25 million cfs threshold to open the Spillway had been sufficiently analyzed in the 1976 EIS.[55] Thus, the Fifth Circuit held that the Corps had not undertaken a major federal action that would trigger its obligation to prepare a supplemental EIS.[56]

IV. ANALYSIS

A. The Court Was Correct in Finding that the Operation of the Bonnet Carré Spillway was Not a Major Federal Action

The plaintiffs' attempts to characterize the increased operation of the Spillway as a major federal action fall short in light of precedent that limits the scope of "major federal actions" to ongoing projects. The Fifth Circuit correctly characterized NEPA as "requiring prospective environmental analysis rather than retrospective environmental analysis."[57] As NEPA is not expressly retroactive, the issue of whether or not NEPA obligations extended to completed projects was subject to much litigation and debate when the statute was first promulgated.[58] However, most courts found that NEPA did not apply retroactively, [59] setting the stage for the Supreme Court's decisions in *Marsh v. Oregon Natural Resources* (*Marsh*) and *Norton v. Southern Utah Wilderness Alliance* ("*SUWA*") that

50. *Harrison Cty.*, 63 F.4th at 460.
51. *Id.* at 462.
52. *Id.*
53. *Id.* at 465.
54. *Id.* at 465-66.
55. *Id.* at 460.
56. *Id.*
57. *Id.* at 466.
58. Burk E. Bishop, *Applying the National Environmental Policy Act of 1969 to Ongoing Federal Projects*, 26 SW. L. J. 744, 755 (1972). *See also* Sunny J. Nixon, *The National Environmental Policy Act's Influence on Standing, Judicial Review, and Retroactivity*, 7 LAND & WATER L. REV. 115, 122 (1972).
59. *See* Nixon, *supra* note 58, at 122 ; *see also* Norton v. SUWA, 542 U.S. 55, 56 (2004) ("There is no ongoing 'major Federal action' that could require supplementation (though BLM *is* required to perform additional NEPA analyses if a plan is amended or revised, see §§ 1610.5-5, 5-6).").

established completed projects only require a supplemental EIS if an agency proposes new plans or changes.[60]

In *Marsh,* the plaintiffs filed a NEPA claim against the Corps for failing to prepare a supplemental EIS for the Elk Creek Dam in Oregon. The plaintiffs asked the court to compel the Corps to review information discovered after the EIS had been finalized, but when only one-third of the dam construction had been completed.[61] The Court found that NEPA required agencies to analyze the "environmental effects of their planned action, even after a proposal has received initial approval." [62] An agency must prepare a supplemental EIS if new information shows that "the remaining action" will have environmental impacts in "a significant manner or to a significant extent not already considered."[63] Under this standard, the Court found that a major federal action remained to occur, and the Corps had to consider preparing a supplemental EIS for the remaining dam construction.[64]

Fourteen years after *Marsh*, the plaintiffs in *SUWA* contended that the Bureau of Land Management (BLM) failed to prepare a supplemental EIS to account for damages to public land from off-road vehicle use in its land use plan.[65] The Supreme Court could have used *SUWA* to further *Marsh*'s recognition that federal actions are often ongoing and NEPA obligations are not discontinued after initial approval, even if there is no ongoing construction.[66] Instead, the Court unanimously decided that an approved land use plan is no longer a major federal action.[67] This decision effectively terminated agencies' obligations to prepare a supplemental EIS until the agency deviates from the approved plan, regardless of whether significant new information or circumstances exist.[68] While legal scholars have criticized *SUWA* as improperly narrow, allowing BLM to ignore new information on off-road vehicle impacts and bypass its NEPA obligations, it is the controlling law in this case.[69]

In *Harrison County*, the Fifth Circuit correctly decided that the Spillway was not an ongoing major federal action.[70] The Spillway is a finalized "fixture" that has been "operational and materially unchanged for more than 90 years."[71]

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60. *See* Marsh v. Or. Nat. Res. Council, 490 U.S. 360, 375 (1989); *SUWA*, 542 U.S. at 72-73.
61. *Marsh*, 490 U.S at 368.
62. *Id.* at 374.
63. *Id.*
64. *Id.*
65. *SUWA*, 542 U.S. at 61.
66. Nicholas C. Yost & Gary Widman, *The "Action-Forcing" Requirements of NEPA and Ongoing Actions of the Federal Government*, 34 ENV'T L. REP. 10435, 10436 (2004).
67. *SUWA*, 542 U.S. at 73.
68. *See id.*
69. *See* Aaron M. Kappler, *Off-Roading Without a Map: The Supreme Court Drives Over NEPA in Southern Utah Wilderness Alliance*, 24 GA. ST. U. L. REV. 533, 550 (2007); Christopher M. Buell, Note, *Norton v. Southern Utah Wilderness Alliance: The U.S. Supreme Court Fails to Act on Agency Inaction*, 67 U. PITT. L. REV. 641, 641-42 (2006); Michael C. Blumm & Sherry L. Bosse, *Norton v. SUWA and the Unraveling of Federal Public Land Planning*, 18 DUKE ENV'T L. & POL'Y F. 106, 138-47 (2007).
70. Harrison Cty. v. U.S. Army Corps Eng'rs, 63 F.4th 458, 464 (5th Cir. 2023).
71. *Id.* at 465.

Marsh's holding that agencies must prepare a supplemental EIS for impacts "not already considered" explicitly refers to "remaining" and "planned" actions.[72] *SUWA* further emphasized that courts cannot compel agencies to perform a supplemental EIS once plans are finalized.[73] Given this precedent, the Fifth Circuit correctly decided that NEPA's "forward-looking" mandate did not apply to the completed Spillway.[74] Regardless of ongoing construction on the broader MR&T, "any new information yielded by further analysis" would not affect the design of the Spillway.[75] There were no aspects of the Spillway "under consideration" that would benefit from new environmental analyses.[76]

Further, the Corps had not proposed any substantive changes to the Spillway's operating procedures.[77] The threshold of 1.25 million cfs has been the same since the original EIS in 1976 and was reaffirmed in 1984 and 1999.[78] While the flow rate of the Mississippi River may meet the 1.25 million cfs threshold more often, the Corps has used the original operating plan for nearly 100 years.[79] While the Fifth Circuit conceded that climate change imposed "significant new circumstances," the Spillway's operation had been "materially unchanged" with no "shift in managerial philosophy or planning." The Fifth Circuit correctly found that, as in *SUWA,* the plaintiffs could "identify no pending decisionmaking" that hinged on new analysis.[80]

Thus, the court correctly found that there was no "remaining major federal action" at the Spillway to trigger NEPA's requirement to prepare a supplemental EIS. Without this discrete non-discretionary duty, the plaintiffs could not meet the elements of a §706(1) claim. As the Fifth Circuit properly concluded: "Congress and the Corps have authority to act on the plaintiffs' dire environmental concerns. The federal courts do not."[81]

B. Harrison County *Indicates that NEPA is an Insufficient Tool for Addressing Climate Impacts on Existing Infrastructure*

Harrison County indicates that, under NEPA's prospective framework, agency inaction becomes the defense against allegations of agency inaction. This counterintuitive logic is supported by the Supreme Court's assertion in *SUWA* that an agency "*is* required to perform additional NEPA analyses if a plan is amended or revised" and the Fifth Circuit's focus on the Corps' "materially unchanged" operating procedures.[82] If the Corps *did* make changes to its

72. Marsh v. Or. Nat. Res. Council, 490 U.S. 360, 373. 393 (1989).
73. *SUWA*, 542 U.S. at 73.
74. *Harrison Cty.*, 63 F. 4th at 464.
75. *Id.*
76. *Id.*
77. *Id.* at 466.
78. *Id.*
79. *Id.* at 466.
80. *See id.* at 464 (emphasis omitted).
81. *Id.* at 466.
82. *See id.* at 466; Norton v. SUWA, 542 U.S. 55, 64 (2004).

Spillway operations, the plaintiffs would have a strong case to compel the agency to prepare a supplemental EIS. [83] In cases in which the Corps is reluctant to perform additional NEPA analysis, *Harrison County* incentivizes the agency to abstain from proposing or implementing climate adaptation measures. By continuing to use 100-year-old procedures, the Corps ensures that a supplemental EIS remains discretionary and cannot be compelled under APA § 706(1).

Harrison County indicates that when, how, and if the Corps updates its decades-old analyses is at the agency's discretion.[84] While federal guidance and recommendations encourage the Corps to regularly evaluate its existing flood infrastructure, [85] the Corps will likely not do so without a legislative mandate. A 2022 House Committee report observed that the Corps was out of step with "clear direction from Congress" to address the resiliency and sustainability of future flood infrastructure projects.[86] *Harrison County* suggests the Corps has a similar tendency to maintain the status quo on existing projects.[87] The Corps convinced the Fifth Circuit that its increased use of the Spillway equated to "'routine managerial actions' of an agency tasked with operating a complex and important piece of infrastructure."[88]

If Congress does not establish a non-discretionary duty to review existing projects under NEPA or otherwise, impacted communities may wait indefinitely for the Corps to account for climate change. So long as the agency does not initiate any changes to its "routine" decision making, courts will likely have no authority to compel the preparation of a supplemental EIS. Instead, the burden will continue to fall on communities along the Mississippi River to "routinely" adapt to major environmental and economic losses.

CONCLUSION

The Fifth Circuit identified the underlying tension in the case: "The true culprit for the plaintiffs' environmental misfortunes is not the Corps or the Spillway, but the environment itself."[89] *Harrison County* provides an example of a perverse incentive for agencies to avoid litigation by maintaining the status quo during a time when agencies should be creatively and proactively adapting to the climate crisis. The case indicates that NEPA's prospective nature makes it insufficient to compel agency action on existing projects, eliminating a key tool in environmentalists' legal arsenal. Without new Congressional mandates to

83. *See Harrison Cty.*, 63 F.4th at 466.

84. *See id.* at 466.

85. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-24-105496, CLIMATE CHANGE: OPTIONS TO ENHANCE THE RESILIENCE OF FEDERALLY FUNDED FLOOD RISK MANAGEMENT INFRASTRUCTURE 46 (Jan. 16, 2024); *see also* 43 C.F.R. § 46.415(b)(3) ("A proposed action or alternative(s) may include adaptive management strategies allowing for adjustment of the action during implementation. . . . includ[ing] a monitoring component, approved adaptive actions that may be taken, and environmental effects analysis for the adaptive actions approved.").

86. H.R. REP. NO. 117-347, at 61 (2022).

87. *See Harrison Cty.*, 63 F.4th at 465.

88. *See id.*

89. *Id.*

establish that agencies have an affirmative duty to address climate impacts, more communities will face the adverse consequences of 100-year-old decisions while agencies fail to act.

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