IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 11-60302

BOARD OF MISSISSIPPI LEVEE COMMISSIONERS,
Plaintiff - Appellant,

v.

MISSISSIPPI WILDLIFE FEDERATION, NATIONAL WILDLIFE FEDERATION; ENVIRONMENTAL DEFENSE FUND; SIERRA CLUB; GULF RESTORATION NETWORK; AMERICAN RIVERS,
Intervenor Defendants - Appellees.

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; LISA P. JACKSON, in her official capacity as Administrator; NANCY STONER, in her official capacity as Acting Assistant Administrator for Water,
Defendants - Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
(HON. SHARION AYCOCK)

RESPONSE BRIEF OF THE FEDERAL DEFENDANTS

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CERTIFICATE OF INTERESTED PARTIES

Fifth Circuit No. 11-60302, *Board of Mississippi Levee Comm'rs v. EPA, et al.*

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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STATEMENT REGARDING ORAL ARGUMENT

The federal defendants believe that oral argument would be helpful to the Court due to the complexity of the record and the novel issues presented for review.

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INTRODUCTION

The Board of Mississippi Levee Commissioners (the "Board") sued the United States Environmental Protection Agency, Lisa P. Jackson, and Nancy Stoner (collectively, "EPA"), alleging that EPA's decision to prohibit the specification of a dredged and fill material disposal site proposed by the United States Army Corps of Engineers (the "Corps") under Section 404(c) of the Clean Water Act, 33 U.S.C. § 1344(c), was arbitrary and capricious. EPA prohibited use of a disposal site associated with the Yazoo Backwater Area Pumps Project ("Pumps Project"), which was a project designed to reduce backwater flooding in the Yazoo River basin by pumping water over a floodgate and allowing it to drain into the Mississippi River. The Board's sole basis for its claim was its contention that the Pumps Project was exempted from certain requirements of the Clean Water Act, including Section 404(c), because Congress approved the project pursuant Section 404(r), 33 U.S.C. § 1344(r). To meet the requirements of Section 404(r) a project must be "specifically authorized by Congress" and the project's Environmental Impact Statement ("EIS"), prepared pursuant to the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, *et seq.*, must be "submitted to Congress" before project authorization or an appropriation of funds.

JURISDICTIONAL STATEMENT

The district court exercised jurisdiction pursuant to 28 U.S.C. § 1331 and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 702, 704. The Board filed a

timely notice of appeal on April 26, 2011. R4448. However, as explained below, *infra* Section I, because the Board lacks standing to assert its claim, the Court lacks jurisdiction to resolve this suit.

STATEMENT OF THE ISSUES

1. Whether the Board should be granted third party standing to vindicate the legal rights and interests of the Corps—the party that sought authorization to dispose of dredged and fill material—which does not agree that Section 404(r) has exempted the Pumps Project.

2. Whether the Board lies within the zone of interests of a provision passed by Congress to protect the separation of powers and to resolve differences within the federal government regarding which federal projects should move forward.

3. Whether the Corps "submitted" an EIS for the Pumps Project to Congress within the meaning of Section 404(r) of the Clean Water Act when the Corps denies that it ever made such a submission and the record supports the Corps' position.

4. Whether the Pumps Project was "specifically authorized," within the meaning of Section 404(r), by Congress in 1941 when the project described in 1941 evolved significantly over the intervening seventy years.

STATEMENT OF THE CASE

Section 404(c) of the Clean Water Act authorizes EPA to prohibit, withdraw, deny or restrict the specification of any defined area as a disposal site for dredged or fill material after a determination that the discharge will have unacceptable adverse effects on municipal water supplies, fisheries, wildlife, or recreation. 33 U.S.C. § 1344(c). Section 404(c) is often described as EPA's "veto" authority. In examining the Pumps Project, EPA determined that its large-scale hydrologic alterations would degrade critical ecologic functions that support wildlife and fisheries. R441. EPA

therefore invoked its authority under Section 404(c) and prohibited the discharges associated with the Pumps Project. Before making its decision, EPA, in consultation with the Corps, investigated whether Section 404(r) applied to the Pumps Project. R463. EPA determined there was no evidence that the requirements of Section 404(r) had been met. Although both the Corps and EPA maintain that the requirements of Section 404(r) were never satisfied, the Board filed this suit alleging that Section 404(r) of the Clean Water Act barred the exercise of EPA's Section 404(c) authority. R21.

STATEMENT OF FACTS

I. STATUTORY BACKGROUND

A. The Clean Water Act

Congress enacted the Clean Water Act, 33 U.S.C. §§ 1251-1387, to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The Act's stated objectives evince a "broad, systemic view of the goal of maintaining and improving water quality." *United States v. Riverside Bayview Homes*, 474 U.S. 121, 132 (1985).

To achieve those objectives, the Clean Water Act prohibits the "discharge of any pollutant by any person," unless in compliance with the Act. 33 U.S.C. § 1311(a). The Clean Water Act sets up two independent permitting regimes for discharges of pollutants. Section 404, the regime relevant here, authorizes the Corps to issue a permit "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a). Although the Corps does not issue

itself a permit, it does apply all the substantive requirements of the Clean Water Act to its discharges. 33 C.F.R. § 335.2. Section 404(b) provides that the Corps must base its decisions regarding permits on guidelines developed by EPA, in conjunction with the Corps, that govern the specification of disposal sites for discharges of dredged or fill material (hereafter the "Section 404(b)(1) Guidelines"). 33 U.S.C. § 1344(b); 40 C.F.R. § 230; *Bersani v. EPA*, 850 F.2d 36, 39 (2d Cir. 1988). Fundamental to the Section 404(b)(1) Guidelines "is the precept that dredged or fill material should not be discharged into the aquatic ecosystem, unless it can be demonstrated that such a discharge will not have an unacceptable adverse impact." 40 C.F.R. § 230.1(c).

Section 404(c) authorizes EPA to prohibit the specification of a disposal site for dredged or fill material whenever it "determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect" on, among other things, fishery areas and wildlife. 33 U.S.C. § 1344(c). EPA's regulations define "unacceptable adverse effect" as an "impact on an aquatic or wetland ecosystem which is likely to result in significant degradation of municipal water supplies (including surface or ground water) or significant loss of or damage to fisheries, shellfishing, or wildlife habitat or recreation areas." 40 C.F.R. § 231.2(e). The regulations also state that EPA should consider "the relevant portions of the section 404(b)(1) guidelines" in making its decision. *Id.*

Before making a determination under Section 404(c), EPA must provide for notice and opportunity for public hearings, consult with the Corps, and provide

written findings and reasons for prohibiting the specification of the disposal site. 33 U.S.C. § 1344(c). EPA has also issued regulations setting forth procedures the agency will follow before exercising its authority under Section 404(c). These procedures include notifying the Corps' District Engineer (or the State and the permit applicant, if applicable) in writing of EPA's intent to issue a public notice of a Section 404(c) proposed determination, providing public notice of the proposed determination, providing a thirty to sixty day public comment period, and providing an opportunity for a public hearing. 40 C.F.R. §§ 231.3, 231.4.

Section 404 also provides certain limited exemptions to the 404(a) permitting regime. Among other exemptions, Section 404(r) of the Clean Water Act exempts "[t]he discharge of dredged or fill material as part of the construction of a Federal project specifically authorized by Congress" from, state water quality certification requirement and the requirements of Section 404 only when

> information on the effects of such discharge, including consideration of the [404(b)(1) Guidelines], is included in an environmental impact statement for such project . . . and such environmental impact statement has been submitted to Congress before the actual discharge of dredged or fill material in connection with the construction of such project and prior to either authorization of such project or an appropriation of funds for such construction.

33 U.S.C. § 1344(r). In considering this provision, "[o]f central importance in the House debates was the assurance that consideration and acceptance of the environmental impact statement by Congress would be 'equivalent to' review under the Section 404(b)(1) guidelines." *Monongahela Power Co. v. Marsh*, 809 F.2d 41, 51

(D.C. Cir. 1987) (quoting 123 Cong. Rec. 39187 (1977), reprinted in 3 Comm. on Environment and Public Works, 95th Cong., 2d Sess., *A Legislative History of the Clean Water Act of 1977: A Continuation of the Legislative History of the Federal Water Pollution Control Act*, at 472 (Comm. Print 1978) (statement of Sen. Muskie)).

The Council on Environmental Quality (CEQ) has also issued nonbinding guidance on the application of Section 404(r). That guidance counsels an agency that wishes to obtain a Section 404(r) exemption to submit to EPA, and the Corps when appropriate, the EIS for the project. R3265. EPA and the Corps then review the EIS to determine if it contains adequate information on the proposed discharges and is consistent with the 404(b)(1) Guidelines. R3265. If EPA or the Corps determine that the project is not consistent with the 404(b)(1) Guidelines, the guidance states that the EIS contain a sentence disclosing that conclusion. R3266. Under the CEQ guidance, "[i]n all cases . . . the written conclusions of EPA or the Corps are included in or attached to the environmental impact statement, clearly identified, circulated with the statement, and submitted to the Congress" when seeking a Section 404(r) exemption. R3266.

B. The National Environmental Policy Act

NEPA requires federal agencies to prepare a detailed statement on the environmental impacts of any "major Federal action[ ] significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). NEPA does not dictate substantive results, but it does require agencies to take a "hard look" at potential

environmental consequences and make relevant information available so that the public can play a role in the decision making process. *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 768 (2004); *Spiller v. White*, 352 F.3d 235, 238 (5th Cir. 2003).

NEPA's implementing regulations, promulgated by CEQ, govern the procedures agencies follow when preparing an environmental impact statement (EIS) and dictate when an EIS is completed. An EIS must be prepared in two stages: draft and final. 40 C.F.R. § 1502.9. Agencies are required to circulate both the draft and the final EIS to other federal agencies with a particular interest, any individual who requests the document, and "[i]n the case of a final environmental impact statement any person, organization, or agency which submitted substantive comments on the draft." *Id.* § 1502.19(a), (c), (d). In preparing the final EIS, the agency must respond to all substantive comments. *Id.* § 1503.4. Finally, the agency must "[a]t the time of its decision" prepare a "record of decision" or "ROD." *Id.* § 1505.2. The ROD, among other things, sets forth what the agency's decision actually was among the alternatives analyzed in the EIS. *Id.* § 1505.2.

II. FACTUAL BACKGROUND

A. History of Flood Control Project in the Yazoo Basin.

Flood control projects in the Yazoo Basin have a long history stretching back over seventy years. The area at issue, known as the "Yazoo Backwater Area," lies in

west-central Mississippi, just north of Vicksburg. ADD1.[1] It is bookended by the mainline Mississippi River levees to the west and the levees of the Will M. Whittington Auxiliary Channel to the east. R379. The Big Sunflower River, the Little Sunflower River, Deer Creek, and Steele Bayou all flow through this area toward the Mississippi River. *Id.*

Historically this area was part of the vast stretches of forested wetlands that lined the banks of the Mississippi River and was subject to extensive backwater flooding when the Mississippi River rose and water backed up into the Yazoo River Basin. R379; R394. Today it is a remnant of those bottomland hardwood wetlands that houses immense biodiversity and provides important ecological functions. R395–96. The area contains an impressive array of wildlife, including 363 species of terrestrial and semi-aquatic vertebrate species, the second richest assemblage of fish species in North America, and a diverse population of aquatic invertebrates, reptiles, and amphibians. R395. This count includes dozens of species at risk or declining. R397. The area is of particular importance to migratory bird species, providing critical habitat and forage to the sixty percent of all bird species in the United States that pass through the region during their biannual migration. R397.

[1] This map is available in the record at R375. A color copy of that same map is included in an addendum accompanying this brief for the convenience of the court.

1. *Evolution of a pumping project in the Yazoo Basin.*

The Mississippi River and Tributaries Project (MR&T Project) began in 1928 with the goal of reducing flooding along the Mississippi. The Flood Control Act of 1941, Pub. L. No. 77-228, 55 Stat. 638 (1941) (hereafter "Flood Control Act"), provided general authorization to the Corps to build structures aimed at reducing flooding along the Mississippi and its tributaries, including the Yazoo River Basin. In relevant part, the Flood Control Act authorizes "Plan C of the report of March 7, 1941, of the Mississippi River Commission." 55 Stat. at 642. That report, printed in House Document 359, 77th Congress, explained that the planned leveeing of the Yazoo Backwater Area would create drainage problems, particularly with the Sunflower River. R4091. Essentially, water that would normally flow from the Yazoo Backwater Area to the Mississippi River would be trapped by the levees designed to keep the Mississippi's waters from flowing up into the backwater area. The Report called for construction of additional levees in the area and evacuation of the drainage impoundment on the Sunflower through culverts, floodgates, and storage in a sump area for pumping over the levee. R4091–92; *see also* R4107 (map of proposal). Specifically, Plan C would protect the Yazoo Backwater Area by damming the Sunflower River with a backwater levee and by installing three separate pumps on the Big Sunflower River, Deer Creek, and Steele Bayou. R382. Combined, the pumps would have a capacity of 14,000 cubic feet per second and would keep flood waters from rising above the ninety-foot contour level (hereafter, the "1941 Project").

R4092; R380–81. In other words, pumping was only envisioned to protect lands with an elevation of more than ninety-feet above sea level.

World War II and the Korean War tabled implementation of the 1941 Project. R381. In 1962, the Corps adopted a recommendation modifying Plan C to remove the construction of the Big Sunflower and Deer Creek drainage structures and to include a twenty-seven mile channel connecting the Sunflower River and the Steele Bayou. R381. Construction of these projects in the Yazoo Backwater Area moved forward following the 1962 modifications. Over nineteen years, the Corps built the Will M. Whittington Auxiliary Channel and levees, the Steel Bayou and Little Sunflower flood control gates, and the Sunflower River to Steele Bayou connecting channel. R382. These projects greatly reduced the flooding in the Yazoo Backwater Area. When closed, the floodgates prevent Mississippi River water from backing up the Steele Bayou and the Little Sunflower and into the Yazoo Backwater Area. R382. However, closing the floodgates also traps precipitation from upland areas that would normally flow into the Mississippi River and backwater flooding may result. R382.

It is that potential for flooding that triggered a 1978 reevaluation of the proposal for a pumping plant. The 1978 reevaluation recommended placing one pumping plant at Steele Bayou because the connecting channel now focused flow from all tributaries to that location. R382. This single plant would have a capacity of 17,500 cubic feet per second and would be designed to keep flood water from rising above the eighty-foot contour line (hereafter, "the 1978 Project"). That is, under the

new 1978 Project, all land with an elevation greater than eighty feet would now be protected from flooding. R382.

2. *NEPA analysis of the 1978 Project.*

The Corps released a draft EIS on the updated 1978 Project in March of 1982. R383. The EIS was released as part of a "Reevaluation Report-Environmental Impact Statement." R3391. The reevaluation portion of the document focused on the technical requirements of the project and the EIS described the environmental impacts of the Pumps Project. *See* R3427–31; R3468. The EIS evaluated three different plans. The "National Economic Development Plan" called for a pumping station with a capacity of 25,000 cubic feet per second that would begin pumping when water levels reached eighty feet (or eighty-five feet in the winter). R3470. The "Recommended Plan" created a 17,500 cubic foot per second pumping station that would also begin pumping when water levels reached eighty feet (or eighty-five feet in the winter, as with the National Economic Development Plan). *Id.* Finally, the "Environmental Quality Plan" would build a 15,000 cubic foot per second pumping station that would begin pumping at the eighty-five foot level year round. R3472.

As part of the reevaluation process, the Corps analyzed whether the 1978 Project, as described in the Reevaluation Report, was authorized for construction.[2] In

[2] Whether a project is "authorized" for construction is a separate inquiry from whether a project is "specifically authorized" under Section 404(r). *See* infra Section III.

a "Post Authorization Report" the Corps determined that the authorization provided in the Flood Control Act of 1941 was sufficiently broad to encompass the changes between the 1941 Project and the 1978 Project. Those changes included moving from three pumps to one pump, a twenty-five percent increase in pumping capacity, and the changes in the costs and benefits of the project, which were estimated at less than a twenty-five percent change. R927–33; R935. In accordance with the Corps' regulations, submission to Congress for authorization was not required and, therefore, approval authority and filing of the final EIS was delegated to the Mississippi River Commission. R935.

The Corps circulated a final EIS for the 1978 Project in March of 1983 for comments. R383. EPA's comments on the final EIS were submitted to the Corps in May of 1983. R383. During the comment periods on both the draft and the final EIS, EPA emphasized its concerns regarding the project's impacts on water quality and wetlands habitat. R383. Major General William E. Read, President of the Mississippi River Commission, signed a ROD on behalf of the Corps on July 7, 1983. R946. The ROD selected the Recommended Plan. *Id.* On July 12, 1984, the Corps responded to EPA's comments on the final EIS. R951.

B. EPA's Section 404(c) Determination

1. *NEPA analysis of the Pumps Project.*

Work on the 1978 Project began, but was halted in 1986 when revisions to federal law instituted a cost-share provision where a local project sponsor was

required to provide funds covering twenty-five percent of the project's costs. R384. The Board was not willing to contribute the necessary funds. R384. In 1996, that provision was revised again, restoring full federal funding to the project and work could resume. R384. Due to the significant time that had elapsed, the Corps determined that it must update its NEPA analysis. The draft supplemental EIS analyzed yet another redesign of the project, intended to respond to some of EPA's concerns and lessen the environmental impact of the project. R385. The reformulation would reduce pumping capacity from 17,500 cubic feet per second back to 14,000 cubic feet per second and prevent inundation above the eighty-seven foot contour line. R385. EPA again provided comments concluding the project was environmentally unsatisfactory and a candidate for action under Section 404(c) of the Clean Water Act. R385. Despite several years of efforts by the Corps and EPA to reach an agreement regarding the project, no additional changes to the Pumps Project were made and EPA remained opposed to the project when the Reformulation Report and final supplemental EIS were released in November of 2007. R385.

2. EPA's Section 404(c) determination.

In 2008, EPA published a notice of its Proposed Determination to prohibit the specification of a site for the disposal of dredged or fill material for the Pumps Project under Section 404(c). 73 Fed. Reg. 14,806 (March 19, 2008). A public hearing was held on April 17, 2008. R387. Approximately five hundred people attended the five-hour meeting in Vicksburg, Mississippi. R387. Of the sixty-seven people who gave

oral statements, one person from the Corps spoke, four people from the Board spoke, thirty-two people spoke in opposition to the Pumps Project, twenty-nine people spoke in support of the project, and one person did not express an opinion. R387. During the public comment period, EPA received approximately 47,600 comment letters. R388. Of the comment letters, approximately 1,500 were individual letters, over 97% of which urged EPA to "veto" the Pumps Project, and the remainder were mass mailers, all of which supported EPA's Proposed Determination. R388.

Before undertaking its Section 404(c) review in February of 2008, EPA reviewed Section 404(r) and consulted with the Corps regarding its applicability. R392. EPA determined that the statutory prerequisites for 404(r)'s application had not been met and 404(r) did not apply to the Pumps Project. R392; R462–63. In July of 2008, EPA received a letter from Senators Cochran and Wicker inquiring about the applicability of Section 404(r). In addition, EPA held a meeting with the Board in which the Board provided information that it believed supported the contention that Section 404(r) applied to the Pumps Project. R392. Following receipt of the Senators' letter and the July meeting, EPA again consulted with the Corps regarding Section 404(r) and reviewed all available information. EPA determined there was no evidence that an EIS for the proposed project was ever submitted to Congress. R392–93. The Corps concurred in this assessment. R465; R1607.

On August 31, 2008, EPA issued its Final Determination prohibiting the disposal of dredged or fill material associated with the Pumps Project (the "Final

Determination"). R366. It noted that the Yazoo Backwater Area contains up to 229,000 acres of wetlands in addition to streams, creeks, and other aquatic features. R441. The area is home to "some of the richest wetland and aquatic resources in the Nation," including highly productive fisheries, bottomland hardwood forests, and migratory bird foraging grounds. R441. The wetlands provide habitat for the federally protected Louisiana black bear and pondberry plant, improve water quality by retaining and removing pollutants, temporarily store surface waters, maintain stream flows, and support aquatic food webs. R441. The Pumps Project would dramatically alter the timing and spatial extent of the inundation of these wetland areas. *Id.* Those changes would degrade at least 28,400 to 67,000 acres of wetlands and diminish their capacity to provide critical ecological functions. R441. EPA determined these impacts were inconsistent with the Clean Water Act and exercised its authority under Section 404(c). R442. This was only the twelfth time EPA issued a Final Determination under Section 404(c) in the nearly forty-year history of the Clean Water Act. EPA, Chronology of 404(c) Actions, *available at* http://water.epa.gov/lawsregs/guidance/ wetlands/404c.cfm.

C. The District Court Litigation

The Board filed this suit in the United States District Court for the Northern District of Mississippi. Invoking the APA, the Board's complaint alleged that EPA's exercise of its Section 404(c) authority was arbitrary and capricious because—in its view—the Pumps Project was exempted from Section 404(c) by Section 404(r). R21.

The parties filed cross-motions for summary judgment. The Board contended that all conditions for Section 404(r)'s application had been met because (1) the Flood Control Act of 1941 "specifically authorized" the Pumps Project, despite the project's redesign in 1978; (2) the March 28, 1983 cover letters to the Chairmen of the Public Works Committees demonstrated that the final EIS for the Pumps Project was submitted to Congress; and (3) the appropriations bill for fiscal year 1985 funded the Pumps Project. In its motion, EPA argued that the Pumps Project did not meet the requirements of Section 404(r) because it was never "specifically authorized" by Congress and that the Corps had never submitted the EIS for the project to Congress or otherwise sought an exemption under Section 404(r). R3972–73; R4317.

In a lengthy opinion, the district court ruled for the defendants on a number of independent grounds. First, the court determined that there was no evidence that the unnamed EIS referred to in the March 1983 cover letters was the EIS for the Pumps Project. R4432. Next, the court found that, in any event, the EIS for the Pumps Project was not final at the time the letters were sent to the Chairmen and thus could not have satisfied Section 404(r). R4435. And, finally, it concluded that the mailing was not a "submi[ssion] to Congress" within the meaning of Section 404(r). R4435–45. The district court did not reach the question of whether the project had been "specifically authorized by Congress." Accordingly, the court entered judgment for EPA. R4445.

STANDARD OF REVIEW

This Court reviews the district court's grant of summary judgment and jurisdiction issues, such as standing, *de novo*, applying the same standard as the district court. *Performance Autoplex II Ltd. v. Mid-Continent Cas. Co.*, 322 F.3d 847, 853 (5th Cir. 2003); *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co. Inc.*, 73 F.3d 546, 555 (5th Cir. 1996). The APA's "narrow" standard of review, which requires a court to "uphold the EPA's findings, conclusions, and ultimate action . . . unless 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,' " applies to EPA's Section 404(c) determination. *BCCA Appeal Group v. EPA*, 355 F.3d 817, 824 (5th Cir. 2003) (quoting 5 U.S.C. § 706(2)(A)). Final agency action "is 'arbitrary and capricious' only where the agency has considered impermissible factors, failed to consider important aspects of the problem, offered an explanation for its decision that is contrary to the record evidence, or is so irrational that it could not be attributed to a difference in opinion or the result of agency expertise." *BCCA Appeal Group*, 355 F.3d at 824 (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). Thus, agency decisions will be upheld so long as the agency "examine[s] the relevant data and articulate[s] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.' " *Motor Vehicle Mfrs. Ass'n of U.S.*, 463 U.S. at 43 (citing *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

Under the APA, the Court must limit its review of EPA's factual conclusions to whether those conclusions are supported by "substantial evidence" in the administrative record. Under the APA's arbitrary-and-capricious standard of review, "substantial evidence" is the most stringent standard that could apply to questions of evidentiary sufficiency for factual determinations. *See Dickinson v. Zurko*, 527 U.S. 150, 164 (1999); *Hawkins v. Agric. Mktg. Serv.*, 10 F.3d 1125, 1128–29 (5th Cir. 1993); *Ass'n of Data Processing Serv. Orgs., Inc. v. Bd. of Governors of the Fed. Reserve Sys.*, 745 F.2d 677, 683-684 (D.C. Cir. 1984). Under this standard, the Court must decide, based on the record under review, whether "it would have been possible for a reasonable jury to reach the [agency's] conclusion." *Allentown Mack Sales & Serv., Inc. v. N.L.R.B.*, 522 U.S. 359, 366–67 (1998).

SUMMARY OF ARGUMENT

1. Supreme Court precedent limits standing to cases in which the plaintiff is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers. In bringing this suit, however, the Board is attempting to vindicate the legal rights and interests of a third party—the Corps. The dredged and fill material disposal site prohibited by EPA was for use by *the Corps*, not a third party, and was for disposal of dredged and fill material associated with construction of *a federal public works project*. The rights of the Board were not implicated by the prohibition of the Corps' site and if the Corps had wished to challenge EPA's decision on the basis that the project was exempted by Section 404(r), the Corps had

the opportunity to make that challenge. The Board should not be permitted to take up the mantle of the Corps to defend the Corps' project when the Corps itself has no wish to do so.

Furthermore, the Board falls outside the zone of interests of Section 404(r). Section 404(r) is narrowly tailored to apply only to federal actors and federal projects. Congress passed the provision out of concern for separation of powers and to resolve disputes within the federal family regarding which federal projects should move forward. The Board is not the type of party that Section 404(r) was meant to protect or benefit.

2. Contrary to the Board's contentions, an exemption from Section 404(r) was never sought by the Corps and the requirements of Section 404(r) were not met. For Section 404(r) to apply, an agency must "submit" a final EIS to Congress. Submission of an EIS to Congress cannot occur by accident, but must be a purposeful action on the part of a federal agency. Here, the Corps explains that it never made a submission within the meaning of Section 404(r) and the record supports this fact. Absent a submission of a final EIS, Section 404(r) does not apply.

In addition, the project significantly changed between 1983, the date the Board believes an EIS was submitted to Congress, and 2007 when the project was reformulated, analyzed in a supplemental EIS, and ultimately "vetoed" by EPA. Even if an EIS was submitted to Congress in 1983, it analyzed a significantly different

project than the project that was "vetoed" twenty-five years later. Accordingly, any exemption could not apply to the reformulated project.

3. Finally, the Pumps Project was not "specifically authorized" as required by Section 404(r). The Board maintains that specific authorization occurred in 1941. But the 1941 project differed meaningfully from both the 1978 Project and the Pumps Project in terms of technical specifications and the amount of land subjected to inundation. For example, the 1978 Project would impact four times the amount of wetlands than the 1941 Project. These significant changes dramatically altered the scope of the project such that the 1941 specific authorization does not apply to the later iterations of the project.

ARGUMENT

In this suit, the Board asks this Court to mandate application of an exemption to the Clean Water Act that is only available to federal agencies and which the Corps, the only entity that could invoke the exemption in this case, maintains it did not seek. The Board lacks standing to pursue this claim. Moreover, even if the Board could assert the legal rights of the Corps, the Corps' and EPA's assessment that the Pumps Project was not exempt under Section 404(r) was correct. The Corps never submitted an EIS to Congress and the Pumps Project was never specifically authorized by Congress within the meaning of Section 404(r).

I. THE BOARD LACKS STANDING TO ASSERT ITS CLAIM.

As the Supreme Court has explained, standing doctrine comprises two parts: "Article III standing, which enforces the Constitution's case-or-controversy requirement, and prudential standing, which embodies judicially self-imposed limits on the exercise of federal jurisdiction." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004) (citation and quotation omitted). "The goal of the prudential standing requirements is to determine whether the plaintiff is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers."[3] *Nat'l Solid Waste Mgmt. Ass'n v. Pine Belt Reg'l Solid Waste Mgmt. Auth.*, 389 F.3d 491, 498 (5th Cir. 2004) (quotations omitted). "As an aspect of justiciability, the standing question is whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Warth v. Seldin*, 422 U.S. 490, 498–99 (1975) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). Prudential standing is generally understood to have three parts:

> (1) whether a plaintiff's grievance arguably falls within the zone of interests protected by the statutory provision invoked in the suit, (2) whether the complaint raises abstract questions or a generalized grievance more properly addressed by the legislative branch, and (3) whether the plaintiff is asserting his or her own legal rights and interests rather than the legal rights and interests of third parties.

[3] Prudential standing arguments cannot be waived. *Nat'l Solid Waste Mgmt. Ass'n v. Pine Belt Reg'l Solid Waste Mgmt. Auth.*, 389 F.3d 491, 498 (5th Cir. 2004) (raising the issue of prudential standing sua sponte for the first time on appeal).

St. Paul Fire & Marine Ins. Co. v. Labuzan, 579 F.3d 533, 539 (5th Cir. 2009) (quotation and alterations omitted). The Board cannot show it falls within the zone of interests or that it is asserting its own legal rights and interests.

A. The Board does not have third-party standing.

First, apart from the "minimum constitutional mandate" of some threatened or actual injury to the plaintiff stemming from the putatively illegal action, "the plaintiff generally must assert *his own legal rights and interests*, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth*, 422 U.S. at 499 (emphasis added); *McCormack v. Nat'l Collegiate Athletic Ass'n*, 845 F.2d 1338, 1340–41 (5th Cir. 1988). "Without such limitations . . . the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights." *Id.* at 500. "Essentially, the standing question in such cases is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Id.* There is good reason for this rule, namely "the avoidance of the adjudication of rights which those not before the Court may not wish to assert." *Duke Power Co. v. Carolina Env'tl Study Group, Inc.*, 438 U.S. 59, 80 (1978).

In this suit, the Board, which has sued only EPA, seeks to assert the legal rights of *the Corps*—a party whom they do not represent and have no authority to speak for.

The Pumps Project is a *federal public works project* that would be entirely funded and constructed by the federal government. The Board has been granted no permit and has no legally cognizable right to have the project built. The "permit" prohibited by EPA in its Final Determination was issued to the *Corps*.[4] Only the Corps has the "legal right[] and interest[]" to vindicate its own "permit." *See Warth*, 422 U.S. at 499; *Am. Immigration Lawyers Ass'n v. Reno*, 199 F.3d 1352, 1360 (D.C. Cir. 2000). This case is analogous to a situation in which a private party is granted a permit under Section 404 and that permit is "vetoed." In such a case, only the permit holder himself could challenge the decision. A third party with an interest in seeing the permit holder's project go forward could not challenge the Section 404(c) determination in court because the third party would be attempting to vindicate the rights of the permit holder. *See id.* Likewise, here the Board is impermissibly attempting to vindicate the rights of the Corps. Third-party standing of this kind is not permitted under the rules established by Supreme Court precedent.

If the Corps had wished to challenge EPA's "veto" on the grounds that it was precluded by Section 404(r), the Corps could have done so. First, 404(c) requires that the Administrator of EPA "consult" with the Secretary of the Army before

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[4] The Corps does not technically issue itself a "permit" for a proposed Corps discharge of dredged or fill material into waters of the United States, however, it does comply with all requirements of the Clean Water Act and its regulations, *see* 33 C.F.R. § 335.2, and, under the facts of this case, occupies a position directly analogous to that of a permit holder.

prohibiting the specification of a site for disposal of dredged or fill material. EPA carried out that consultation in this case. R386. This consultation process is intended to resolve conflicts between the two agencies if they exist. Next, the Executive Branch has dispute resolution mechanisms that resolve legal disputes between agencies. Executive Order number 12,146, § 1-402, *reprinted in* 28 U.S.C. § 509 note, requires agencies whose heads serve at the pleasure of the President—which includes both the Corps and EPA—to submit legal disputes that they "are unable to resolve" to the Attorney General for resolution "prior to proceeding in any court." If the Corps had wished to assert its rights under Section 404(r) in the face of a "veto" from EPA, it certainly could have done so. Because the Corps agreed that Section 404(r) did not apply, the Corps did not pursue this option. It is inconceivable that a third party could now step in and seek to litigate an issue that the "permit holder"—the Corps—believes has already been properly resolved or would need to have been resolved through other channels that are not subject to judicial review. The Board simply cannot force the adjudication of the rights of the Corps, who is not before the Court, which the Corps does not wish to assert. *See Duke Power Co.*, 438 U.S. at 80.

B. The Board does not fall within Section 404(r)'s zone of interests.

In addition, the Board cannot show that it falls with the "zone of interests" of Section 404(r) and it lacks standing on that basis as well. The "zone of interests" test is an aspect of prudential standing distinct from third party standing. *Am. Immigration Lawyers Ass'n*, 199 F.3d at 1357. To establish prudential standing, plaintiffs must show

that the interest they seek to vindicate "is arguably within the zone of interests to be protected or regulated by the statute." *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970). Prudential standing has been described as "a gloss on the meaning of § 702" of the APA. *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 395–96 (1987). This doctrine recognizes that, in enacting Section 702 of the APA, Congress "had not intended to allow suit by every person suffering injury in fact." *Id.* Thus, the Supreme Court added an "additional requirement that the interest sought to be protected by the complainant be arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.* (quotation and alteration omitted).

The text and legislative history of Section 404(r) demonstrate that it was not enacted to protect the interests of parties like the Board. To determine whether the Board lies within Section 404(r)'s zone of interest, the Court must inquire as to Congress' intent in enacting the provision. *Air Courier Conference of Am. v. Am. Postal Workers Union AFL-CIO*, 498 U.S. 517, 524 (1991). The Joint Explanatory Statement of the Conference Committee explained that "[t]he exemption from the requirement for a section 404 permit granted certain Federal projects in the conference substitute is in recognition of the Constitutional principle of separation of powers." 3 Comm. on Environment and Public Works, 95th Cong., 2d Sess., *A Legislative History of the Clean Water Act of 1977: A Continuation of the Legislative History of the Federal Water Pollution Control Act* at 288 (Comm. Print 1978); R4192. It was passed to regulate the

relationship between Congress and the executive agencies and provide a balance between administration of the Clean Water Act and Congress' interests in advancing certain specified projects. *Id.* Nowhere is it suggested that the provision was meant to protect the interests of *non-federal parties* who might want the federal government to build a project, but have no right to its completion. The exemption is narrowly tailored to apply only to federal projects and was designed to resolve disputes within the federal family—Congress, the Corps, and EPA—concerning which federal projects should move forward. Its primary goal was to maintain "separation of powers." *Id.* The Board falls well outside of this zone and lacks standing to bring this suit. Because the Board lacks prudential standing, the Court need go no further to resolve this case.

II. A FINAL EIS FOR THE PUMPS PROJECT WAS NOT SUBMITTED TO CONGRESS.

In any event, EPA's and the Corps' determination that Section 404(r) did not apply is well supported by the record and should be upheld. Section 404(r) provides that discharges associated with "Federal projects specifically authorized by Congress," can be exempted from Section 404, only if

> information on the effects of such discharge, including consideration of the [Section 404(b)(1) Guidelines], is included in an environmental impact statement for such project pursuant to [NEPA] and such environmental impact statement has been submitted to Congress before the actual discharge of dredged or fill material in connection with the construction of such project.

33 U.S.C. § 1344(r). The purpose of this provision was to give Congress "the benefit of all the necessary information when it makes its decision" regarding whether a project should be exempted from Section 404. 3 Comm. on Environment and Public Works, 95th Cong., 2d Sess., *A Legislative History of the Clean Water Act of 1977: A Continuation of the Legislative History of the Federal Water Pollution Control Act* at 288 (Comm. Print 1978); R4192. First, the Corps never submitted an EIS to Congress. In addition, Congress was never provided the requisite information for the Pumps Project. And, even if the necessary information was provided to Congress, Congress did not have notice that Section 404(r) was implicated. Accordingly, the requirements of Section 404(r) were not met.

A. The Corps did not submit an EIS to Congress.

Section 404(r) sets forth a procedure that requires joint implementation by Congress and the executive branch. Under the provision, Congress has the ultimate authority to determine whether the project should be exempted from the Clean Water Act. But the agency and the executive branch also play a role in triggering Section 404(r)'s application by submitting an EIS to Congress. *See* 33 U.S.C. § 1344(r). "Submitted" means "to send or commit for consideration, study or decision." Webster's Third New International Dictionary 2277 (1993). The word connotes an active, purposeful role for the party submitting the document. A submission is not an accidental or serendipitous event.

As EPA found in its Final Determination, the necessary submission did not occur. R465. The Board asserts that two letters sent to the Chairmen of the House and Senate Public Works Committees in March of 1983 that state that "a final environmental impact statement" was attached "for your information" is proof that the Corps "submitted" the EIS for the 1978 Project to Congress. Plt.'s Br. at 19. This claim has no merit. First the Corps has reviewed its records, consulted with EPA, and concluded it never submitted an EIS for the Pumps Project to Congress. R465; R1607. That view is entitled to a presumption of regularity. *See Hayward v. U.S. Dept. of Labor*, 536 F.3d 376, 379–80 (5th Cir. 2008). The letters in question do not identify the EIS or the project it was prepared for by name, do not mention Section 404(r) or the Clean Water Act, and claim that the mailing was only for the Chairmen's "information." R1590–91. In short, they contain no indicia of a submission to Congress and fully support the Corps' view that it did not submit an EIS.

Moreover, even if the Corps chose to share an EIS with certain members of Congress, that does not mean that an EIS was "submitted" to Congress within the meaning of Section 404(r). As the text of Section 404(r) makes clear, the Corps must decide to submit the EIS before Section 404(r) can be implicated. Section 404(r) is not triggered when an EIS is shared with some members of Congress or when some members of Congress have access to an EIS. It requires a *submission* which is a

deliberate act on the part of the agency. The Corps maintains it did not make a submission and the Court need go no further to resolve this case.[5]

In addition, the available evidence amply supports the Corps' assertion that it did not submit an EIS for the 1978 Project to Congress. The Corps did not follow procedures that it normally would follow when submitting an EIS to Congress[6] nor did it behave in a way that indicated it was seeking or believed it had obtained a Section 404(r) exemption. First, Section 404(r) exempts projects from more than just Section 404(c). When a project has a Section 404(r) exemption, it is not required to comply with Section 404(a)'s permitting requirements or required to receive a state water quality certification. Nothing in the record suggests the Corps believed those requirements did not apply. To the contrary, the record demonstrates that in April of 1982, the Corps held a public meeting in part to "serve as a 'public hearing' as provided for by Section 404(a)." R4326. In 1983, the Corps obtained a state water quality certification from the state of Mississippi. R4321; R4322. It continued to work with Mississippi to ensure the certification remained updated in 1985. R4324; R4325. The Corps would not have been required to comply with these provisions of

[5] Indeed there are many reasons an executive branch agency would share information with Congress or provide various environmental reviews to members of Congress or committees that would not be intended to or sufficient to trigger Congress's Section 404(r) review.

[6] Although adhering to these procedures may not be *necessary* to trigger Section 404(r), that the Corps did not follow them here supports its claim that it did not submit an EIS to Congress in the meaning of Section 404(r).

the Clean Water Act had the project been exempt under Section 404(r). This demonstrates the Corps did not view itself as having sought or received a Section 404(r) exemption and believed it was required to follow all provisions of the Clean Water Act.

In addition, the Corps did not act in accordance with regulations in effect in 1983 referencing CEQ guidance on seeking a Section 404(r) exemption.[7] As EPA found in its Final Determination, "[i]f the Corps had submitted the Final EIS to Congress, it would have followed procedures outlined in CEQ's [Guidance]." R465. The Guidance states that an agency wishing to submit an EIS to Congress for consideration of a Section 404(r) exemption should send copies of the EIS to the EPA Regional Administrator, and the Corps when appropriate,[8] and should consult

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[7] The Corps' regulation included the following provision: "Refer to reference (bb) of § 230.3 . . . for further guidance on applying Section 404(r) to proposed Corps actions." 33 C.F.R. § 230.25(3) (1980); R4149. That reference is the CEQ Guidance. *Id.* § 230.3(bb); R4132. Corps regulations no longer contain this provision and no longer reference the CEQ Guidance. Therefore, for submission to Congress *after* the new regulations were in place, the Corps would not have followed CEQ's procedures.

However, the Board misrepresents the Corps' regulations that were in place in 1983 when it maintains the "Corps also believed that the CEQ Guidance did not apply to it" because the Corps regulations governing "a specific Section 404(r) process for Corps production of its own NEPA documents" "makes no reference of EPA review pursuant to the CEQ Guidance." Plt.'s Br. at 30 n.10. This statement is inaccurate. The regulation cited by the Board, 33 C.F.R. § 230.25(3), as explained above, says exactly the opposite.

[8] The Board is mistaken when it argues the CEQ guidance was not meant to apply to EISs prepared by the Corps. Plt.'s Br. at 30. By its terms, the guidance requires that "the appropriate EPA Regional Administrator(s) shall be consulted regarding Section 404 matters during preparation of an EIS by *a District or Division Engineer*, and both the

with EPA regarding the Section 404 issues. R3265. If EPA concludes the project is not in compliance with the Section 404(b)(1) Guidelines, the guidelines require the EIS contain a statement to that effect before it is submitted to Congress. R3266.

There is no evidence the Corps initiated this Section 404(r) review with EPA. The Board claims this failure is inconsequential because EPA never issued a statement saying the EIS was not consistent with the Section 404(b)(1) Guidelines. Plt.'s Br. at 31. But, because the Corps never sought such an exemption, EPA was never on notice that a Section 404(r) exemption was contemplated it had no reason to make this determination. Accordingly, it cannot be known what EPA would have done had it believed the Corps was seeking to exempt the project from the Clean Water Act. *See* R2698–2700 (EPA's comments on the EIS for the 1978 Project). Furthermore, the CEQ Guidance states that "the proponent agency shall ensure that the written conclusions of EPA or the Corps are included in or attached to the environmental impact statement, clearly identified, circulated with the statement, and submitted to the Congress." R3266. EPA's comments were not complete until May of 1983. R383. Accordingly, under these circumstances it would be very unusual for the Corps to submit an EIS to Congress at this stage in the process.

Finally, in March of 1983, the EIS for the 1978 project was not at a stage where the Corps would have deemed it ready for submission to Congress. At the time, the

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Regional Administrator(s) and District Engineer(s) shall be consulted concerning such matters during preparation of an EIS by *another Federal agency*." R3265.

Corps pointed out that its environmental assessment process was incomplete as of March of 1983. The letters sent to the Chairmen state that "[u]pon receipt of comments on the proposed report and environmental statement from the States of Mississippi and Louisiana and appropriate federal agencies, the Chief of Engineers will forward his final report to the Secretary of the Army." R1590–91. Accordingly, the letters themselves make plain that the Corps was waiting to receive comments on the final EIS before proceeding. EPA did not submit its comments on the final EIS until May of 1983, two months after the letters were mailed to the Chairmen. R383.

The Board makes a fundamental error when it assumes that because the EIS was titled "final," it was complete and would not be subject to further revisions. That is not the case. Under the NEPA regulations, an EIS may be labeled a "final" EIS well before the document is actually completed. The NEPA regulations expressly permit an agency to request comments on a final EIS. 40 C.F.R. § 1503.1(b). The Corps did this when it sent the final EIS to EPA for comment.[9] R854–55. The Corps' own regulations contemplate that comments will be received on the final EIS. 33 C.F.R. § 230.19(d) (1980); R4145. Changes may be made to a "final" EIS in light of the comments received after its circulation. The Corps' own statements at the time

[9] The Board maintains the unnamed final EIS sent on March 28, 1983 was the EIS for the Pumps Project. Plt.'s Br. at 24. EPA maintains there is insufficient evidence to demonstrate what project the unnamed final EIS analyzed. *See* Infra Sec. II D. However, if the Court concludes that the unnamed final EIS is the EIS for the Pumps Project, the March 28, 1983 letter sent to EPA unambiguously demonstrates that the Corps decided to request comments on the Pumps Project's final EIS. R936.

indicate that it was waiting until the ninety-day comment period had expired and it could be certain no further changes were required before forwarding the final EIS to the Secretary of the Army. R936. It would be very surprising if the Corps deemed the final EIS unready for review by the Secretary, but ready for submission to Congress.

In sum, there is nothing in the record suggesting the Corps sought an exemption or believed it received an exemption. The Corps has consistently maintained that it never invoked Section 404(r). Therefore, under the plain meaning of the statute, no "submission" occurred and Section 404(r) is inapplicable. The Court should end its inquiry here.

B. The 1983 EIS was not the EIS for the Pumps Project.

Even if the Board could establish that the 1983 EIS was submitted to Congress, the *Pumps Project*—the project outlined in the 2007 reformulation report and ultimately "vetoed" by EPA—would not qualify for the Section 404(r) exemption because the 1983 EIS analyzed the *1978 Project*, which was significantly different than the Pumps Project. The Board attempts to overcome this by arguing that because the 1978 Project and the Pumps Project "both envision pumping plants designed to reduce backwater flooding in the Yazoo Basin" changes to the specifications of the projects are not material regardless of their scope. Plt.'s Br. at 50 & 51. In fact, the changes to the project significantly altered its associated costs and benefits. Those changes included a reduction in pumping capacity and an increase in the sump level of

eighty feet to eighty-seven feet.[10] A change in the sump level of that magnitude, *see infra* Section IV, combined with the twenty percent decrease in pumping capacity (from 17,500 cubic feet per second to 14,000 cubic feet per second), dramatically alters the amount of land that will be inundated and, accordingly, the benefits of the project for flood control and the costs of the project to the environment.

These changes in design alter the calculus that Congress must consider when choosing to exempt a project under Section 404(r). The Board's interpretation ignores that Section 404(r) requires *specific* authorization and seeks to exempt projects if they are *authorized*. While the Corps had general authorization to carry out the Pumps Project, the 1978 Project was significantly altered before it became the Pumps Project. As a result of those changes, even if the 1978 project *were* exempted under Section 404(r), that exemption would not apply to the Pumps Project and the Corps would need to meet all requirements of Section 404(r) anew.

C. An ambiguous mailing to the Chairmen does not constitute submission to Congress.

The Clean Water Act seeks "to restore and maintain the chemical and biological integrity of the nation's waters." *Chemical Mfrs. Ass'n v. EPA*, 870 F.2d 177, 195 (5th Cir. 1989). Section 404(r) itself

[10] The "sump level" is the elevation above which the pumps are designed to prevent flooding. The higher the sump level, the more area is allowed to flood before the pumps are turned on.

> transmits a crisp and unwavering message: all significant discharges, whether or not exempt from the permit requirement, must be subjected to Section 404(b)(1) scrutiny or its equivalent; some competent body, be it the Corps of Engineers, EPA, Congress, or the state where the discharge is to occur, must perform a Section 404(b)(1) review. Every type of discharge embraced by an exemption must survive a check of this kind.

Monongahela Power Co. v. Marsh, 809 F.2d 41, 51 (D.C. Cir. 1987) (footnote omitted). Implicit in the requirements of Section 404(r) is the assumption that Congress must be aware of the consequences of its actions. The "submission" requirement of Section 404(r) is intended not only to make the necessary information *available* to the Congress, but also to *notify* Congress that its authorization or funding will trigger Section 404(r) and exempt the project from the normal requirements of Section 404, including EPA's authority under Section 404(c). This interpretation is supported by the legislative history, the structure of the Clean Water Act, and the purpose of the Act. *See Monongahela Power Co.*, 809 F.2d at 51.

The cover letters the Board points to as evidence of submission to Congress provide no notice. Indeed, as discussed above, the letters do not identify the EIS or the project it was prepared for by name, do not mention Section 404(r) or the Clean Water Act, and do not indicate that the documents have any import. In fact, the letters mention only the Fish and Wildlife Mitigation Report, which was prepared pursuant to the Fish & Wildlife Coordination Act, by name and claim that the mailing was only for the Chairmen's "information." R1590–91. If this letter had been

intended to trigger Section 404(r), which it was not, it would be misleading in the extreme.

The Board contends that Section 404(r) does not require any specific information in a cover letter. The argument misses the point. Absent some sort of notice to Congress that this was a submission to Congress under Section 404(r), Congress could not possibly have had an opportunity to make a decision about the propriety of the project. Under the Board's reading of Section 404(r), a surreptitious "submission" consisting of mailing an unidentified EIS as part of a package of documents, along with a letter that not only fails to inform the recipient of the import of the documents, but insists that no action is expected or warranted from Congress, relieves an agency of its obligation to comply with the Clean Water Act. Such an interpretation is inconsistent with the intent of Section 404(r), which would provide Congress with an opportunity to consider the project in light of analysis in the EIS and the Section 404(b)(1) guidelines. *See Monongahela Power Co*, 809 F.2d at 51; *see also Amarillo Prod. Credit Ass'n v. Farm Credit Admin.*, 887 F.2d 507, 510 (5th Cir. 1989) ("In construing the terms of this statute, we are obligated to ascertain the intent of Congress and to give effect to that legislative intent."). Nothing in the record suggests Congress was on notice that Section 404(r) was implicated or that it sought to invoke Section 404(r) on behalf of the Pumps Project. Under these circumstances the exemption does not apply.

D. No evidence supports a conclusion that the unnamed final EIS was the final EIS for the Pumps Project.

The Board stakes its claim on a mailing sent on March 28, 1983 to the Chairmen of the Public Works Committees, along with other interested parties and stakeholders. Plt.'s Br. at 19. That mailing purports to include "[a] copy of the proposed report of the Chief of Engineers on Yazoo Backwater Project, Mississippi – Fish and Wildlife Mitigation Report." R1590–91. The mailing also included "other pertinent reports and a Final Environmental Impact Statement, with addendum." R1590–91. Nothing in the record sheds light on what final EIS was included in the mailing. As the district court found, there is insufficient evidence to support a conclusion that the EIS for Pumps Project accompanied the Chief of Engineers' report in the mailing.

Neither does the letter identify whether the evaluation of the project under the Section 404(b)(1) Guidelines, which were attached to the completed final EIS as Appendix J, R3502–14, were included as an addendum. Section 404(r) explicitly requires that the submitted EIS contain consideration of the Section 404(b)(1) Guidelines. There is simply no evidence that this critical component was included in the March 1983 mailing. And in the absence of that evidence, the Board must lose for it is the Board's burden to establish that EPA erred in finding Section 404(r) does not apply. *Medina County Env't Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 699

(5th Cir. 2010) ("The petitioner has the burden of proving that the agency's determination was arbitrary and capricious.").

III. THE PUMPS PROJECT WAS NOT "SPECIFICALLY AUTHORIZED" BY CONGRESS.

First, the question of whether a federal project is "specifically authorized" by Congress is a determination that should be made by the agency in the first instance. That the parties are opining on whether the facts of this case meet the requirements of the statutory language without an opportunity for the Corps, the agency charged with implementing this section of the Clean Water Act, to make a finding is further evidence that this case was improperly brought and should be dismissed for lack of prudential standing. *See* supra Section I. The Corps should have an opportunity to determine the implications of the many changes made to the 1941 Project after its initial authorization and to create a record supporting that determination. But because the Corps never submitted an EIS to Congress and is not a defendant here, it never had an opportunity or a reason to make this assessment. The Board improperly seeks to take this determination out of the hands of the agency and have it decided by the Court in the first instance. The Court should deny the Board's attempt to circumvent the deference due to factual determinations of an agency.

In any event, the Pumps Project was not "specifically authorized." The Board argues that the term "specifically authorized" is meant only to distinguish between the general powers of the agency conferred in an organic act and any project authorized in

a separate law. Plt.'s Br. at 45. According to the Board, the term "specifically authorized" means only "that the agency could not rely upon its general grant of powers to go forward with the project." *Id.* at 45–46. This fundamentally misconstrues the powers of the Corps. The Corps has no "general grant of powers," such as an organic act, that would "generally authorize[] [it] to construct canals, levees, and other flood control works." *Id.* at 45. All such activities must be authorized by a specific statute. *See, e.g.*, The Flood Control Act of 1941, Pub. L. No. 77-228, 55 Stat. 638 (1941) (*authorizing* flood control activities in the Yazoo Basin). An authorization can be broad and allow the Corps discretion to alter the technical specifications of a project. Thus, the Corps determined that the changes to the specifications of the Pumps Project were *authorized* by the 1941 Flood Control Act. R935. Congress was certainly aware of the way Corps projects are authorized when it drafted Section 404(r) in 1977. Congress' use the term "specifically authorized" therefore must be given meaning. It requires something more than the minimum authority to carry out a project. In this case, while the engineering changes between the 1978 and 2007 projects were not so significant that they were outside the bounds of the general project that Congress authorized in 1941, the overall changes, including the environmental impacts, were substantial enough that for purposes of Section 404(r), the 1978 and 2007 pumps projects could not be said to be "specifically authorized."

Moreover, the Board contends the Pumps Project was specifically authorized by the 1941 Flood Control Act. Plt.'s Br. at 48. Under the Board's versions of

events, the Pumps Project was specifically authorized in 1941, and then, more than forty-three years later, an EIS was submitted to Congress and Congress appropriated funds for it. At a minimum to trigger Section 404(r), the 1941 Project that was specifically authorized and the 1978 Project for which funds were appropriated would need to be the same project. This was not the case. Because of significant changes to the design of the project between 1941 and 1984, the project for which an EIS was supposedly submitted cannot be said to have been "specifically authorized" by the 1941 Flood Control Act. In other words, the 1941 Project and the 1978 Project were not the same projects. The 1978 Project would have required its own specific authorization before it became eligible for a Section 404(r) exemption.[11]

The 1941 Flood Control Act authorizes "the extension of the authorized project and improvements contemplated in plan C of the report of March 7, 1941, of the Mississippi River Commission." Flood Control Act, Pub. L. No. 77-228, 55 Stat. 638 § 3 (1941). Plan C called for pumps that would

> prevent the sump level from exceeding 90 feet, mean Gulf level, at average levels of less than 5 years. Due to the small amount of cleared

[11] Similarly, the 1985 appropriation the Board cites is not sufficient to satisfy Section 404(r) in this case. Congress could not have appropriated "funds for such construction" because there was no specific authorization and no one—neither the Corps nor Congress—ever identified what iteration of the project was to be funded. The EIS did not identify a specific pump project for the Backwater area. Instead, it presented three alternatives, each of which had significantly different costs, benefits, and environmental impacts. Importantly, neither did Congress select a specific iteration of the pump project in the 1985 appropriation. The facts here fail to establish the Section 404(r) exemption.

> land below contour 90 there does not seem to be much advantage in holding the sump to lower levels. It could indeed, under existing conditions, probably be permitted to go somewhat higher without great damage.

R4092. A map included in the Report illustrates the sump area[12] associated with the ninety-foot contour. R4107. Thus, it is clear that at the time the 1941 Act was passed, the envisioned project would provide flood protection with a sump area defined by the ninety-foot contour, or possibly even higher. Nowhere, however, is there any indication that a lower sump contour was contemplated.

The 1978 project that supposedly received appropriated funds had a sump level of *eighty feet*—a ten foot difference. R382. Because the Yazoo Backwater Area is relatively flat land, small changes in the sump level dramatically alter the amount of acreage that is subject to inundation. For example, in the 2007 supplemental EIS, the Corps estimated that the ninety-one foot sump level would have hydrologic impacts on 28,408 acres of wetlands, while the eighty-seven foot sump level would impact 66,945 acres of wetlands. R602–06. Thus a change in only four feet more than doubled the amount of impacted wetlands. The Corps estimates that the 1978 Project, with a sump level of eighty feet, would impact approximately *137,000 acres* of wetlands. R383. This a huge change in impacts from those associated with the

[12] The "sump area" is the area expected to experience inundation and where no effort will be made to remove water by pumping.

specifically authorized ninety-foot sump level and significantly alters the scope of the project and its costs and benefits.

Furthermore, the technical specifications changed significantly between the 1941 Project and the 1978 Project. During the decades separating the projects, the Corps used its discretion to alter certain aspects of Plan C as described in the 1941 Flood Control Act. Instead of building the Big Sunflower and Deer Creek drainage structures as originally envisioned in Plan C, the Corps included a twenty-seven mile channel connecting the Little Sunflower and the Steele Bayou drainage structures. R381. This channel intercepted the flow from all tributaries in the area and funneled them to the Steele Bayou drainage structure. R382. Thus, during the 1978 redesign the Corps altered the original plan to build three pumping stations with a combined capacity of 14,000 cubic feet per second and planned instead to build a single pumping station with a capacity of 17,500 cubic feet per second. The changes to Plan C, and the pumping component in particular, demonstrate that the 1941 Project had very different design specifications than the 1978 Project.

Section 404(r) was designed around a presumption that Congress should decide, in light of the environmental considerations, whether a particular project should be built. The purpose of the provision indicates that Congress must know which project it is "specifically" authorizing and it must clearly indicate its intent *after* receiving an EIS for the project. Here, the lag time and the significant changes in the project parameters between when the Board believes the specific authorization and

appropriation of funds occurred demonstrate that Congress's 1941 authorization was not sufficient to invoke Section 404(r). Put another way, to the extent the Flood Control Act "specifically authorized" a project in 1941, the fiscal year 1985 appropriation was for a different project. Accordingly, Section 404(r) was never triggered and does not apply.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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ADDENDUM

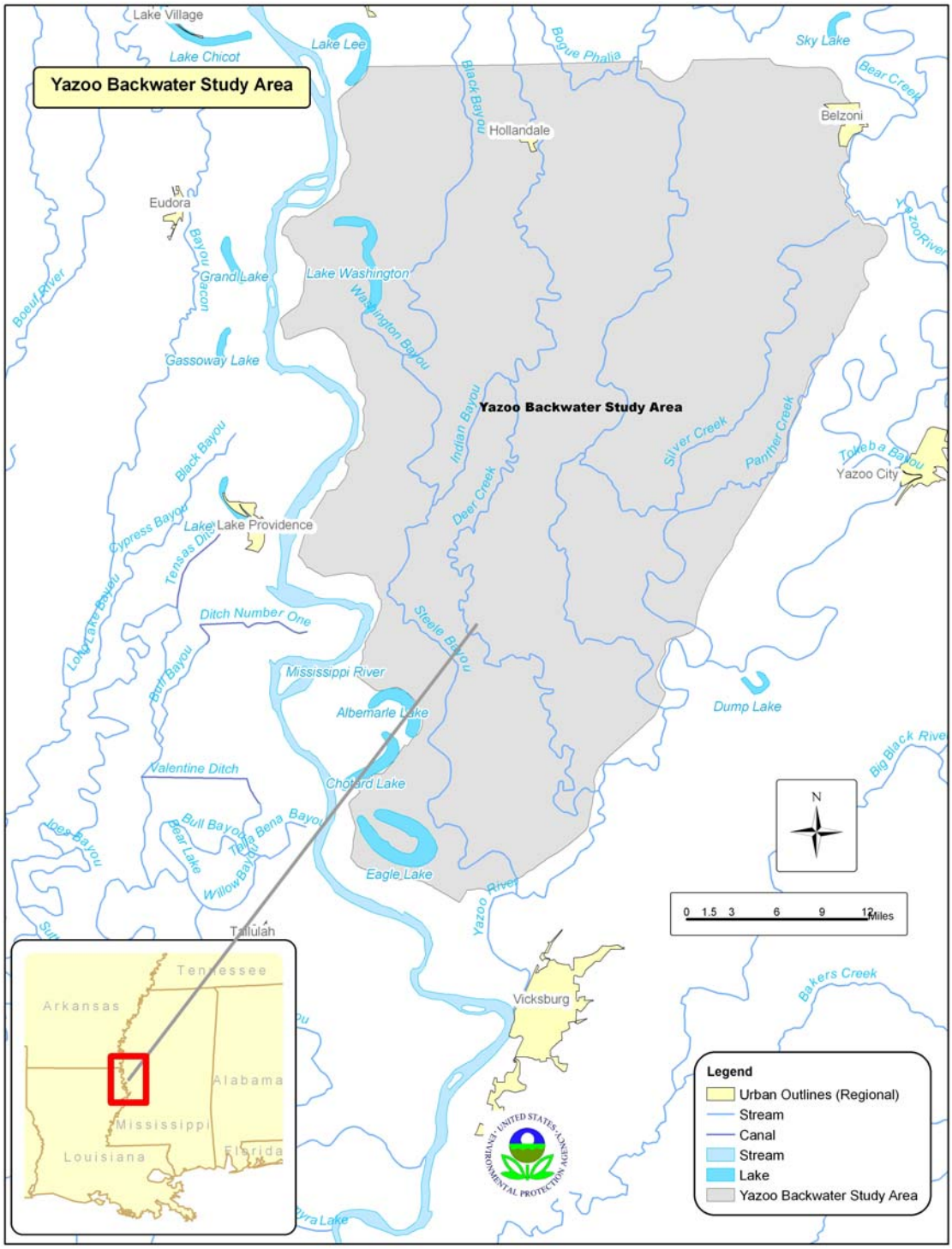

Figure 1. The Yazoo Backwater Study Area is located in west-central Mississippi, just north of Vicksburg, Mississippi. Of particular focus are the approximately 630,000 acres inundated by the 100-year flood event which lie in parts of Humphreys, Issaquena, Sharkey, Warren, Washington, and Yazoo Counties in Mississippi

CERTIFICATE OF SERVICE

I certify that on August 17, 2011, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

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No. 11-60302, Bd of MS Levee Commissioners v. EPA, et al
USDC No. 4:09-CV-81

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You must submit the seven paper copies of your brief, with red covers, as required by 5TH CIR. R. 31.1 within 5 days of the date of this notice pursuant to 5th Cir. ECF Filing Standard E.1.

Sincerely,

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