

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

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

Plaintiff,

vs.

Civil No. 11-CV-00067-SNLJ

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

Defendants.

**INTERVENOR’S RESPONSE TO MOTION FOR TEMPORARY
RESTRAINING ORDER AND PRELIMINARY AND PERMANENT INJUNCTION**

NOW COMES the State of Illinois, by the authority of LISA MADIGAN, the Attorney General of the State of Illinois and pursuant to Federal Rule of Civil Procedure 24(c) submits this Response to the Motion for Temporary Restraining Order and Preliminary and Permanent Injunction.

The State of Missouri seeks to restrain the Army Corps of Engineers from implementing the Birds Points – New Madrid Floodway Operations Plan. The State of Illinois seeks to intervene to oppose this action and to support the defense of the Army Corps by the Department of Justice. This Response is intended to plead the claim or defense for which intervention is sought and to satisfy the substantive requirements of Federal Rule of Civil Procedure 24(c).

First, the State of Illinois desires to adopt the Response filed on behalf of the Army Corps

by the Department of Justice and the arguments therein regarding the threat of harm posed to the State of Missouri; the balancing of interests, including the injury posed by a grant of injunctive relief; the likelihood that the State of Missouri might prevail on the merits; and the public interest.

Secondly, the State of Illinois respectfully suggests that this Court be mindful of the previous litigation that sought to enjoin the Army Corps from crevassing the frontline levee of this same floodway. In *United States v. 1426.5 Acres of Land, More or Less, Situate in Mississippi and New Madrid Counties*, 732 F.2d 1375 (8th Cir. 1984), the injunction issued against the Army Corps was reversed. The Court found that the 1983 version of the Birds Points – New Madrid Floodway Operations Plan “clearly falls within the congressional authorization” regarding “the raising of the levees and the artificial breaching of the levees at any point when the water reached 58 feet on the Cairo gauge with a prediction that the water might exceed 60 feet.” 732 F.2d at 1380-81. This appellate opinion emphasized the broad scope of this authorization and the necessity of relying upon the technical expertise of the Army Corps:

However, Congress provided no additional standards for determining whether and where to crevasse the levee; it simply authorized the crevassing at any point on the frontline levee. Congressional delegation in this instance is therefore very broad in scope; furthermore, the delegation requires the Corps to exercise considerable discretion in a highly technical area. In such circumstances, the courts have little, if any standards against which to assess the agency decision, thus rendering the substance of the agency action largely unreviewable.

Id. at 1381. This Court must also accord the Corps a high degree of deference regarding any decision to implement the Floodway Operations Plan.

Lastly, the claim regarding the potential release of agrichemicals and other pollutants is speculative at best. The State of Missouri even concedes that “there is no way to judge the

breadth and depth of these effects without further information.” Missouri Memorandum at page 4. The performance of an additional Environmental Impact Statement by the Corps should not be construed as any informational deficiency. It is more relevant to determine whether the State of Missouri has put into place emergency plans to prevent environmental releases of contaminants from identified sources, e.g. agricultural operations, in the event that the Birds Points – New Madrid frontline levee must be crevassed.

WHEREFORE, the State of Illinois respectfully requests that this Court DENY the Motion for Temporary Restraining Order and Preliminary and Permanent Injunction.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. LISA MADIGAN,
Attorney General of the
State of Illinois

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

STATE OF MISSOURI)	
)	
Plaintiff,)	
)	
vs.)	No. 11-CV-00067-SNLJ
)	
UNITED STATES ARMY CORPS)	
OF ENGINEERS,)	
)	
Defendant.)	

CERTIFICATE OF SERVICE

I hereby certify that on April 28, 2011, I electronically filed the foregoing Intervenor’s Response to Motion for Temporary Restraining Order and Preliminary and Permanent with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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and I hereby certify that on April 28, 2011, I mailed by United States Postal Service, the document to the following nonregistered participant:

None

Respectfully submitted,

By: /s/Rex L. Gradeless
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