No. _____

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF MISSOURI, ATTORNEY GENERAL CHRIS KOSTER, MISSOURI DEPARTMENT OF NATURAL RESOURCES, AND MISSOURI STATE EMERGENCY RESPONSE AGENCY

Petitioners/Applicants,

v.

U.S. ARMY CORPS OF ENGINEERS, MAJOR GENERAL MICHAEL J. WALSH, and COLONEL VERNIE L. REICHLING JR.

Respondents.[1]

APPLICATION FOR TEMPORARY INJUNCTION PENDING CERTIORARI

To the Honorable Samuel A. Alito, Jr., Associate Justice and Circuit Justice for the Eighth Circuit:

Petitioners State of Missouri, its Attorney General and executive agencies, respectfully apply pursuant to Rule 22 for a temporary injunction barring the U.S. Army Corps of Engineers from artificially

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[1] Although relief is not sought against them, the States of Illinois and Kentucky have also intervened as defendants in this action and are being served with this Application.

breaching a Missouri levee – relief that was denied Friday by the U.S. District Court for the Eastern District of Missouri and Saturday by the U.S. Court of Appeals for the Eighth Circuit – until the matter is in a proper posture for and the State can prepare and file a petition for writ of certiorari. The underlying case questions the authority of the Corps to affirmatively destroy the levee – as opposed to allowing it to be overtopped, as it was designed to do and as the Corps' own plans provide. Arguably the legal questions that the petitioners have raised before the Eighth Circuit and would raise in a petition for writ of certiorari to this Court might survive the Corps' decision. But it appears that no relief would actually be available at that time to address the tragic impact of the Corps' action – and that in the absence of available relief, the basis for proceeding with the suit, including seeking certiorari, may dissipate or even disappear.

The question is certainly live at the moment. The U.S. Army Corps of Engineers is about to decide (or may have already decided, but not announced) to use explosives to breach the Frontline Levee along the Mississippi River. That would suddenly redirect a substantial part of the Mississippi River through Mississippi County, Missouri. To do so

prior to the river naturally overtopping the levee (if that ever happens) would violate the Corps' own Birds Point-New Madrid Floodway Operations Plan and Missouri's Clean Water Law – to which the Corps is subject under § 313(a) of the Clean Water Act ("CWA"), 11 U.S.C. § 1323(a). Within hours of the Corps' action, there will be no intact Levee. The damages to the State and its citizens will have already occurred, but as the Corps has already argued below, they will largely if not entirely be unable to obtain relief through the courts. Eliminating the possibility of relief effectively means that there will no longer be a basis for demanding judicial attention to the important questions of the extent to which the Corps is bound by its own Plan and the extent to which the Corps is required, like other federal agencies, to conform to state clean water laws. But most important, the people who live in and farm the land will have suffered irreparable damage.

BACKGROUND

Facts: the threat posed by the Corps' proposed action

The Birds Point-New Madrid Floodway ("the Floodway") encompasses most of Mississippi County, Missouri, and parts of New Madrid County, Missouri, and covers over 130,000 acres. The Floodway,

located just below the confluence of the Ohio and Mississippi Rivers, is bounded by two levees. One levee—the Front Line Levee—follows the western bank of the Mississippi River approximately forty miles, starting upstream at a point across the River from Cairo, Illinois, and ending just upriver from New Madrid, Missouri. Between these two cities, the River forms a wide arc. The second levee—the Setback Levee—is fairly straight and connects the two ends of the arc, creating an open area between the two levees that is about thirty miles long and is, in places, more than ten miles wide. (See maps attached to the District Court Decision, attached as Exhibit A, as Exhibits 1 and 2.) The Front Line Levee height is 62.5 feet; the Setback Levee is 65.5 feet. However, 16 miles of the 40 mile length of the Front Line Levee are 60.5 feet, and a 1,500 foot gap exists at the southern portion of the Front Line Levee to allow drainage and backflow into the Floodway.

The area inside the Floodway, although mostly farmland on which corn, soybeans, wheat, cotton, rice, and other crops are grown, is home to approximately 200 people and 90 residences. These farms use agricultural chemicals, petroleum products, and propane tanks in their normal operations.

The U.S. Army Corps of Engineers, which operates the Floodway and related flood-control structures, adopted the Birds Point-New Madrid Floodway Operations Plan in 1986. The Plan gives the Corps the discretion to place the Floodway into operation (in other words, to cause rather than merely permit the Front Line Levee to fail) when the flood heights are predicted to be in excess of 60 feet on the Cairo gage. Birds Point-New Madrid Floodway Operations Plan, October 1986, § I(B)(2)(a) (the "Plan") (attached as Exhibit C). According to the Plan, the Corps must use explosives to blow up the fuse plug on the Front Line Levee "only as absolutely essential to provide authorized protection to all citizens." *Id.* at § I(A). The Plan states that the Corps expects natural overtopping of the fuse plug to occur (something the Corps has not disputed, as a factual matter, in the current circumstances), and the Plan expressly contemplates that such natural overtopping will occur prior to even determining the "necessity to artificially crevasse the frontline levee." Id. at § II(A). The fuse plug is 60.5 feet tall. To naturally overtop, then, the flood height must be at least 60.5 feet.

Contrary to the Plan, the Corps now says that it will not wait for natural overtopping before deciding and then artificially causing the levee to fail. The Corps has said that it will artificially crevasse the Front Line Levee at the fuse plug when the Cairo river gage reaches 60.5 feet. At last report (10:00 a.m. CDT), the Cairo river gage read 59.76 feet.[2] The Corps has dispatched a barge loaded with explosives upriver from Memphis, Tennessee. The Corps announced on Saturday evening that the barge was docked at Wickline, approximately two hours from the Front Line Levee. Once the explosives barge arrives at the Front Line Levee, it will take 15-20 hours to mix and load the explosive charges into the Levee.

The Corps' detonation will cause over two miles of the Levee to fail immediately, sending a fifteen-foot wall of water across the Floodway. The Floodway will then divert 550,000 cubic feet per second of floodwaters—one quarter of the total flow of the Mississippi River—into the Floodway. The water will rush over the farmland, destroying homes and outbuildings, and taking the agricultural chemicals, petroleum tanks, diesel fuel, and propane tanks stored and in use with it. The

[2] The current and projected river levels are posted at http://water.weather.gov/ahps2/hydrograph.php?wfo=pah&gage=ciri2&view=1,1,1,1,1,1,1,1,1&toggles=10,7,8,2,9,15,6

intentional breach and resulting fifteen-foot wave of rushing water will have more drastic consequences than would the slower, natural overtopping contemplated in the Plan. The wall of water will scour the soil, destroying buildings and releasing farm chemicals, petroleum products and other water contaminants into the water coming into the Floodway and into waterways within the Floodway.

Procedure: Relief Denied by the District Court and the Court of Appeals

The State sought a temporary restraining order and preliminary injunction based on two counts: Count I, that the Corps will violate the State's Clean Water Law, and Count III, that if the Corps blows up the levee before it overtops, it is abusing its discretion by acting contrary to the 1986 Plan.

On Friday, April 29, the District Court denied the State's requests for a temporary restraining order and for preliminary injunction. (Copy attached as Exhibit A). As to Count I, the court noted that the State relied upon the waiver of sovereign immunity contained in § 313(a) of the Clean Water Act ("CWA"), 11 U.S.C. § 1323(a), but held that the Corps was exempt from that waiver under §511(a) of the CWA, 33 U.S.C. § 1371(a), because artificially breaching the levee was part of the

"authority of the Secretary of the Army … to maintain navigation." As to Count III, the court ruled that it was bound by the decision in *Story v. Marsh*, 732 F.2d 1375 (8th Cir. 1984), though that decision preceded and thus did not address the Corps' 1986 Plan that specified overtopping before use of explosives.

The State immediately appealed the denial of the preliminary injunction and asked the U.S. Court of Appeals for the Eighth Circuit to enter an injunction pending appeal. (Copy of order attached as Exhibit B). That court denied the request on Saturday, April 30, 2011.

AUTHORITY OF THE CIRCUIT JUSTICE

The authority of the Court to enjoin the Corps action is found in the All Writs Act, 28 U.S.C. § 1651: "the Supreme Court … may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." The authority of the Circuit Justice to award such relief was explicit in Rule 44.1 prior to the 1990 revisions, "Although this provision was omitted from Rule 23 in the 1990 revision, perhaps on the theory that the power of a Circuit Justice to grant a stay is sufficiently broad to encompass all injunctions, no Justice has suggested that this omission reduced the injunctive

power of a Circuit Justice." Gressman, et al, SUPREME COURT PRACTICE (9th Ed., 2007), at 853.

REASONS TO GRANT TEMPORARY RELIEF

The issues that the petitioners wish to address at the Eighth Circuit and if necessary, ultimately, in this Court, are important ones: Can the Corps of Engineers set out procedures and prerequisites in its flood control plan in specific terms, but then ignore them? And is the Corps, unlike other federal agencies, immune from state clean water laws?

In posing those legal issues, it is important to emphasize, first, that the question before the district court and the court of appeals was not whether the Front Line Levee could be breached and the Floodway used, but whether that could happen by artificial means before the overtopping that would occur as the natural result of the varying levee heights and as contemplated by the 1986 Plan on which Missouri and its citizens presumably could rely. Artificial action causes two problems: it presents the very real possibility that the Front Line Levee will be breached prematurely (*i.e.*, the "crevassing" will occur regardless of whether the water level ever actually reaches 61 feet); and

it causes more rapid flooding that increases the damage to the land, farms, and residents of the Floodway.[3]

That factual question leads back to the two legal issues: whether by affirmatively causing the failure of the Front Line Levee the Corps is operating outside its own authority; and whether the Corps is violating Missouri law to which Congress has made it subject.

As to the Corps' authority, the district court felt bound by *Story v. Marsh*, 732 F.2d 1375 (8th Cir. 1984). In *Story*, the Eighth Circuit held that the Corps' action in developing the Birds Point-New Madrid Floodway Operations Plan (the "Plan") was unreviewable because Congress did not establish standards for the development of the Plan. But in developing the Plan, the Corps imposed upon itself a standard by which to judge its actions. The Corps stated in the Plan, "[i]t is the intent that operation occur only as absolutely essential to provide the authorized protection to all citizens." (Exhibit C at § I(A)). The Plan also goes on to say that "[i]t is expected that natural overtopping of the

[3] As farmers testifying before the District Court also pointed out, an artificial breach makes the flood a "manmade" event, disqualifying them from recovering under the crop insurance they purchased long after the 1986 Plan was adopted and publicized. Because many or most sold flowage easements to the government many years ago, such insurance may be the only, very limited remedy to which they would be legally entitled, though the damages to their land could last for decades.

fuse plug section [which is 60.5 feet in elevation] will be allowed to occur *prior to determining* the necessity to artificially crevasse the frontline levee." (Exhibit C at § II(A) (emphasis added).) So the Corps has established that as a first step toward a decision, it will allow overtopping and only after overtopping occurs will it consider the necessity, at which time it will not detonate the levee unless absolutely essential. The district court refused to apply that standard, and the court of appeals refused relief.

Having provided the court with a standard, the Corps is now subject to the Administrative Procedures Act, 5 U.S.C. 701, et seq., and the district court, the court of appeals, and ultimately this court may review the decision if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A). Here the decision is both arbitrary, capricious, an abuse of discretion and in violation of both the Clean Water Act and the Missouri Clean Water Law. The decision is arbitrary, capricious, and an abuse of discretion an abuse of discretion not just because it departs from the 1986, but because there is no demonstrated threat to anyone caused by allowing

natural overtopping of the frontline levee before hastening the levee's destruction with man-made demolition.

We refer to the Missouri Clear Water Law, as well as the federal APA, because Congress, long after the Floodway was constructed, made federal agencies subject to such state laws:

> Each … agency of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants, an each officer, agent or employee thereof in the performance of his official duties shall be subject to and comply with, all Federal, 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 including the payment of reasonable service charges.

33 U.S.C. § 1323(a). The Eighth Circuit has in the past applied Missouri law to the Corps. *State of Missouri v. Department of the Army*, 672 F.2d 1297, 1304 (8th Cir. 1982). There, the court affirmed the district court's conclusion that § 1323 of the federal Clean Water Law subjects the Corps to state water quality laws if the Corps is causing the discharge or runoff of pollutants. *Id.* at 1304.

Here, no one disputed that destroying a segment of the Front Line Levee will immediately result in the inundation of flood waters that will directly cause the discharge or runoff of pollutants, including farm

chemicals and other contaminants into waters of the state. The Corps is effectively redirecting runoff, caused by excess rainfall, into an area where chemicals and other pollutants are present. The direct cause of that activity will be pollution of waters of the state and potential harm to Big Oak Tree State Park. This action fits squarely within the definition of "runoff of pollutants" as that term is used in 33 U.S.C. § 1323.

And no one seriously disputes that causing such runoff violates Missouri's Clean Water Law. Section 644.051.1(1), Mo. Rev. Stat. (2000), of the Missouri Clean Water Law provides that 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. Section 644.016(14) of the Missouri Clean Water Law defines "person" to include any agency, board, department, or bureau of the federal government. Section 644.016(16) of the Missouri Clean Water Law 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.

And § 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.

Evidence at the district court hearing was unequivocal: flooding will move great amounts of silt, sediment and debris through a flood plain; the amount moved will be increased by the sudden release caused by an artificial breach; the material moved and deposited elsewhere will include herbicide and fertilizer residues, and stored chemicals customarily used in farming operations also move through a floodplain during flood events. It will affect petroleum storage tanks, farm chemical storage buildings, and LP gas tanks. Pollutants will flow into

the "waters of the state" that would remain in place if the artificial breach did not take place.

Despite the apparent violation of Missouri's Clean Water Law, the the district court denied relief. It did so based on its reading and application of an exception to the waiver of immunity found in § 1323. Section § 1371(a)(2)(a) exempts from the state law not flood control, but navigation: "This chapter shall not be construed as . . . (2) affecting or impairing the authority of the Secretary of the Army (a) to maintain navigation . . . . " There are two theories under which this "navigation exception" could apply – but neither actually works here.

The first theory is that the exception to the waiver applies because the Floodway is not just a flood control but also a navigation project, *i.e.*, a project authorized by Congress to enhance or preserve navigation on the Mississippi. But that was not the case. The Birds Point – New Madrid Floodway Project was first authorized by the Flood Control Act of 1928 (the "1928 Act"), 45 Stat. 534, and later by the Flood Control Act of 1965 the "1965 Act"), 79 Stat. 1079. In the preamble to the 1928 Act, Congress identified "the project" as one of "the flood control of the Mississippi River in its alluvial valley." Unlike the 1928 Act, other

Congressional authorizations have specified both flood control and navigation as the primary purposes of the projects. Compare the preamble language quoted above with the following language of the 1944 Flood Control Act, ch. 665, 58 Stat. 887, under which the Corps constructs and operates "works of improvement, for navigation or flood control."

This and other language in the 1944 Flood Control Act was later interpreted as by this Court as identifying both navigation and flood control as the primary purposes of that Act. *ETSI Pipeline Project v. Missouri*, 484 U.S. 295 (1988). A similar finding has not been made with respect to the 1928 Act authorizing the Floodway Project. While various documents involving the Floodway Project may recite benefits from the project to navigation, the language of the statute enacted by Congress shows that the purpose of the project – and, more importantly, the sole authority granted by Congress to the Corps with regard to the Floodway – was for flood control. Missouri's Complaint is intended to prohibit imminent violations of the Missouri Clean Water Law from the discharge or runoff of pollutants into its waters caused by the Corps'

intentional flooding activities under its flood control authority, not to affect water levels needed for navigation.

Under the Corps' logic, any action taken by the Corps as part of any project authorized for flood control that has any impact on navigation will not be subject to state clean water laws. Because the Corps' major flood control assignments are limited, quite logically, to those on or affecting "navigable waters," the navigation exception, as the Corps interprets it, swallows the "subject to state environmental law" rule. If the intent of Congress was to create such a broad exception to Clean Water Act's waiver of sovereign immunity for flood control projects, it would have used said "navigation or flood control" in 33 U.S.C. § 1371(a)(2)(a). The Corps should not be allowed to pollute state waters by now characterizing the project as a navigation project, when the Congressional authority plainly says otherwise.

The second theory, the one that seems to have persuaded the district court, is that the Corps is not subject to state law when as a matter of fact, a particular flood control decision affects or impairs navigation – even if that act takes place in what is purely a flood control project. But that theory doesn't work here either. There is simply no

evidence that beginning with an artificial breach would affect navigation any differently than would following the 1986 Plan and waiting for the lower, Front Line Levee to first overtop.

The district court relied on the testimony of David Berretta – who did, indeed, agree with his counsel that not blowing the levee would impair navigation because it would have "the possibility of creating cutoffs or the river taking a short circuit." (Exhibit A at 9). Yet the Floodway Project is, by design, a cutoff that directs the River through a short circuit from the upper fuse plug through the Floodway to the lower fuse plug; the possibility of the River creating even a permanent cutoff exists regardless of whether the breach in the levee is artificial or natural. Mr. Berretta said that flooding can also cause silting in of the navigational channel. But on cross-examination, Mr. Berretta conceded that silting – like cutoffs and short circuits – will result from the operation of the Floodway regardless of whether the Corps follows the 1986 Plan and waits for overtopping or goes ahead and causes the breach in advance.

What the Corps proposes to do is not to protect or otherwise affect navigation. As Mr. Berretta conceded on cross, and confirmed in

redirect, the demolition of the levee at most moves or reschedules, but does not eliminate or event reduce, any navigational problems caused by flooding. As a consequence, applying state regulation to the demolition of the Front Line Levee does nothing to interfere with the Secretary's authority to maintain navigation.

Again, the questions that the petitioners would raise in a petition for writ of certiorari (if, after a decision by the court of appeals on the merits, there is still a legal reason and a factual predicate for doing so), are (1) whether the Corps' discretion is limited by the plans that it adopts, *i.e.*, whether states and their citizens can actually rely on those plans when making decisions themselves, or in the alternative whether the Corps has unbridled discretion to abandon those plans; and (2) whether the navigation exception swallows the waiver rule, eliminating not just for the states along the Mississippi River but other states where the Corps operates (or even for states downstream of where the Corps operates) the ability to enforce their clean water laws with regard to Corps actions. As a practical matter, the District Court, now with the implicit endorsement of a "United States court of appeals[,] has decided an important question of federal law that has not been, but

should be, settled by this Court that merit this Court's review." Supreme Court Rule 10(c). Absent relief from this Court, shortly there may not be a "case or controversy" remaining in which those questions can be answered to the benefit of the State of Missouri and its citizens.

CONCLUSION

For the reasons stated above, the Corps should be barred from artificially breaching the Front Line Levee until the petitioners can prepare and the Court can consider a petition for writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 1, 2011, the foregoing was delivered via electronic transmission and that it will be mailed on May 2, 2011 to the following:

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