

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
AT CAPE GIRARDEAU**

STATE OF MISSOURI, ex rel.)
Chris Koster, and the)
MISSOURI DEPARTMENT)
OF NATURAL RESOURCES,)
MISSOURI STATE EMERGENCY)
MANAGEMENT AGENCY)

Plaintiff,)

v.)

Civil Action No. _____

UNITED STATES ARMY CORPS)
OF ENGINEERS,)
MAJOR GENERAL MICHAEL J. WALSH,)
COLONEL VERNIE L. REICHLING JR.)

Defendants.)

Complaint

The State of Missouri, at the relation of Chris Koster, Attorney General, the Missouri Department of Natural Resources, and Missouri State Emergency Management Agency jointly file this complaint and allege as follows:

Nature of the Action

1. The purpose of this action is to block the Army Corps of Engineers from detonating explosives that will destroy portions of the Front Line levee, which is located in Mississippi and New Madrid Counties in Missouri. The destruction will flood most of Mississippi County and a portion of New Madrid County. The action violates the Missouri Clean Water Law, Mo. Rev. Stat. § 644, et seq., and the federal Administrative Procedures Act, 5 U.S.C. § 701, et seq.

Parties

2. Chris Koster, is the duly elected, qualified, and acting Attorney General of Missouri. The Attorney General is authorized to institute, in the name and on behalf of the State, all civil proceedings at law or in equity necessary to protect the rights and interests of the State under § 27.060, RSMo 2000 . Section 644.076, RSMo, of the Missouri Clean Water Law authorizes the Attorney General to bring this lawsuit.

3. The Missouri Department of Natural Resources (“the Department”) is a duly authorized state agency created under Mo. Rev. Stat. §640.010, to administer the programs relating to environmental control and conservation, and to manage the natural resources of the State of Missouri.

4. The Missouri State Emergency Management Agency (“SEMA”) is a duly authorized state agency created under Mo. Rev. Stat. §44.020 responsible for the planning for and responding to natural and manmade disasters in the State of Missouri. Attorney General Koster, the Department and SEMA shall be collectively referred to as “the State” in this Petition unless specifically designated otherwise.

5. The United States Army Corps of Engineers (“the Corps”) is the agency of the United States government with responsibility for flood control in the Mississippi River basin.

6. Defendant Major General Michael J. Walsh is the commander of the Mississippi Valley Division of the Corps and President-designee, Mississippi River Commission. General Walsh is named in his official capacity only.

7. Colonel Vernie L. Reichling Jr. is the commander of the Corps’ Memphis District. Colonel Reichling is named in his official capacity only.

Jurisdiction and Venue

8. This Court has jurisdiction pursuant to § 313 of the federal Clean Water Act, 33, U.S.C. 1323, and Administrative Procedures Act, 5 U.S.C. § 703. Venue is proper in this court.

General Allegations

9. The Flood Control Act of May 15, 1928, 45 Stat. 534, authorizes the Corps to develop plans for controlling flooding on the Mississippi River.

10. In response to that congressional authorization, and to control flooding above and below the confluence of the Mississippi and Ohio Rivers, the Corps developed the Birds Point – New Madrid Floodway and, in 1985, issued an associated “Birds Point – New Madrid Floodway Operations Plan” (“the Plan”). See Exhibit A.

11. In essence, the floodway is a huge swath of land that the United States government has decided to sacrifice to flooding in order to protect other areas that it considers more valuable.

12. The floodway encompasses most of Mississippi County, Missouri and parts of New Madrid County Missouri. In all, the floodway covers over 130,000 acres in Missouri, an area three times the size of the city of St. Louis.

13. In constructing the floodway, the United States built two levees.

14. One levee, known as the frontline levee, follows closely along the path of the river over approximately 40 miles starting upstream at a point across the river from Cairo, Illinois, and ending just up river of New Madrid, Missouri.

15. Between these two cities, the river forms a wide arc.

16. The second levee, known as the setback – mainline levee, is fairly straight and connects the two ends of the arc, creating an open area between the two levees that is about 30 miles long and is, in places, more than ten miles wide.

17. The area inside the two levees has over 90 homes and more than 200 residents, as well as pets and livestock. In addition, the area is being used for crops that have significant economic value.

18. The area inside the floodway also has petroleum storage tanks, farm chemical storage buildings and LP gas tanks.

19. The Corps issued the Plan in 1986.

20. The Plan calls for blowing up portions of the frontline levee so that flood waters can be directed into the floodway.

21. Pursuant to the terms of the Plan, the decision to blow up the levee is made on the recommendation of the Corps' Memphis District commander and on the order of the President of the Mississippi River Commission.

22. When this happens, the inundation of flood waters will flood the homes, buildings and cropland in the floodway.

23. The threat of flooding is currently causing the evacuation of the families in the floodway.

24. The flood will also cause the release of farm chemicals into the environment and cause those chemicals, along with sediment and other contaminants, to enter into waters of the state of Missouri.

25. Pursuant to § 313 of the federal Clean Water Act, 33, U.S.C. 1323, each department, agency, or instrumentality of the federal government engaged in any activity which

may result in the discharge or runoff of pollutants, and each officer, agent, or employee thereof in the performance of his official duties, shall be subject to, and comply with, all State requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner and to the same extent as any nongovernmental entity.

26. Thus in § 313 of the federal Clean Water Act, the federal government has waived its sovereign immunity for violations of state water pollution laws.

27. Section 313 of the federal Clean Water Act goes on to say that the waiver applies to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner.

28. As a consequence, Defendant is subject to suit in this court for violations of Missouri's Clean Water Law, Mo. Rev. Stat. § Chapter 644.

29. The preceding paragraphs are incorporated into each subsequent count of this complaint.

COUNT I – Unlawful Pollution to Waters of the State

30. Pursuant to Mo. Rev. Stat. § 644.051.1(1), it is unlawful for any person to cause pollution of any waters of the State or to place or cause or permit to be placed any water contaminant in a location where it is reasonably certain to cause pollution of any waters of the State.

31. Mo. Rev. Stat. § 644.016(26) defines “person” to include any agency, board, department, or bureau of the federal government.

32. Mo. Rev. Stat. § 644.016(26) defines “pollution” as such contamination or other alteration of the physical, chemical or biological properties of any waters of the state, including

change in temperature, taste, color, turbidity, or odor of the waters, or such discharge of any liquid, gaseous, solid, radioactive, or other substance into any waters of the state as will or is reasonably certain to create a nuisance or render such waters harmful, detrimental or injurious to public health, safety or welfare, or to domestic, industrial, agricultural, recreational, or other legitimate beneficial uses, or to wild animals, birds, fish or other aquatic life.

33. Mo. Rev. Stat. § 644.016(26) defines “waters of the state” as all rivers, streams, lakes and other bodies of surface and subsurface water lying within or forming a part of the boundaries of the state which are not entirely confined and located completely upon lands owned, leased or otherwise controlled by a single person or by two or more persons jointly or as tenants in common and includes waters of the United States lying within the state.

34. Mo. Rev. Stat. § 644.016(23) defines “water contaminant” as any particulate matter or solid matter or liquid or any gas or vapor or any combination thereof, or any temperature change which is in or enters any waters of the state either directly or indirectly by surface runoff, by sewer, by subsurface seepage or otherwise, which causes or would cause pollution upon entering waters of the state, or which violates or exceeds any of the standards, regulations or limitations set forth in sections 644.006 to 644.141 or any federal water pollution control act, or is included in the definition of pollutant in such federal act

35. Defendants’ breach of the frontline levee will cause pollution to waters of the state of Missouri and will place or cause or permit to be placed water contaminants in a location where they are reasonably certain to cause pollution of waters of the state of Missouri in violation of Mo. Rev. Stat. § 644.051.1(1).

36. Mo. Rev. Stat. § 644.076.1 states that in the event the director of the Missouri Department of Natural Resources determines that any provision of sections 644.006 to 644.141

or standard, rules, limitations or regulations promulgated pursuant thereto, is in imminent danger of being violated, the director may cause to have instituted a civil action in any court of competent jurisdiction for the injunctive relief to prevent any such violation or for the assessment of a penalty not to exceed ten thousand dollars per day for each day, or part thereof, the violation occurred and continues to occur, or both, as the court deems proper.

37. Pursuant to Mo. Rev. Stat. § 644.076.1, RSMo, this Court may impose upon Defendants an injunction and penalties of up to Ten Thousand Dollars (\$10,000.00) per day for each day of each violation.

Count II – The Birds Point – New Madrid Floodway Operations Plan is Unlawful under the Administrative Procedures Act

38. Pursuant to § 706 of the Administrative Procedures Act, 5 U.S.C. § 706, the reviewing court must set aside agency action that is held to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law or contrary to constitutional right, power, privilege, or immunity.

39. Defendants have been arbitrary, capricious and abused their discretion in the adoption of the Plan because the Plan protects some land over other land without identifying the basis for that decision.

40. Defendants have been arbitrary, capricious and abused their discretion in the adoption of the Plan because Defendants have failed to update the plan for over twenty-five years to account for changes in the conditions of the river or the relative value of the properties affected by the Plan.

41. Defendants have acted in a manner contrary to constitutional rights because Defendants have not secured all necessary easements and appropriate rights to allow the flooding of all of the private property to be affected.

42. This court may set aside the Defendants' adoption of the Plan pursuant to § 706 of the Administrative Procedures Act, 5 U.S.C. § 706.

Count III – Defendants' actions in implementing the Birds Point – New Madrid Floodway Operations Plan are Unlawful under the Administrative Procedures Act

43. Pursuant to § 706 of the Administrative Procedures Act, 5 U.S.C. § 706, the reviewing court must set aside agency action that is held to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law or contrary to constitutional right, power, privilege, or immunity.

44. The Plan does not set mandatory procedures. Rather, the plan gives the Corps' Memphis district commander and the President of the Mississippi River Commission the discretion to implement the plan.

45. However, the Plan states that “[i]t is the intent that operation occur only as absolutely essential to provide the authorized protection to **all** citizens.” The Plan at page 2.

46. Defendants have been arbitrary, capricious and abused their discretion in the implementation of the Plan because the actions taken in implementing the Plan will result in the unnecessary destruction of property.

47. Defendants have been arbitrary, capricious and abused their discretion in the implementation of the Plan because the actions taken in implementing the Plan will result in the release of pollutants into waters of the state of Missouri in violation of Missouri law.

48. Defendants have been arbitrary, capricious and abused their discretion in the implementation of the Plan because there is currently no evidence that the implementation of the Plan is needed to protect the integrity of any other flood control structures in the Mississippi River basin.

49. Defendants have been arbitrary, capricious and abused their discretion in the implementation of the Plan because the Corps has failed to take all actions necessary to limit water levels in the Mississippi River basin, including the failure to properly manage reservoirs to minimize releases to the Mississippi and Ohio Rivers.

50. Defendants have been arbitrary, capricious and abused their discretion in the implementation of the Plan because the corps has failed to adequately identify the basis for implementing the steps for leading up to and including the demolition of the frontline levee.

51. Therefore, this court may set aside the Defendants' adoption of the Plan pursuant to § 706 of the Administrative Procedures Act, 5 U.S.C. § 706.

WHEREFORE, the State asks this Court for a Judgment granting the following relief:

A. Issuing a temporary restraining order and preliminary and permanent injunctions prohibiting Defendants from any violations of the Missouri Clean Water Law, Chapter 644, RSMo, and the regulations duly promulgated thereunder;

B. Issuing a temporary restraining order and preliminary and permanent injunctions prohibiting Defendants continued implementation of the Birds Point – New Madrid Floodway Operations Plan;

C. Assessing costs of these proceedings against Defendants; and

D. Granting such other relief as may be just and proper.

Respectfully submitted,
CHRIS KOSTER
Attorney General

/s/John K. McManus
JOHN K. MCMANUS
Chief Counsel
Missouri Bar No. 59486
Broadway State Office Building
221 West High Street, 8th Floor
P.O. Box 899
Jefferson City, MO 65102
Telephone: (573) 751-0052
Facsimile: (573) 751-8796

ATTORNEYS FOR PLAINTIFF



**US Army Corps
of Engineers**
Memphis District

BIRDS POINT - NEW MADRID

FLOODWAY

OPERATIONS

PLAN

October 1986

U. S. ARMY
CORPS OF ENGINEERS/MEMPHIS DISTRICT
JANUARY 1986

TITLE: Birds Point - New Madrid Floodway Operations Plan

OPLAN 1 (ANNEX R - MDR 500-1-1, EMERGENCY EMPLOYMENT OF ARMY AND OTHER RESOURCES)

I. Situation.

A. General. This plan of operation provides for operational readiness of the Birds Point - New Madrid Floodway. It is the intent that operation occur only as absolutely essential to provide the authorized protection to all citizens.

B. Authority:

1. Legal Authority. Flood Control Act of 1928, 45 Stat, 534; Flood Control Act of 1965, 79 Stat. 1076.

2. Operational Intent. House Document No. 308, 88th Congress, 2nd Session, page 58:

"a. That the Floodway normally will not be placed in operation until flood heights in excess of 60 feet on the Cairo gage are predicted.

b. That the Federal Government reserves the right to ensure proper functioning of the Floodway by creation of artificial crevasses in the fuseplug levee or elsewhere when stages are at or above 58 feet on the Cairo gage."

C. Operational Responsibility.

1. Memphis District. The Memphis District is responsible for preparation and execution of the Birds Point - New Madrid Floodway Plan of Operation upon order of the President, Mississippi River Commission (MRC).

2. State of Missouri. The State of Missouri will be responsible for warning, evacuation and rescue of the occupants of the floodway, traffic control, control of access into the floodway area, and any necessary law enforcement (See Annex D).

3. Waterways Experiment Station (WES). Personnel trained in explosive technology will be made available by WES to assist the Memphis District in the explosive demolition of the crevasse sections of the Birds Point-New Madrid Floodway frontline levee. Notification of need for WES personnel will be made by the Memphis District Emergency Operations Staff after notification to begin operation has been ordered by the President, MRC.

4. Coast Guard. The Coast Guard will, when necessary, assist the Corps of Engineers (CE) and constituted authorities in evacuation, rescue and relief operations. As soon as the decision is made to place the floodway into operation, the Coast Guard will be notified by the Chief, River Operations Branch, Memphis District, so that river traffic can be advised and controlled.

II. Execution.

A. Concept of Operations. On recommendation of the Memphis District Commander and order of the President, MRC, the Memphis District will dispatch a tow from Ensley Engineer Yard with material, equipment and personnel to place the Floodway into operation. Work crews will be deployed on top of the levee to locate and prepare the access wells to the pre-emplaced horizontal pipes. The slurry explosives will be mixed on the barge and pumped from the barge into the pipes. After completion of the pumping operation, and when deemed necessary, the pipes will be armed with booster charges and all final preparations will be made for artificial crevassing. It is expected that natural overtopping of the fuseplug section will be allowed to occur prior to determining the necessity to artificially crevasse the frontline levee. Upon order of the President, MRC, crevasses will be accomplished as required by hydrologic conditions.

B. Timetable. The timetable for operation is based on the rate of rise from the project design flood (PDF) curve. A faster rate of rise or other emergency situation would necessitate expediting the preparation of the Floodway. Conversely, if the rate of rise is slower than expected during the PDF, additional preparation time will be available. (See Annex B)

C. Sequence of Operations:

1. Dispatch equipment, material, and personnel, from Memphis, TN. Upon arrival and issuance of competent order begin preparing Inflow Crevasse (will require approximately 15 hours).
2. At approximate 60 feet on the Cairo gage, the Inflow Crevasse will have been completely prepared for operation.
3. Preparation of the Inflow/Outflow Crevasses will require approximately 15 hours.
4. Arming shall not occur until it is absolutely necessary for execution of the crevasse.
5. Artificial crevassing will be upon order of the President, MRC.

D. Coordinating Instructions. This plan will be reviewed annually by the Memphis District staff and updated by Emergency Operations Branch. Any changes will be submitted to MRC for approval.

III. Administration and Logistics.

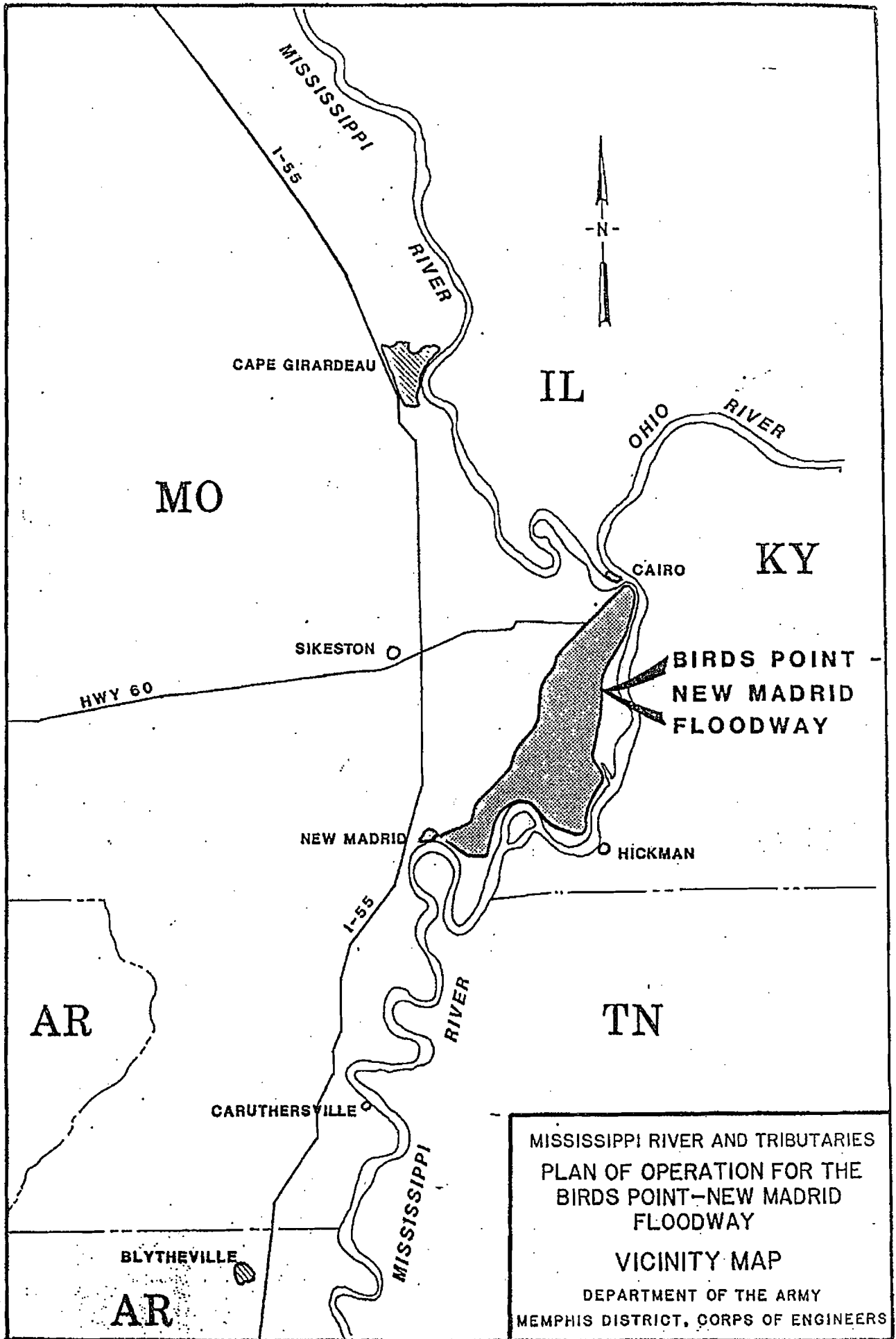
Annex C, Logistics
Annex D, State Support
Annex F, Public Affairs

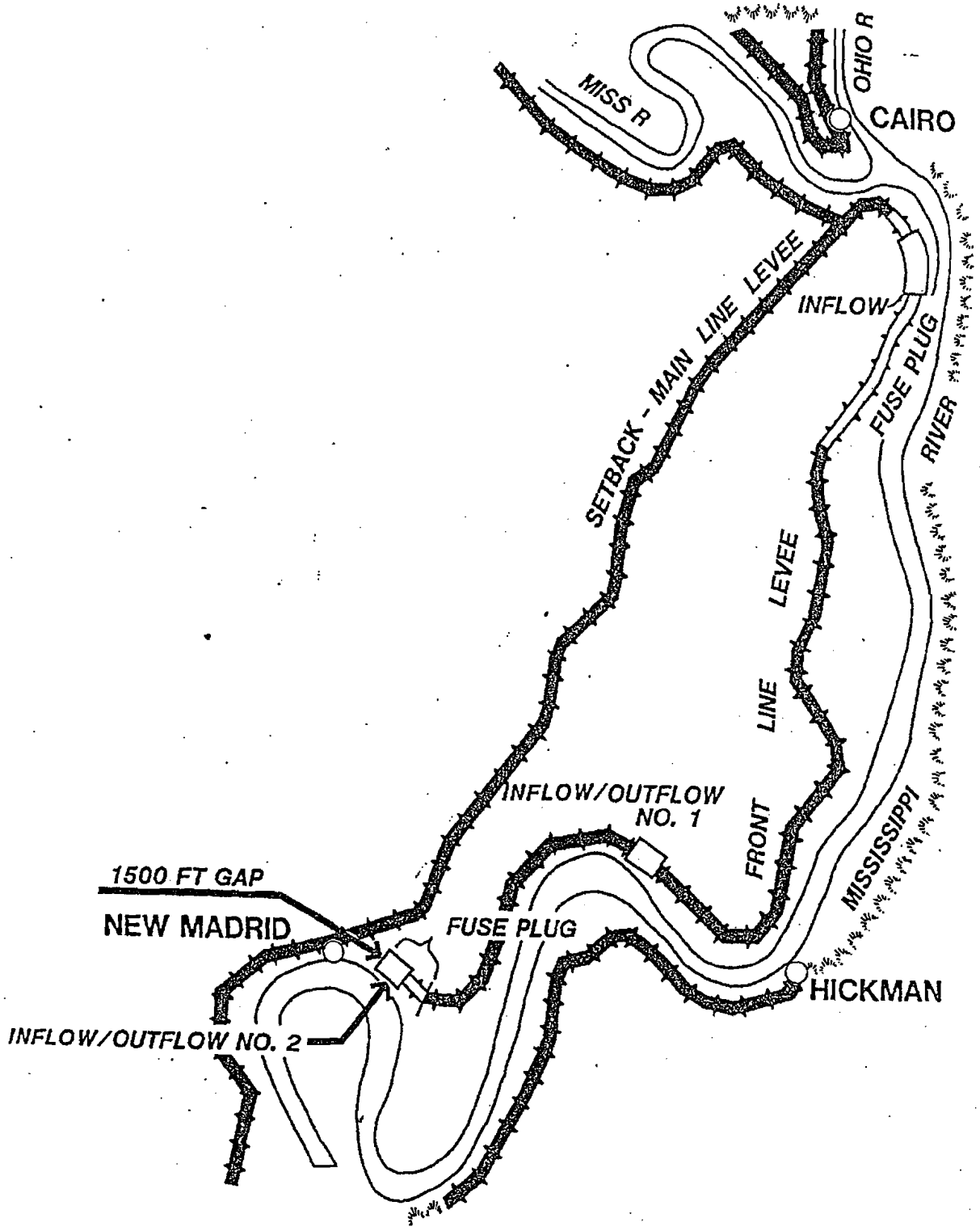
OFFICIAL:

DALE F. MEANS
Colonel, Corps of Engineers
Commanding

Kenneth G. Williams
KENNETH G. WILLIAMS
Emergency Operations Manager

ANNEXES: A - Concept of Operation
B - Timetable
C - Logistics
D - State Support
E - Safety
F - Public Affairs
G - Communications





MISSISSIPPI RIVER AND TRIBUTARIES
PLAN OF OPERATION FOR THE
BIRDS POINT-NEW MADRID FLOODWAY

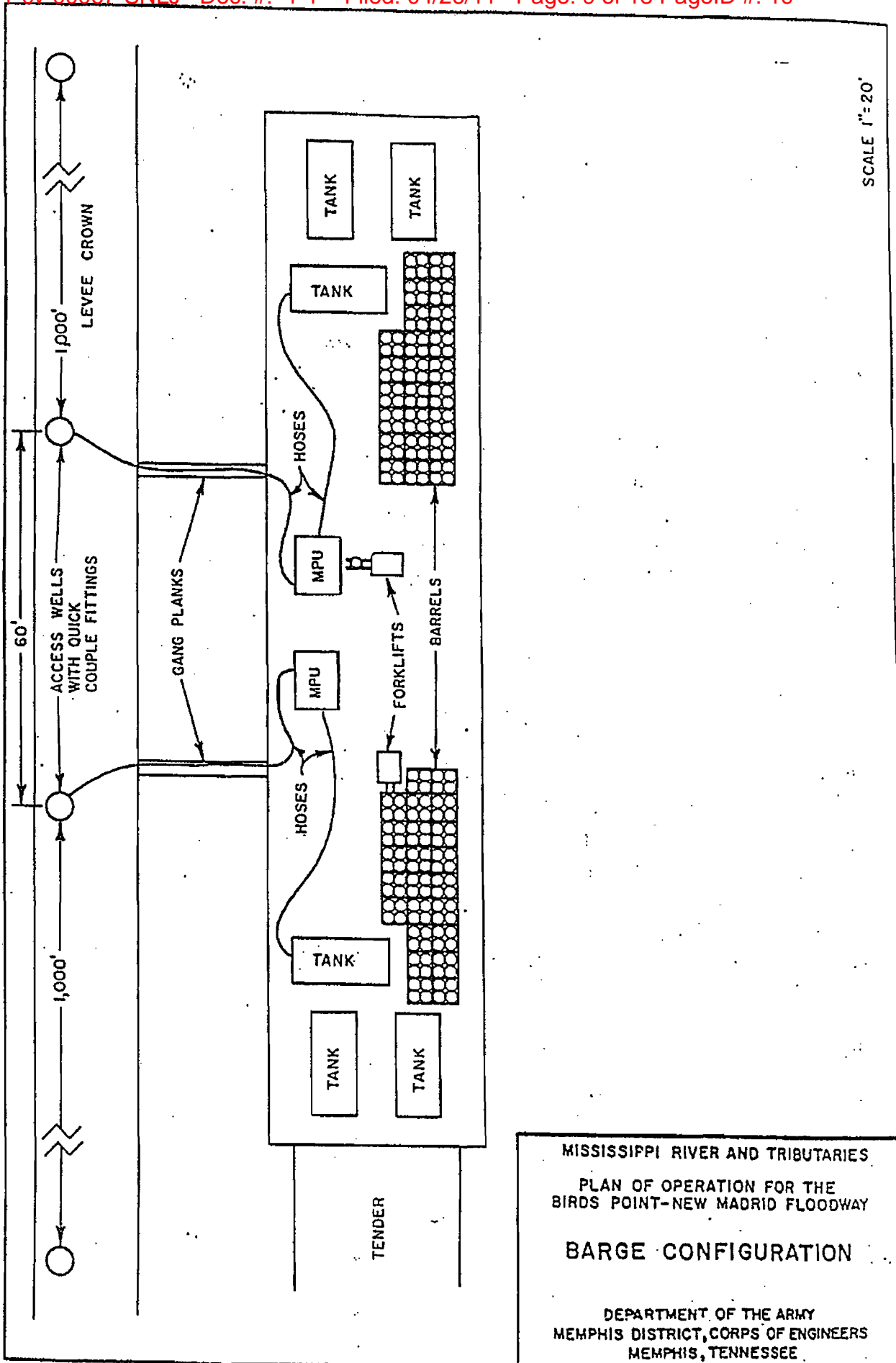
GENERAL MAP

DEPARTMENT OF THE ARMY
MEMPHIS DISTRICT, CORPS OF ENGINEERS.
MEMPHIS, TENNESSEE

ANNEX A (CONCEPT OF OPERATION) to the Birds Point-New Madrid Floodway Operations Plan

1. Upon order of Commander, Memphis District, all equipment and materials will be loaded on 2 modified mat barges and one equipment barge. Each mat barge will be loaded with 192 barrels of aluminum powder (4 barrels per pallet), six 2,500 gallon fiberglass tanks of the liquid component, two mix-pump units (MPUs) with protective covering, and two forklifts with rotating heads and accessories. Two dozers and two backhoes will be loaded on the equipment barge. These barges, along with one empty barge, the M/V Strong, Tender Goodwin and M/V Mississippi will be made up in a tow ready to depart for the Floodway.
2. On the recommendation of the Commander, Memphis District, and order of the President, MRC, the tow will depart Ensley Engineer Yard, Memphis Harbor for the Floodway. All required operational personnel not on the tow will meet the tow at the Inflow Crevasse. Upon arrival of the tow at the Floodway, the M/V Mississippi will be utilized as the Command Post.
3. On order of the President, MRC, the preparation of the Inflow Crevasse will begin. One tow boat will push the equipment barge into the levee and deploy a work crew and two backhoes on top of the levee. The work crew will locate and prepare the access wells to the pre-emplaced horizontal pipes by removing the material over and inside the well and installing quick couple fittings on the 4 inch pipes.
4. The Strong and Goodwin will each push a mat barge (described in paragraph 1) into the levee. The barge will be stationed parallel to the levee and adjacent to 2 access wells which are spaced 60 feet apart (See Plate A-1). Two gang planks will be extended from the barge to the top of the levee. Hoses will extend from the discharges on the MPU's, across the gang planks, and into the access wells. At this point, the MPU's will be loaded with aluminum powder with the solution being fed directly from the 2500 gallon tanks. Two forklifts will be used to load the aluminum powder into the hopper on the MPU's. The MPU's will properly mix the components and pump the blasting agent into the pipes in the levee. From one location approximately 2000 feet of levee can be prepared for operation. This procedure will be repeated at approximately 2000 foot intervals.
5. Following the completion of the mixing and pumping of the blasting agent, WES explosive technicians will prime both ends of the 4 inch pipe with a booster charge and make all other necessary preparations for firing of charges in the Inflow Crevasse. Detonation of the Inflow Crevasse will be in 1000 foot sections as required by hydrologic conditions and on order of the President, MRC.
6. Following preparation of the Inflow Crevasse the Inflow/Outflow Crevasses will be prepared for operation. One

boat and barge will be designated to prepare each crevasse. Both Inflow/Outflow No. 1 and No. 2 will be artificially crevassed in 1000 foot increments, as required by hydrologic conditions.



SCALE 1"=20'

MISSISSIPPI RIVER AND TRIBUTARIES
 PLAN OF OPERATION FOR THE
 BIRDS POINT-NEW MADRID FLOODWAY
 BARGE CONFIGURATION
 DEPARTMENT OF THE ARMY
 MEMPHIS DISTRICT, CORPS OF ENGINEERS
 MEMPHIS, TENNESSEE

ANNEX B (TIMETABLE) to the Birds Point-New Madrid Floodway Operations Plan

Cairo Gage

1. At approximately 56 feet.

a. Tow loaded with equipment (including mix-pump units), materials, (including components of blasting agent), and personnel departs Ensley Engineer Yard for the Floodway. (Travel time approximately 36 hours)

b. Advise Director of Public Safety of the State of Missouri and presiding commissioners, Mississippi and New Madrid Counties, State of Missouri of action.

2. At approximately 59 feet.

a. Tow arrives at the Floodway.

b. Upon order of the President, MRC, deploy work crew on Inflow Crevasse to prepare access wells.

c. Mix and pump blasting agent into pipes in levee.

d. Evacuate all equipment and personnel from levee.

e. Prime pipes with booster charges and place detonating cord (as needed).

f. Advise Director of Public Safety of the State of Missouri, and presiding commissioners, Mississippi and New Madrid Counties, State of Missouri of action.

3. At approximately 60 feet.

a. Inflow Crevasse completely prepared for artificial crevassing. (Preparation of the Inflow Crevasse requires approximately 15 hours.)

b. Advise Director of Public Safety of the State of Missouri, and presiding commissioners, Mississippi and New Madrid Counties, State of Missouri of action.

4. Upon order of the President, MRC, crevasses will be accomplished as required by hydrologic conditions.

5. Preparation of the Inflow/Outflow Crevasses will follow the preparation of the Inflow Crevasse. Approximately 15 hours will be required for preparation of both of the Inflow/Outflow Crevasses.

6. The Inflow/Outflow Crevasses will be artificially crevassed, after the Inflow Crevasse is crevassed, as required to maintain the project flowline.

ANNEX C (LOGISTICS) to the Birds Point-New Madrid Floodway Operations Plan

1. Situation. Same as basic plan.

2. Mission. Memphis District will furnish all logistical support for operational personnel.

3. Execution.

a. Concept of Operation. Upon receipt of notification from the Breaching Commander to begin, Logistics Commander shall:

(1) Request River Operations Branch make ready the towboats for the trip to the Birds Point-New Madrid Floodway.

(2) Supervise the loading of the equipment and material onto barges.

(3) Request Real Estate to provide approximately 2500 square feet of suitable office space which can be used for a Press Center.

(4) Contact utility districts for necessary power hookups for the Press Center.

(5) Provide transportation for operational personnel if required.

b. Coordinating Instructions. The Logistics Support Command shall fall under the direct supervision of the Logistics Commander. He shall have sufficient personnel in the field for task accomplishment and also be in contact with the Floodway Coordinator for any anticipated supplies that cannot be located locally. The Floodway Coordinator, located in the Memphis District EOC, shall assist the Logistics Commander.

4. Service Support.

a. State support shall be coordinated by the Security Officer.

b. Power hookups and purchase of electricity to service the Press Center shall be from a local utility company.

c. Lodging:

(1) The Command and Control organization shall be provided room and board on the M/V Mississippi.

(2) The barge teams shall be placed on TDY and obtain lodging at a motel in the vicinity of the Floodway.

d. Personal clothing is the responsibility of the individual. Inclement weather clothing (rain suits) and safety

clothing (hard hats, gloves) shall be supplied by the Logistics Commander.

e. Gasoline, diesel and aviation fuel shall be obtained from commercial sources in the area, if required.

5. COMMAND AND CONTROL. Logistics Support Command shall be located on the M/V Mississippi.

Appendix 1 - List of Required Major Equipment and Material

APPENDIX I (LIST OF REQUIRED MAJOR EQUIPMENT AND MATERIAL) to ANNEX C (LOGISTICS) to the Birds Point-New Madrid Floodway Operations Plan

1. Equipment.

- 1-M/V Mississippi
- 1-M/V Strong
- 1-Tender Goodwin
- 2-Mat Barges
- 1-Equipment Barge
- 4-Mix-Pump Units (MPU)
- 4-Forklifts and accessories
- 2-Dozers
- 4-Pickup Trucks
- 2-Carryalls
- 2-Vans
- 2-Backhoes

2. Material.

- 275-Tons of DBA-105P blasting agent
- 36-4" X 2 1/2" reducers with high pressure clamps
- 150-High Explosive Boosters
- 28,000-Feet of Detonating Cord
- 25-Blasting Caps

ANNEX D (STATE SUPPORT) to the Birds Point-New Madrid Floodway Operations Plan

1. Mission. To assure adequate support of Missouri state agencies in those areas of state responsibility and to provide coordination of Federal and state activities.

2. Execution.

a. Concept of Operations.

(1) Liaison. The State of Missouri will be requested to furnish a liaison officer representing the State for all matters relating to operation of the Floodway. The liaison officer will be provided working space in the Press Center and/or Command Post, if required.

(2) Warning and Evacuation. The State of Missouri has the responsibility for warning residents of the possible use of the Floodway and for evacuation of all personnel from the Floodway, other than Federal personnel involved in preparation of the crevasses and other flood fight activities.

(3) Rescue and Relief. The State of Missouri will be responsible for all rescue operations within the Floodway and for all relief activities for evacuees.

(4) Traffic and Visitor Control. The State of Missouri is responsible for controlling civilian access to the work area and Floodway.

(5) Law Enforcement. The State of Missouri is responsible for providing any necessary law enforcement required in connection with the operation of the Floodway.

b. Coordinating Instructions. All state support will be coordinated with the Memphis District Security Officer.

ANNEX E (SAFETY) to the Birds Point-New Madrid Floodway Operations Plan

1. Mission. The Memphis District will assure that all operations during implementation of this plan are conducted in a safe manner.

2. Execution.

a. Materials.

(1) Blasting Agent DBA-105P. The DBA-105P is stored in a two component, unmixed form. The two components, aluminum powder and a solution, are nondetonable. During mixing operations, the aluminum powder can become suspended in the air and could be ignited. Although the aluminum powder is coated to help prevent combustion, the barges used for the mix-pump operation will be designated as no smoking areas. Further, only diesel-powered forklifts will be used for this operation.

(2) Class A Explosives. The WES Explosive Technicians will be responsible for:

(a) Handling the Class A Explosives (caps, boosters, primacord).

(b) Loading, arming and firing of the explosive charges will be in accordance with EM 385-1-1.

b. Barge Operations. The barges used for the mixing and pumping operations will be equipped with a guard rail on the perimeter as specified in EM 385-1-1. All personnel working on the barge will be required to wear personal floatation devices.

c. Safe Distances. Execution of the approved operational plan should take into account the following explosive hazard maximums:

(1) The distance away from the crevasse sites beyond which no damage from airblast would be expected is 2000 feet.

(2) The distance away from the crevasse sites beyond which no damage from ground motion would be expected is 2300 feet.

(3) The safe distance from flying debris would be less than the limits of possible damage from airblast or ground motion.

(4) For design purposes, a maximum hazard distance of 2500 feet was used for each crevasse site.

ANNEX F (PUBLIC AFFAIRS) to the Birds Point-New Madrid Floodway Operations Plan

1. Situation. Same as basic plan.
2. Mission. To insure that accurate and timely information is disseminated to media and interested publics.

3. Execution.

(1) The Memphis District Public Affairs Office will be responsible for preparation and dissemination of news releases and announcements on the operation of the Floodway, following coordination with and approval of the Public Affairs Officer, MRC. News releases and announcements on the operation of the Floodway will also be coordinated with local and state authorities prior to release. The Memphis District Public Affairs Officer (PAO) will also be responsible for photo documentation of the Floodway operation, and all audio-visual and photographic support will be coordinated with the Public Affairs Office.

(2) A 24-hour Press Center will be established in the vicinity of the Floodway to serve as a field operating agent of the Memphis District Public Affairs Office. The District PAO will serve as a communications and coordination point for all public affairs activities.

(3) The PAO or his representative will be responsible for providing assistance to news media representatives as required, assisting and coordinating with representatives as required, assisting and coordinating with responsible Corps elements on public affairs matters, and for providing other support as needed.

(4) Media briefings will be scheduled as required. The Memphis District PAO will serve as the official Corps of Engineers spokesman for all matters concerning the operation of the floodway.

(5) A press kit will be prepared and made available. The kit will include a fact sheet and map of the floodway.

(6) The PAO will coordinate shuttle service for VIPs and news media personnel to work areas as required and as conditions and accessibility permit. Knowledgeable escorts will be provided as directed.

ANNEX G (COMMUNICATIONS) to the Birds Point-New Madrid Floodway Operations Plan

1. Situation.

a. The M/V Mississippi will serve as the Command Post for operation of the floodway.

b. The M/V Mississippi and Strong, and Tender Goodwin are equipped with all necessary communications equipment.

2. Mission. Memphis District Communications-Electronics (C-E) Unit will install and maintain all communications systems in support of the floodway operations.

3. Execution.

a. Following the establishment of the Press Center, the Memphis District C-E Unit will install radio communications equipment. Telephone communications at the Press Center will be provided by commercial source.

b. C-E Unit will provide continuing maintenance on all communications systems during preparation and operation of the floodway.

c. All radio communications will be in accordance with MDR 500-1-2.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI**

STATE OF MISSOURI, ex rel.)
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MISSOURI DEPARTMENT)
OF NATURAL RESOURCES,)
))
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v.)
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UNITED STATES ARMY CORPS)
OF ENGINEERS,)
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COLONEL VERNIE L. REICHLING JR.)
))
Defendants.)

Civil Action No. _____

Affidavit of Paul D. Parmenter

I, Paul D. Parmenter after being duly sworn, do hereby state that the following is based upon my personal knowledge and is true and accurate to the best of my recollection:

1. My name is Paul D. Parmenter, and I am the Director of the State Emergency Management Agency (“SEMA”) for the Missouri Department of Public Safety. In that capacity, I coordinate with other state agencies on state legislation relating to emergency preparedness, earthquake issues and floodplain management. I am responsible for the day-to-day operations of SEMA, which is housed in the Missouri Department of Public Safety under the Missouri Adjutant General's Office.

2. Since the flooding began in Southeast Missouri, I have been conducting SEMA’s emergency preparedness and disaster relief response effort.

3. I have had several opportunities to review the “Birds Point – New Madrid Floodway Operations Plan” (“Birds Point Plan”) and am familiar with it.

4. The Birds Point Plan calls for blowing up a portion of the Front Line Levee, which is located near Cairo, Illinois, so that flood waters can be directed into more than 130,000 acres of Missouri land when certain conditions are met.

5. According to the Birds Point Plan, the New Madrid Floodway “normally” will not be placed in operation until flood heights in excess of 60 feet on the Cairo gage are predicted.

6. The Birds Point Plan gives broad discretion to the president of the Mississippi River Commission (“MRC”). The president of the MRC, alone, will decide whether to intentionally breach the Front Line Levee when “absolutely essential” to provide authorized protection to all citizens.

7. As of April 26, 2011, the flood height was approximately 56 feet on the Cairo gage.

8. The National Weather Service predicts that the Mississippi River will crest, or peak, at a flood height of 61 feet on May 3, 2011.

9. The National Weather Service is basing its prediction, in part, on information controlled by the United States Army Corps of Engineers.

10. The United States Army Corps of Engineers controls the Barkley Dam, which is located upriver from the Front Line Levee. The Barkley Dam prevents water in the Kentucky River from flowing into the Ohio River. The Ohio River flows into the Mississippi at the confluence at Cairo, Illinois.

11. The United States Army Corps of Engineers has been releasing water from the Barkley Dam into the Ohio River, which has then flowed into the Mississippi River, causing the flood height to go up.

12. If the United States Army Corps of Engineers stops releasing water from the Barkley Dam, the flood height level at the Cairo gage may go down.

13. I believe the United States Army Corps of Engineers has failed to demonstrate that it is "absolutely essential" to intentionally breach the Front Line Levee.

14. I believe the United States Army Corps of Engineers has also failed to demonstrate that the Front Line Levee is in danger of overtopping, as the United States Army Corps of Engineers has not taken action to prevent the flow of water from the Barkley Dam into the confluence at Cairo, Illinois.

15. I believe the United States Army Corps of Engineers has failed to demonstrate that the integrity of the levee systems protecting communities in the New Madrid Floodway will be compromised if the Front Line Levee is not intentionally breached.

FURTHER AFFIANT SAYETH NOT:

Paul D. Parmenter
Director, State Emergency Management Agency
Missouri Department of Public Safety

STATE OF MISSOURI)
) ss.
COUNTY OF COLE)

Subscribed and sworn before me on this 26th day of April, 2011.



Notary Public

Printed Name

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI**

STATE OF MISSOURI, ex rel.)
Chris Koster, the)
MISSOURI STATE EMERGENCY)
MANAGEMENT AGENCY, and the)
MISSOURI DEPARTMENT)
OF NATURAL RESOURCES,)
)
Plaintiff,)
)
v.)
)
UNITED STATES ARMY CORPS)
OF ENGINEERS,)
MAJOR GENERAL MICHAEL J. WALSH,)
COLONEL VERNIE L. REICHLING JR.)
)
Defendants.)

Civil Action No. _____

Affidavit of Davis Minton

I, Davis Minton, after being duly sworn, do hereby state that the following is based upon my personal knowledge and is true and accurate to the best of my recollection:

1. My name is Davis Minton, and I am the Deputy Department Director, Operations, with the Missouri Department of Natural Resources. In that capacity, I manage the inspection and enforcement activities of the Department under the Missouri Clean Water Law, MO. REV. STAT. § 644 *et seq.*

2. I am familiar with the floodway area subject to the “Birds Point – New Madrid Floodway Operations Plan” (“Bird’s Point Plan”). The United States Army Corps of Engineers issued the Birds Point Plan in 1986.

3. The floodway area encompasses most of Mississippi County, Missouri and parts of New Madrid County Missouri. In all, the floodway area covers over 130,000 acres in Missouri, an area three times the size of the city of St. Louis.

4. The Birds Point Plan calls for using explosives to demolish a portion of the Front Line Levee so that flood waters can be directed into the floodway area when certain conditions are met.

5. In constructing the floodway area, the United States Army Corps of Engineers built two levees.

6. One levee, known as the Front Line Levee, follows closely along the path of the river over approximately 40 miles starting upstream at a point across the river from Cairo, Illinois, and ending just up river of New Madrid, Missouri.

7. Between these two cities, the river forms a wide arc.

8. The second levee, known as the Setback – Mainline Levee, is fairly straight and connects the two ends of the arc, creating an open area between the two levees that is about 30 miles long and, in places, more than ten miles wide.

9. More than 200 residents live in approximately 90 homes constructed within the floodway area with their pets and livestock. In addition, the floodway area is used for cropland.

10. The floodway area also has petroleum storage tanks, farm chemical storage buildings and LP-propane gas tanks.

11. If the United States Army Corps of Engineers demolishes a portion of the Front Line Levee as planned, the inundation of flood waters will flood the homes, buildings and cropland in the floodway area.

12. The flood water will also cause the discharge of agricultural chemicals, petroleum products, and LP-propane gas into the environment and cause those chemicals and products, along with sediment and other contaminants, to enter into waters of the state of Missouri.

13. Agricultural chemicals, petroleum products, and LP-propane gas are water contaminants, within the meaning of MO. REV. STAT. § 644.016(23).

14. Sediment is a water contaminant, within the meaning of MO. REV. STAT. § 644.016(23).

15. Based on the foregoing, I believe that demolishing a portion of the Front Line Levee will cause the United States Army Corps of Engineers to unlawfully discharge water contaminants into waters of the state, and to cause pollution of waters of the state or place water contaminants in a place reasonably certain to cause pollution of waters of the state, in violation of MO. REV. STAT. § 644.051.1(1) .

FURTHER AFFIANT SAYETH NOT:



Davis Minton
Deputy Department Director, Operations

STATE OF MISSOURI)
) ss.
COUNTY OF COLE)

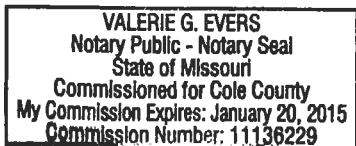
Subscribed and sworn before me on this 26 day of April, 2011.



Notary Public

Valerie G. Evers

Printed Name



My commission expires: January 20, 2015

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

State of Missouri, ex rel. Chris Koster, the Missouri Department of Natural Resources, and the State Emergency Management Agency

(b) County of Residence of First Listed Plaintiff Cole (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)

John K. McManus, Missouri Attorney General's Office, P.O. Box 899, Jefferson City, MO 65102; (573) 751-8370

DEFENDANTS

U.S. Army Corps of Engineers, Major General Michael J. Walsh, and Colonel Vernie L. Reichling, Jr.

County of Residence of First Listed Defendant (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

Attorneys (If Known)

Mike Parks, michael.j.parks@usace.army.mil

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff, 2 U.S. Government Defendant, 3 Federal Question (U.S. Government Not a Party), 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, PTF DEF, Incorporated or Principal Place of Business In This State, Incorporated and Principal Place of Business In Another State, Foreign Nation

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Table with 5 columns: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, SOCIAL SECURITY, FEDERAL TAX SUITS, BANKRUPTCY, OTHER STATUTES. Includes various legal categories like Insurance, Real Estate, Personal Injury, etc.

V. ORIGIN

- 1 Original Proceeding, 2 Removed from State Court, 3 Remanded from Appellate Court, 4 Reinstated or Reopened, 5 Transferred from another district (specify), 6 Multidistrict Litigation, 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): Federal Administrative Procedures Act, 5 U.S.C. § 701, et seq. Brief description of cause: Injunctive Relief to prevent intentional flooding of Birds Point-New Madrid Floodwa

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 DEMAND \$ CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE DOCKET NUMBER

DATE 4/26/11 SIGNATURE OF ATTORNEY OF RECORD [Signature]

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

State of Missouri)	
)	
)	
Plaintiff,)	
)	
v.)	Case No. 1:11-cv-00067-SNLJ
U.S. Army Corps of)	
Engineers, et al.)	
)	
Defendant,)	
)	

ORIGINAL FILING FORM

THIS FORM MUST BE COMPLETED AND VERIFIED BY THE FILING PARTY WHEN INITIATING A NEW CASE.

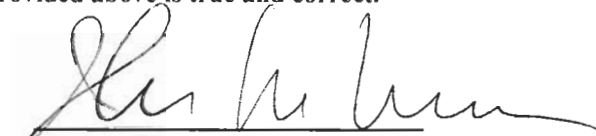
THIS SAME CAUSE, OR A SUBSTANTIALLY EQUIVALENT COMPLAINT, WAS PREVIOUSLY FILED IN THIS COURT AS CASE NUMBER _____ AND ASSIGNED TO THE HONORABLE JUDGE _____.

THIS CAUSE IS RELATED, BUT IS NOT SUBSTANTIALLY EQUIVALENT TO ANY PREVIOUSLY FILED COMPLAINT. THE RELATED CASE NUMBER IS _____ AND THAT CASE WAS ASSIGNED TO THE HONORABLE _____. THIS CASE MAY, THEREFORE, BE OPENED AS AN ORIGINAL PROCEEDING.

NEITHER THIS SAME CAUSE, NOR A SUBSTANTIALLY EQUIVALENT COMPLAINT, HAS BEEN PREVIOUSLY FILED IN THIS COURT, AND THEREFORE MAY BE OPENED AS AN ORIGINAL PROCEEDING.

The undersigned affirms that the information provided above is true and correct.

Date: 4/27/11


Signature of Filing Party