

October 15, 2021

Radhika Fox  
Assistant Administrator  
Office of Water  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue NW  
Washington, D.C. 20004

RE: Yazoo River Backwater Pumps 2008 Clean Water Act (CWA) Section 404(c) Final Determination

Dear Assistant Administrator Fox,

As you know, the Environmental Protection Network (EPN) is an organization of over 550 U.S. Environmental Protection Agency (EPA) alumni volunteering their time to protect the integrity of EPA, public health, and the environment. EPN harnesses the expertise of former EPA career staff and confirmation-level appointees from Democratic and Republican administrations to provide the unique perspective of former regulators with decades of historical knowledge and subject matter expertise.

On January 15, 2021, the U.S. Army Corps of Engineers (ACOE) published its Record of Decision (ROD) for the Yazoo Area Pumps Project. The ROD was based on the Final Supplemental Environmental Impact Statement (SEIS) No. 2 finalized on December 11, 2020. The 45-day public comment period for the Draft SEIS No. 2 ended on November 30, 2020, only eleven days before the final document was released. Also on November 30, 2020, the then Regional Administrator for EPA Region 4 concluded that the proposed project was *not* prohibited by EPA's 2008 Final Determination.<sup>1</sup> Both the ACOE and EPA are in litigation over these matters.

As discussed below, we believe the Regional Administrator at that time erroneously concluded that the proposed 2020 pump project was not covered by the 2008 Final Determination. This decision was neither made with the opportunity for public input nor did the agency follow precedent for modifying a CWA Section 404(c) Final Determination. As a result, many of the issues the public commented on and the EPA reviewed as part of the 2008 Final Determination, including an analysis of the environmental justice issues, were not fully discussed nor was there full opportunity for public input on this highly significant federal action. If allowed to stand, the Regional Administrator's action and the ACOE ROD would severely undermine both the procedural and the substantive integrity of the CWA 404(c) regulatory process.

### Background

In 2008, EPA issued a Final Determination, under Section 404(c) of the CWA, withdrawing the specification of the proposed project site for the discharge of dredged and/or fill material for the

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<sup>1</sup> November 30, 2020 letter from Mary S. Walker, Regional Administrator, EPA Region 4, to Colonel Robert A. Hilliard, U.S. Army Corps of Engineers, Vicksburg District.

construction of the project. EPA determined that “the construction and operation of the proposed pumps would dramatically alter the timing, and reduce the spatial extent, depth, frequency, and duration of time that wetlands within the project area are inundated.” Furthermore, “these large-scale hydrologic alterations would significantly degrade the critical ecological functions provided by approximately 67,000 acres of wetlands in the Yazoo Backwater Area, including those functions that support wildlife and fisheries resources.”<sup>2</sup> These impacts were not tied to the particular footprint/precise location of the proposed pump but rather to their operation and purpose.

Significant portions of the area impacted are currently in National Wildlife Refuges, National Forest Lands, lands enrolled in federal conservation programs, and state-owned conservation lands. In addition, some of the lands have been purchased and restored using taxpayer funds as mitigation for previously constructed federal water projects.

The implementing regulations for Section 404(c) of the CWA, 40 CFR Part 231, set out a very specific and mandatory process to issue Section 404(c) Final Determinations. During the 2008 Section 404(c) process, EPA met with local stakeholders, held a formal public hearing, issued and published draft and recommended determinations that allowed for public comment, and responded to all comments made and/or submitted related to the project. This process allowed for a full vetting of all the relevant issues, including the environmental impacts of the project as well as environmental justice concerns.

The scope of the 2008 EPA Section 404(c) review included all the alternatives presented by ACOE in the National Environmental Policy Act (NEPA) documents that supported the project, including Plans 3, 4, 5, 6, 7, and a modified Plan 6. During its review and in the Final Determination, EPA found all six of the plans resulted in unacceptable adverse effects to wetlands and fish and wildlife resources (including spawning and breeding areas), the trigger for action under Section 404(c). Ultimately, in 2008, ACOE chose Plan 5 as the Least Environmentally Damaging Practicable Alternative (LEPDA), which became the subject of the Section 404(c) Final Determination.

#### Scope of the 2008 Final Determination Encompasses the 2020 Project

The 2020 Draft and Final SEIS for the Yazoo River Pumps Project identify the proposed project as the same project that was the subject of the 2008 Section 404(c) Final Determination, the same Plan 5. The 2020 plan recommends construction of the same 14,000 cubic foot per second (cfs) pump capacity with the same purpose and operating parameters, including the pump-on elevation. Further, ACOE did not provide the necessary evidence in support of their conclusion that the 2020 plan would result in a different level of impacts to jurisdictional wetlands than those identified and prohibited in the 2008 Final Determination.<sup>3</sup>

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<sup>2</sup> Final Determination of the U.S. Environmental Protection Agency’s Assistant Administrator for Water Pursuant to Section 404(c) of the Clean Water Act Concerning the Proposed Yazoo Backwater Area Pumps Project Issaquena County, Mississippi. August 31, 2008. page i.

<sup>3</sup> In 2019, EPA found that “[t]he information from the Corps thus far touches on various aspects of the project, but it is not sufficiently comprehensive in the context of the analysis conducted in the [2007] FSEIS, to provide the type of record that would be required to evaluate a potential modification or withdrawal.” August 22, 2019, letter from Mary S. Walker, Regional Administrator, EPA Region 4, to Major General R. Mark Toy, Commander, U.S. Army Corps of Engineers, Mississippi Valley Division.

The November 30, 2020, letter from the Regional Administrator outlines certain differences between the 2008 project and the 2020 project. We believe the Regional Administrator erroneously determined that these differences meant that the revised project was not subject to the 2008 Final Determination. The primary difference is the location of the 14,000 cfs pump that will be built near Deer Creek, approximately eight miles east and upstream of the 2008 Steele Bayou site in the same drainage way. The November 30, 2020, letter also cited factors such as small differences in the Steele Bayou flood control gate operations and the use of natural gas instead of diesel fuel to power the relocated pumps. The January 15, 2021, ACOE Record of Decision also included a number of low-flow wells to augment stream flows in the project area during dry periods. The benefits resulting from this flow augmentation are not clear. Neither the Regional Administrator nor ACOE claimed that the purpose or the scope of the 2020 project was different from the purpose of Plan 5 or the other plans discussed in the 2008 Final Determination.

The 2008 Final Determination anticipated and prohibited any similar pump projects located within the Yazoo Backwater Area identified in the Final Determination that would have the same or similar adverse impacts within the project area. Simply moving the location of the pumps upstream within the same defined project area, or changing the fuel used by the pumps, does not significantly alter the project impacts or its purpose. In the 2008 Final Determination, EPA noted that “derivatives of the prohibited projects that involve only small modifications to the operational features or location of these proposals would also likely result in unacceptable adverse effects and would generate a similar level of concern and review by EPA.”<sup>4</sup> This language indicated that “derivatives” and “changes in location” were presumptively covered by the Final Determination, because of the likelihood they would have similar impacts, but that EPA would review such impacts if such changes were proposed.

#### Precedents for Modifying a 404(c) Final Determination

In order to modify the project, we believe ACOE should have sought modification of the 2008 Final Determination issued by EPA. In an August 22, 2019, letter from the Regional Administrator to ACOE, EPA informed ACOE in writing the detailed information ACOE would need to submit along with a formal request before the agency would review the 2008 Final Determination.<sup>5</sup>

Section 404(c) and the implementing regulations in 40 CFR Part 231 specifically note that a Final Determination issued by the Administrator under Section 404(c) is a final agency action that is then subject to review in the courts. Absent court review, the path for ACOE to take to modify the project is to use the applicable Section 404(c) procedures.

During the history of the Section 404(c) program, EPA has issued 13 Final Determinations. EPA has directly modified only two of the issued Final Determinations to address changed circumstances or different needs. In both cases, EPA went through the appropriate public process after a specific detailed request from ACOE to modify the Section 404(c) Final Determination. This included the issuance of a public notice, the review and response to public comments, and the issuance of an amendment to the Final

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<sup>4</sup> Final Determination of the U.S. Environmental Protection Agency’s Assistant Administrator for Water Pursuant to Section 404(c) of the Clean Water Act Concerning the Proposed Yazoo Backwater Area Pumps Project Issaquena County, Mississippi. August 31, 2008. page iv.

<sup>5</sup> August 22, 2019 letter from Mary S. Walker, Regional Administrator, EPA Region 4, to Major General R. Mark Toy.

Determination. In both prior cases, the project changes and impacts were minor. However, for the 2020 Yazoo Pump project the changes from the 2008 project were relatively minor, but the overall project impacts are still major.

By not following this more rigorous process that allows for important and extensive public input, we believe EPA did not fully consider the complex set of concerns voiced by stakeholders directly and indirectly affected by the project, including serious environmental justice concerns.

### Conclusion

EPN believes that the 2008 Final Determination clearly prohibits discharges for the purpose of construction and operation of the proposed pump or “or any similar pump project” within the defined project area that would result in similar or adverse impacts to jurisdictional wetlands and other waters of the United States. EPN also argues that in her November 30, 2020, letter, the Regional Administrator erroneously concluded that the project proposed in the 2020 DSEIS was significantly different and not subject to the 2008 Final Determination, thus allowing for significant adverse impacts to jurisdictional wetlands and other waters within the project area. EPN thus concludes that EPA did not take the necessary steps, consistent with long-standing practice, to assure the full engagement of all affected stakeholders in any decision to modify a CWA 404(c) final agency action.

We urge EPA to reverse the Regional Administrator’s decision that the 2008 Final Determination does not apply to the 2020 Yazoo Area Pumps Project. We further recommend that EPA develop appropriate regulations that clearly define the process for modifying a Section 404(c) final agency action and to prevent relatively minor project alterations to effectively dismiss a 404(c) Final Determination in the future. Mr. Phillip Mancusi-Ungaro (pmancusi52@gmail.com) or Mr. James Giattina (jdgiattina@gmail.com) would be pleased to assist if you require any further information.

Sincerely,

Michelle Roos  
Executive Director  
Environmental Protection Network

This letter was prepared by Phil Mancusi-Ungaro and James Giattina.

cc: Melissa Hoffer  
Acting General Counsel, EPA

John Blevins  
Acting Regional Administrator, EPA Region 4