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**DAVID CREWS, CLERK**

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF MISSISSIPPI

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UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF MISSISSIPPI  
(Greenville Division)

PACIFIC LEGAL FOUNDATION  
3900 Lennane Drive, Suite 200  
Sacramento, CA 95834  
(916) 419-7111 FAX (916) 419-7747

BOARD OF MISSISSIPPI LEVEE  
COMMISSIONERS,

Plaintiff,

v.

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY; LISA P. JACKSON, in her  
official capacity as Administrator, and MICHAEL H.  
SHAPIRO, in his official capacity as Acting Assistant  
Administrator for Water,

Defendants.

No. 4:09cv081-A-5

**COMPLAINT FOR  
DECLARATORY AND  
INJUNCTIVE RELIEF**

**INTRODUCTION**

1. Plaintiff Board of Mississippi Levee Commissioners (Board) hereby brings this action under the Administrative Procedure Act (APA), 5 U.S.C. § 551, *et seq.*, to challenge the decision of Defendant United States Environmental Protection Agency (EPA) to veto, under Section 404(c), 33 U.S.C. § 1344(c), of the Clean Water Act (CWA), *id.* § 1251, *et seq.*, the Yazoo Backwater Project (Project). Flooding is a perennial problem of sometimes catastrophic proportion in the South Delta. To protect human life and property from this danger, the federal government has authorized many flood control projects in the area. The capstone of these flood control

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1 measures is the Project, which consists of a 14,000 cubic feet per second (cfs) pumping station.  
 2 The Project will significantly reduce severe flooding in the Yazoo Backwater Area, thereby  
 3 defending human life and limb and saving millions of dollars annually in avoided property damage.  
 4 Despite the many social and environmental benefits that the Project will produce, EPA vetoed the  
 5 Project, contending that the Project will be too environmentally harmful. That is flat wrong: the  
 6 Project will produce significant environmental benefits, as well as flood protection. But most  
 7 importantly for present purposes, EPA's veto is illegal because Congress has exempted the Project  
 8 from veto through Section 404(r) of the CWA. The Board therefore requests that the Court declare  
 9 that the Project is exempt, under Section 404(r), from veto under Section 404(c), and that EPA's  
 10 veto is null and void. Further, the Board requests that the Court enjoin EPA from enforcing or in  
 11 any other way giving legal effect to the veto.

#### JURISDICTION AND VENUE

12  
 13 2. Jurisdiction is founded upon 28 U.S.C. § 1331 (federal question); 5 U.S.C. § 702  
 14 (judicial review of agency action); 28 U.S.C. § 2201 (authorizing declaratory judgments); and *id.*  
 15 § 2202 (authorizing relief in addition to declaratory judgment).

16 3. Venue is proper in this District pursuant to 28 U.S.C. § 1391(e)(2), because a  
 17 substantial part of the events or omissions giving rise to the claim occurred in this District, and  
 18 because a substantial part of the property that is the subject of the action is located in this District.  
 19 *See also* 5 U.S.C. § 703 (venue for APA actions).

#### PARTIES

##### Plaintiff

20  
 21  
 22 4. The Board of Mississippi Levee Commissioners oversees the constitutionally  
 23 established Mississippi Levee District and is composed of two members from each of the counties  
 24 of Bolivar and Washington and one from each of the counties of Issaquena, Sharkey, and from that  
 25 part of Humphreys County within the District.

26 5. The Board has jurisdiction over the 163-mile Mississippi River Mainline Levee  
 27 System, from Bolivar County to just north of Vicksburg; the 8-mile Greenville Harbor Dike around  
 28 Lake Ferguson; the 13 mile Brunswick Extension Levee to Eagle Lake; and the 28 miles of Yazoo

1 Backwater Levee which prevents high water on the Mississippi River from flooding the South  
2 Delta.

3 6. In addition to jurisdiction over the Mainline Levee System, the Board also is the  
4 sponsor for flood control projects on interior streams within its jurisdiction, including the Project.  
5 In its flood control mission, the Board represents the interests of homeowners, farmers, and others  
6 who are regularly injured by flooding in the Yazoo Backwater Area.

7 **Defendants**

8 7. EPA is an agency of the United States established pursuant to Reorganization Plan  
9 No. 3 of 1970, 84 Stat. 2086. It is the agency with primary responsibility for the enforcement of  
10 the CWA, and is responsible for the veto decision that is the subject of this action.

11 8. Lisa P. Jackson is the Administrator of EPA, and oversees EPA's enforcement of  
12 the CWA. She is sued in her official capacity only.

13 9. Michael H. Shapiro is EPA's Acting Assistant Administrator for Water.  
14 Mr. Shapiro's predecessor signed the veto decision that is challenged in this action. Mr. Shapiro  
15 is sued in his official capacity only.

16 **LEGAL BACKGROUND**

17 10. Under the CWA, EPA, in conjunction with the United States Army Corps of  
18 Engineers, administers provisions related to the discharge of dredged and fill material into the  
19 waters of the United States. 33 U.S.C. § 1344. *See id.* § 1362(7).

20 11. Under Section 404(b) of the CWA, the disposal site for dredged or fill material is  
21 determined by the Corps

22 (1) through the application of guidelines developed by the Administrator [of EPA],  
23 in conjunction with the Secretary [of the Army], which guidelines shall be based  
24 upon criteria comparable to the criteria applicable to the territorial seas, the  
25 contiguous zone, and the ocean under [33 U.S.C. § 1343(c)], and (2) in any case  
where such guidelines under clause (1) alone would prohibit the specification of a  
site, through the application additionally of the economic impact of the site on  
navigation and anchorage.

26 *See id.* § 1344(b).

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1           15.     Approximately 630,000 acres of the backwater area fall within the 100-year flood  
2 plain. *Id.* The backwater area acts like the base of a funnel; it is part of the Mississippi River  
3 Watershed. Under natural conditions, all of the waters of the vast Mississippi River watershed  
4 (which drains 41% of the land mass of the continental United States) flow through or along the  
5 Delta before reaching the Gulf of Mexico.

6           16.     Congress has responded to Mississippi River flooding by authorizing, through a  
7 number of Flood Control Acts, the construction and maintenance of flood control levees, pump  
8 stations, drainage channels, and floodgates. *See id.* at 14-15.

9           17.     Congress fixed its attention in earnest on controlling Mississippi River flooding  
10 with the Flood Control Act of 1928, 70th Cong., Sess. 1, Ch. 596 (May 15, 1928), passed in  
11 response to the disastrous Mississippi River Flood of 1927. That year, the Mississippi River  
12 flooded 27,000 square miles, killing over 240 people, displacing 700,000, and costing \$1 billion  
13 in damages. The 1928 Act authorized, through the Mississippi River and Tributaries Project, the  
14 construction of the world's longest system of river levees. The Act also funded the construction  
15 of diversion floodways that would siphon off some Mississippi River floodwaters before reaching  
16 the River's lower reaches.

17           18.     As a continuing part of its flood control program, Congress authorized, through the  
18 Flood Control Act of 1941, the construction of a "project for flood control of the Yazoo River,"  
19 including "combinations of reservoirs, levees, and channel improvements." Flood Control Act of  
20 1941, § 3(b), 55 Stat. 639 (Aug. 18, 1941).

21           19.     Elements of the 1941 Act represented a compromise between, on the one hand, the  
22 interests of Arkansas and Louisiana, and on the other hand, the interests of Mississippi. The 1928  
23 Act and the Mississippi River and Tributaries Project envisioned the construction of floodways that  
24 would divert some Mississippi River floodwater out of the main stem of the Mississippi River  
25 before that water could exceed the capacity of the levees in the system. One of these planned  
26 channels was the Eudora Floodway, which would have diverted Mississippi River floodwater  
27 through Arkansas and Louisiana. Both the Arkansas and Louisiana congressional delegations were  
28 opposed to the Eudora Floodway's construction. In exchange for its deletion from the 1941 Act,

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1 Mississippi obtained the promise of additional flood damage protection for the Delta, including  
2 the levees, pumps, and other components of what became known collectively as the Yazoo  
3 Backwater Project.

4 20. Over the next several decades, the Corps designed and constructed a number of  
5 interrelated structures for flood damage protection in the Delta. *See* 2007 Reformulation Main  
6 Report at 15-20. In 1969, the Corps completed construction of the Steele Bayou Structure. In  
7 1975, the Corps completed construction of the Little Sunflower River Structure. In 1978, the  
8 Corps finished the Yazoo Backwater Levee System. *See id.* at 13-14. Also in 1978, the Corps,  
9 anticipating the management of floodwaters at the mouth of Steele Bayou, rather than in multiple  
10 locations, completed construction of the Connecting Channel to divert flow from the Big  
11 Sunflower River Basin to Steele Bayou. This Channel decreased flood stages in the Big Sunflower  
12 River Basin but increased stages in the Steele Bayou Basin.

13 21. The Little Sunflower and Steele Bayou structures protect parts of the backwater area  
14 from backwater flooding of the Yazoo River when its gravitational flow is impeded by the  
15 Mississippi River in flood. *See id.* at 27-28. When closed, these structures' floodgates prevent  
16 Yazoo River water from backing up into the Delta; but their closure also precludes interior  
17 floodwaters from escaping down the Yazoo River and into the Mississippi River. *See id.* at 27.  
18 The Project—a pumping station to evacuate water retained behind the closed Steele Bayou  
19 structure—is the last integrated element of this system. Completion and operation of the pumping  
20 station will alleviate interior flooding.

21 22. In 1973, the Mississippi River flooded the South Delta, creating “a body of water  
22 60 miles long (almost as large as the Great Salt Lake), with financial losses amounting to over \$65  
23 million and personal trauma immeasurable in dollars.” *See* 1982 GDM at 21. Delta interests  
24 thereafter requested the Corps to review whether construction of the Project would be  
25 economically justified. *See id.* at 6-7. As a result of that request, the Corps began in earnest an  
26 economic and environmental assessment of the final phase of the Project. *See id.*

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1           23.     The Corps completed an evaluation, including an environmental impact statement  
2 (EIS), in 1982. As designed and approved at that time, the Project consisted of a 17,500 cfs  
3 electric pump station, with pumping to begin, depending upon the time of year, when the water  
4 level at the Steele Bayou Structure reached either 80 or 85 feet. *See* 1982 GDM at 3-4; 2007  
5 Reformulation Main Report at 143. The pump station would transport or lift backed-up  
6 floodwaters over existing levees to flow downstream. *See* 1982 final EIS at plates 2-3. The  
7 Project's mitigation included the purchase of 6,500 acres of woodland easements or 6,000 acres  
8 of fee title purchases. 2007 Reformulation Main Report at 143.

9           24.     In July, 1982, the Corps completed an economic feasibility report and an EIS for  
10 the Project. The Corps revised these documents in November, 1982. *See id.* at 7.

11           25.     The 1982 final EIS was sent to members of Congress, to EPA, and to others, in  
12 March, 1983. *See* Letter of Col. James W. Ray to Rep. James J. Howard (Mar. 28, 1983); Letter  
13 of Col. James W. Ray to Sen. Robert T. Stafford (Mar. 28, 1983), true and correct copies of which  
14 are attached to this Complaint as Exhibit A and incorporated herein by reference. The 1982 final  
15 EIS contained, in its Appendix J, an analysis, pursuant to CWA Section 404(b)(1), of the impact  
16 of the Project's dredge-and-fill activity on the "waters of the United States." *See* 1982 final EIS  
17 App. J, Section 404(b)(1) Evaluation.

18           26.     The record of decision for the 1982 final EIS was signed in July, 1983. 2007 SEIS  
19 at 1.

20           27.     In July, 1984, Congress appropriated funds for the Project. *See* Pub. L. No. 98-360,  
21 98 Stat. 403 (July 16, 1984).

22           28.     Construction of the Project commenced in 1986. The Corps cleared and graded the  
23 site for the pumping station, built a coffer dam, and began to construct the diversion channel which  
24 would direct interior floodwaters to the pumping station.

25           29.     Also in 1986, Congress passed a Water Resources Development Act, Pub. L.  
26 No. 99-662, 100 Stat. 4082 (Nov. 17, 1986). Pursuant to that Act's cost-sharing provisions, the  
27 Board became liable for up to 25% of the Project's construction costs. *See* 2007 Reformulation  
28 Main Report at 10. Construction soon stopped as the Board would be unable to pay its share

1 because of its limited tax base. The Board sought congressional correction of this conversion of  
2 the Project to cost sharing.

3 30. In the Water Resources Development Act of 1996, Pub. L. No. 104-303, 110 Stat.  
4 3658 (Oct. 12, 1996), Congress amended the 1986 Act's cost-sharing provision to return the  
5 Project's cost-sharing to its original form, meaning that the Board would not be liable for up to  
6 25% of the Project's costs. *See* 2007 Reformulation Main Report at 11.

7 31. In September, 2000, the Corps released a draft supplemental EIS (SEIS), updating  
8 the analyses set forth in the original 1982 EIS. *See* Final Determination of the U.S. Environmental  
9 Protection Agency's Assistant Administrator for Water Pursuant to Section 404(c) of the Clean  
10 Water Act Concerning the Proposed Yazoo Backwater Area Pumps Project, Issaquena County,  
11 Mississippi at 12 (Aug. 31, 2008) (hereinafter EPA Final Determination). The Corps issued the  
12 final SEIS in November, 2007. *Id.*

13 32. The Project's purpose and basic design in the 1982 final EIS and 2007 SEIS were  
14 substantively very similar. Nevertheless, the 2007 SEIS and its associated studies, using updated  
15 methodologies, proposed a number of small changes designed to reduce the Project's  
16 environmental impact. Chief among these differences were: (1) a decrease in pumping-station size  
17 from 17,500 cfs to 14,000 cfs; (2) a change in the pumping initiation point from 80 feet to 87 feet;  
18 and (3) the addition of a nonstructural component to the flood control program. With respect to  
19 this last change, the 2007 SEIS proposed to purchase over 55,000 acres of agricultural land for  
20 reforestation, much of this area located below 87-foot elevation. *See* 2007 Reformulation Main  
21 Report at 143, 148; EPA Final Determination at 12. The agricultural lands to be purchased for  
22 reforestation would continue to be subject to flooding even with the Project's completion.

23 33. With respect to the Project's environmental impact, the 2007 SEIS demonstrated  
24 particular environmental sensitivity. For example, pursuant to the new operation protocols, the  
25 Project's pumps would not be turned on until well over 200,000 acres of the backwater area were  
26 already under water; and the Project would be used to hold water in the backwater area for over

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1 three times as many days as it would be used to pump water out of the area. The Project's  
2 operational features, in combination with the planned purchase of reforestation easements, would  
3 lead to *increases* of 30.3% in aquatic spawning resource value, 8% in aquatic rearing resource  
4 value, 19.5% in wetland resource value, 11.2% in terrestrial resource value, and 52.8% in  
5 waterfowl resource foraging value. 2007 SEIS at 2.

6 34. Despite these many benefits, EPA notified the Corps in February, 2008, that it was  
7 considering vetoing the Project. *See* 73 Fed. Reg. 14,806 (Mar. 19, 2008).

8 35. Prolonged but ultimately fruitless negotiation followed, during which time the  
9 Board and the Corps submitted extensive comments to EPA arguing that the Project was exempt  
10 from veto under Section 404(r). *See* Levee Board Comment Letters of May 2, 2008, July 22, 2008,  
11 August 1, 2008, and August 15, 2008; Corps Comment Letter of August 1, 2008, true and correct  
12 copies of which are attached to this Complaint as Exhibit B and incorporated herein by reference.  
13 *See also* EPA Final Determination at 17-20.

14 36. In addition to comments, the Board also submitted requests under the Freedom of  
15 Information Act (FOIA), 5 U.S.C. § 552, seeking documents related to the Section 404(r)  
16 exemption for the Project. *See* FOIA Requests to Corps of July 28, 2008 (hereinafter FOIA  
17 Requests), true and correct copies of which are attached to this Complaint as Exhibit C and  
18 incorporated herein by reference.

19 37. On August 31, 2008, EPA vetoed the Project, EPA Final Decision at 72-74, with  
20 notice of veto published in the Federal Register on September 19, 2008. *See* 73 Fed. Reg. 54,398.  
21 EPA based its veto decision on the finding that the Project "would significantly degrade the critical  
22 ecological functions provided by approximately 67,000 acres of wetlands in the Yazoo Backwater  
23 Area." *Id.* at 54,398.

24 38. In an appendix to the Final Determination, EPA explained why it considered  
25 Section 404(r) to be inapplicable to the Project. *See* Appendix 1, Clean Water Act Section 404(c)  
26 Review of Yazoo Backwater Area Pumps Project, Response to Comments at 15-19. EPA's  
27 principal basis for its conclusion that Section 404(r) was inapplicable was its view that the 1982

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1 final EIS was never submitted to Congress. *See id.* at 16-18. EPA also asserted that the 1982 final  
 2 EIS was deficient. *Id.* at 18-19.

3 39. Within a few days of EPA's veto decision, the Board received responses to its FOIA  
 4 requests from the Corps. The responses included cover letters, dated March 28, 1983, from  
 5 Colonel James W. Ray to various members of Congress transmitting the 1982 final EIS for their  
 6 review. *See* Exh. A.

7 40. Flooding continues to be a serious threat to the social and economic welfare of the  
 8 Delta. Just this past June, nearly 400,000 acres in the backwater area flooded, with about 150,000  
 9 of those acres farmland. *See* Steve Sanoski, *Mississippi River falling about a foot a day*,  
 10 Vicksburg Post, June 9, 2009, at A1, A7. The human toll from flooding is especially severe in the  
 11 Delta, where over 30% of the population lives below the poverty line. *See* 2007 Reformulation  
 12 Main Report App. 8 at 47. If allowed to stand, EPA's decision to veto a project that would prevent  
 13 any and all flood damage for 59% of the region's homes and thousands of acres of otherwise very  
 14 productive farmland currently at risk to the 100-year flood, *see id.* App. 7 at Table 7-55, will have  
 15 catastrophic consequences for the people of the Delta.

#### 16 **DECLARATORY RELIEF ALLEGATIONS**

17 41. All of the preceding paragraphs are incorporated fully herein.

18 42. EPA's veto of the Project constitutes a live controversy. The Board, as project  
 19 sponsor, contends that the Project is not subject to veto by virtue of Section 404(r). EPA contends  
 20 that the Project is not eligible for the Section 404(r) exemption.

21 43. No further factual development is necessary to resolve the legal issues raised by this  
 22 action. The only legally relevant fact is whether the 1982 final EIS was submitted to Congress  
 23 prior to the July, 1984, project appropriation. Subsequent to EPA's veto, the Board obtained  
 24 copies of cover letters demonstrating that the Corps had submitted the 1982 final EIS to members  
 25 of Congress in March, 1983. *Cf.* Exhs. A & C.

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1 44. Accordingly, an actual and substantial controversy exists between the Board and  
2 EPA as to their respective legal rights and duties. The Board contends that the Section 404(r)  
3 exemption immunizes the Project from EPA's veto, whereas EPA contends that the Project does  
4 not qualify for an exemption.

5 45. The Board, as the Project Sponsor, and its constituents, are and will continue to be  
6 injured by EPA's veto of the Project. The veto means that the Project cannot be built. As a  
7 consequence, the Board's interests in the completion of the Project have been entirely frustrated.  
8 Moreover, the interests of homeowners, farmers, and others who are regularly injured by flooding  
9 in the Yazoo Backwater Area—interests that the Board also represents—have been entirely  
10 frustrated.

11 46. A judicial determination of the parties' rights and responsibilities arising from this  
12 actual controversy is necessary and appropriate at this time.

#### 13 **INJUNCTIVE RELIEF ALLEGATIONS**

14 47. All of the preceding paragraphs are incorporated fully herein.

15 48. The Board is the local sponsor for the Project, and in that capacity represents the  
16 interests of homeowners, farmers, and others who are regularly injured by flooding in the Yazoo  
17 Backwater Area.

18 49. The Board, as the Project Sponsor, is and will continue to be injured by EPA's veto  
19 of the Project. The veto means that the Project cannot be built. As a consequence, the Board's  
20 interests in the completion of the Project have been entirely frustrated. Moreover, the interests of  
21 homeowners, farmers, and others who are regularly injured by flooding in the Yazoo Backwater  
22 Area—interests that the Board also represents—have been entirely frustrated.

23 50. Setting aside EPA's veto will redress the Board's injuries and the injuries of those  
24 whom the Board represents by allowing the Project to be completed.

25 51. The Board has no plain, speedy, and adequate remedy at law, and absent judicial  
26 intervention, the Board and those it represents will suffer irreparable injury.

27 52. EPA, if not enjoined, will continue to enforce its veto of the Project.

28 53. Therefore, injunctive relief is appropriate.

**CAUSE OF ACTION  
(Violation of the APA and CWA)**

54. All of the preceding paragraphs are incorporated fully herein.

55. Under Section 404(r) of the CWA, a federal project cannot be vetoed under Section 404(c) if, prior to the commencement of dredge-and-fill activity, and prior to Congress' appropriation of funds for the project, information on the effects of such activity pursuant to Section 404(b)(1) of the CWA is included in an environmental impact statement, under NEPA, which is then submitted to Congress. *See* 33 U.S.C. § 1344(r).

56. The Corps submitted, in March, 1983, pursuant to its regulations and guidance documents, an EIS to Congress containing information, pursuant to Section 404(b)(1) of the CWA, on the effects of the anticipated dredge-and-fill activity associated with the Project. *See* Exh. A; 1982 final EIS & App. J. Congress appropriated funds for the Project in July, 1984. *See* Pub. L. No. 98-360, 98 Stat. 403 (July 16, 1984). The Project construction commenced in 1986. *See* EPA Final Determination at 11. The Project qualifies for the Section 404(r) exemption.

57. EPA's veto decision is therefore arbitrary and capricious, and contrary to law, and wholly null and void.

58. EPA's veto decision is a final agency action ripe for judicial review.

**PRAYER FOR RELIEF**

The Board prays for judgment from the Court as follows:

1. declare that the Yazoo Backwater Project is exempt, under Section 404(r), from veto under Section 404(c);

2. declare that EPA's veto, 73 Fed. Reg. 54,398, is null and void;

3. enjoin EPA, its agents, employees, officers, and representatives from enforcing or in any other way giving legal effect to EPA's veto;

4. award reasonable costs and attorney's fees, pursuant to 28 U.S.C. § 2412, or any other applicable authority, or the Court's inherent authority; and

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5. grant of any other such further relief that the Court may deem proper.

DATED: August 11, 2009.

Respectfully submitted,

CHARLES S. TINDALL, III  
HEATH S. DOUGLAS  
M. REED HOPPER (*Pro Hac Vice Pending*)  
DAMIEN M. SCHIFF (*Pro Hac Vice Pending*)

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