

August 16, 2024

The Honorable Michael S. Regan
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, D.C. 20004

RE: Yazoo River Backwater Pumps 2008 Clean Water Act Section 404(c) Final Determination; 2024 Draft Environmental Impact Statement

Dear Administrator Regan:

The Environmental Protection Network (EPN) is an organization of over 650 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. Several of our volunteers were actively involved in the development of the 2008 Section 404(c) Final Determination for the Yazoo River Backwater Pumps¹ and helped write this letter.

On June 28, 2024, the Army Corps of Engineers (ACOE) issued a draft Environmental Impact Statement (EIS) that includes a modified plan to address flooding in the Yazoo Backwater Area. This plan (the 2024 proposed plan) includes large pumps adjacent to the Steele Bayou structure to remove water from the backwater area that could potentially drain and impact up to 97,000 acres of wetlands, including wetlands identified in the 2008 Clean Water Act (CWA) Section 404(c) Final Determination (2008 Final Determination). The 2024 proposed plan includes a proposal to fully develop a pump operating regime, limited proposed mitigation, and limited structural alternatives. The 2024 proposed plan has the same or similar impacts as the plan that was identified and prohibited in the 2008 Final Determination. It also has similar impacts as the 2020 proposed plan which EPA later found were also prohibited under the 2008 Final Determination. As discussed below, consistent with our position in 2020, EPN is focused on the fact that the 2024 proposed plan is prohibited by the 2008 Final Determination. In addition, if ACOE would like to seek to modify the 2008 Final Determination, it has not taken the appropriate steps.

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 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

¹ 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. https://www.epa.gov/sites/default/files/2015-05/documents/yazoo-final-determination_signed_8-31-08.pdf

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.”² 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 that would have been 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.

On January 15, 2021, ACOE published its Record of Decision (ROD) for the Yazoo Area Pumps Project. The ROD was based on the Final Supplemental EIS No. 2, which was finalized on December 11, 2020, with a 45-day public comment period. 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.³ This conclusion was challenged in court and resulted in a remand from the court back to EPA for reconsideration.

EPN submitted comments⁴ on October 15, 2021, noting that EPN believed the Regional Administrator at that time erroneously concluded that the proposed 2020-21 pump project was not covered by the 2008 Final Determination. The decision had been made without the opportunity for public input and importantly did not 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

² 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.

³ 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.

⁴ <https://www.environmentalprotectionnetwork.org/wp-content/uploads/2021/10/EPN-Letter-on-Yazoo-404c-permit.pdf>

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.

Subsequently, on November 17, 2021, EPA issued a letter to ACOE, finding that the 2020-21 proposed plan was prohibited by the 2008 Section 404(c) Determination. This led to numerous discussions among the agencies and on January 9, 2023, EPA and ACOE signed a joint collaboration memorandum to work towards identifying an approach to reduce flood risk in the Yazoo Backwater Area.⁵

Discussion

Following the collaborative process, on June 28, 2024, ACOE issued a Draft EIS identifying a “new” pumping project with a 45-day public comment period initially ending on August 12, 2024, but extended to August 27, 2024. Although this plan does include some “mandatory buy-outs” of 52 homes in economically-disadvantaged communities in the Yazoo Backwater Area, it also includes a substantial pump that has the potential to drain the same or similar wetlands identified in the 2008 Section 404(c) Determination and potentially more. EPN believes that, similar to our earlier position on the 2020 version of the project, this proposed project would not be allowed under the 2008 Final Determination unless that Determination is modified following practices EPA had established in prior actions.

It is important to note that 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, changing the fuel used by the pumps, changing the size of the pumps, or changing pump operation parameters 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.”⁶ 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 seek 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 about the detailed information ACOE would need to submit to EPA along with a formal request before the agency would review the 2008 Final Determination.⁷

Section 404(c) and the implementing regulations in 40 CFR Part 231 specifically note that a Final Determination issued by the EPA Administrator under Section 404(c) is a final agency action that is then

⁵ Joint Memorandum of Collaboration Between the U.S. Department of the Army (Civil Works) and U.S. Environmental Protection Agency, January 9, 2023.

⁶ 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.

⁷ August 22, 2019 letter from Mary S. Walker, Regional Administrator, EPA Region 4, to Major General R. Mark Toy.

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 14 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 identified in the implementing regulations, 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 Determination. In both prior cases, the project changes and impacts were minor. However, although the 2020-21 Yazoo Pump project changes from the 2008 project were relatively minor, the overall project impacts are still major. The same applies to the 2024 proposed plan.

By not following this process we believe EPA and ACOE 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 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. Similar to concerns EPA identified in the 2008 Final Determination and EPN expressed on earlier versions of the pumping project, EPN’s concerns with the potential adverse impacts of this version of the project remain.

However, if ACOE remains committed to moving forward with this version of the project, the ACOE should follow the long-standing approach to modify a CWA Section 404(c) final agency action by making a formal request to EPA. As noted above, EPA previously outlined the necessary information that should be submitted.⁸

This letter was prepared by EPA alumni and EPN volunteers Philip Mancusi-Ungaro and James Giattina. If you have any questions or if we can provide any further information, please contact us.

Sincerely,



Michelle Roos
Executive Director
Environmental Protection Network

⁸ August 22, 2019 letter from Mary S. Walker, Regional Administrator, EPA Region 4, to Major General R. Mark Toy.

cc: Michael Connor
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