

## MEMORANDUM

TO: Brigadier General David A. Fastabend

FROM: Joseph P. Bindbeutel, Chief Counsel, Environmental Protection Division  
William J. Bryan, Deputy Chief Counsel  
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DATE: February 28, 2002

RE: **Master Manual Revised Draft Environmental Impact Statement**

We have carefully reviewed the critical components of the Revised Draft Environmental Impact Statement (RDEIS) and intensively researched the legal issues presented by the RDEIS. We support “smart engineering” to develop the habitat necessary for the pallid sturgeon, interior least tern, and piping plover. We do not support Gavins Point Flow changes or reservoir level increases as contained in the alternatives to the Current Water Control Plan (CWCP). The supposed habitat benefits (as little as 69 acres for the shorebirds) are not worth the risks and harm to Missourians.

### **Executive Summary of Comments**

The RDEIS is legally inadequate for many reasons. First, the discussion of alternatives fails to sufficiently consider reasonably foreseeable future impacts including depletions and out-of-basin transfers of Missouri River water. Second, “adaptive management” is contrary to NEPA’s “hard look” and public participation requirements. Third, the public comment period was not meaningful because it opened before the RDEIS was available to the public, and closed while several important studies were still underway and thus were not made available for public comment at all. Fourth, increased pool levels caused by all five of the alternatives to the current water control plan would inundate critical habitat for the interior least tern and piping plover around the reservoirs and thus constitute an unlawful taking of an endangered species by habitat modification for which there is no

incidental take permit available under the BiOp in violation of 16 U.S.C. 1538(a)(1)(B). Fifth, increased spring releases threaten to condemn prime farmland along the Missouri River and its tributaries due to flooding, increased risk of flooding, impeded interior drainage, and practical restrictions on the actual use of farmland all without just compensation in violation of the Fifth Amendment. Sixth, the RDEIS reflects inadequate consideration of Mississippi River impacts (an important study is still ongoing, as explained above). Seventh, the RDEIS fails to account for power supply impacts on the lower river related to more frequent water shortages stemming from the "low summer flow" feature. Finally, the alternatives under consideration would jeopardize congressionally-authorized project purposes, flood control and navigation, and accordingly, those alternatives are *ultra vires*. These comments and others are expressed in greater detail in the following pages.

#### **National Environmental Policy Act (NEPA)**

Congress enacted NEPA in 1969 and President Nixon signed it into law on January 1, 1970. NEPA establishes a policy goal for the nation. NEPA does not require a federal agency to make a particular decision in any case, it only requires a federal agency to consider the ramifications of certain actions. This has been interpreted by the courts as the "hard look" requirement. See, e.g., Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350, 109 S.Ct. 1835, 1846, 104 L.Ed.2d 351 (1989). A federal agency must take a hard look at the environmental impacts of all "major federal actions significantly affecting the quality of the human environment." See 42 U.S.C. § 4332. The policy goal of the nation, then, is not necessarily for every federal agency to make every decision "green," although we are not implying that would be a good or a bad policy *per se*. Instead, the policy goal is simply for federal agencies to consider the potential environmental consequences before acting.

Congress described the purpose of NEPA with these words:

To declare a national policy which will *encourage* productive and enjoyable harmony between man and his environment; to *promote*

efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; *to enrich* the understanding of the ecological systems and natural resources important to the Nation and to establish a Council on Environmental Quality.

42 U.S.C. § 4321 (emphasis added). Congress did not intend for NEPA to be a panacea for all environmental maladies. Instead, Congress simply wanted to encourage and promote environmental awareness, particularly in the deliberative processes of federal agencies.

NEPA provides a check to ensure that federal agencies follow the policy goal of the nation to take environmental considerations into account. The "detailed statement" requirement is designed to ensure some accountability. See 42 U.S.C. § 4332(2)(c). For every "major federal action significantly affecting the quality of the human environment" the responsible federal agency must prepare a detailed statement, commonly referred to as an environmental impact statement, which shows that the agency fully considered the potential environmental consequences of a particular proposed action in the decision-making process.

The detailed statement requirement is procedural and "action-forcing". See Robertson, 490 U.S. at 350, 109 S.Ct. at 1846. It is designed to encourage public input and ensure the accountability of the agency about to make an important decision. See id., 490 U.S. at 349, 109 S.Ct. at 1845. Basically, the detailed statement must explain how the alternatives in it and decisions based on it will or will not achieve the policy goal of NEPA. 40 CFR 1502.2(d). The detailed statement must be made available for public comment. 40 CFR 1506.6. This is usually done with the publication of a DEIS, or in this case, a Revised DEIS (RDEIS), with the "R" reflecting the revision of the Corps' 1994 DEIS, which never reached the stage of a final EIS.

The opportunity for public comment must allow the time for reflection and study which is necessary for interested parties to make meaningful comments. See, e.g., State ex rel Siegelman v. Environmental Protection Agency, 911 F.2d 499, 504 (11th Cir. 1990) (opportunity to comment pursuant to NEPA means a meaningful opportunity to comment). The federal agency must evaluate

the comments at the close of the comment period, and not before. See 40 CFR 1503.4. If the agency makes substantial changes in the proposed action or significant new circumstances or information is brought to the attention of the agency, then the agency must prepare a Supplemental DEIS before it publishes an environmental impact statement (EIS). Otherwise, the agency must cause a final EIS to be prepared taking into account the comments received in response to the DEIS. 40 CFR 1503.4(b). The process repeats itself with respect to the EIS and then, and only then, can the federal agency render a final decision regarding the proposed action. The agency must prepare a Record of Decision (ROD). 40 CFR 1505.2. The ROD is subject to judicial review as a final agency action under the Administrative Procedure Act (APA), 5 U.S.C. § 702.

### **Substantive NEPA Comments**

1. Out-of-basin transfer impacts: The impact of flow management changes as proposed by the RDEIS would be compounded by future depletions of Missouri River water. Several planned out-of-basin transfers would take Missouri River water completely outside of the basin, never to meet any project purposes or provide any benefits to the basin. Yet, the RDEIS fails to adequately contemplate or analyze the scope and breadth of these depletions, which are much closer to becoming a reality than many realize. For instance, there has been no analysis of depletions whatsoever with respect to the Modified Conservation Plan (MCP) alternative.

For years, upstream interests have pursued a plan known as the Garrison Diversion, which has been labeled the granddaddy of wasteful water projects by national environmental and tax-relief groups. The passage of federal legislation, the Dakota Water Resources Act of 2000, has brought the Garrison Diversion to the brink of realization by making the Northwest Area Water Supply Project possible. This is by no means the only out-of-basin transfer contemplated by the larger Garrison project. The United States Congress continues to fund this boondoggle. On October 30, 2001, a House-Senate conference committee approved more than \$70 million dollars in funding for North Dakota water projects, including \$27.5 million for the Garrison Diversion. But even if federal

funding should fail, the State of North Dakota has set aside about \$382 million dollars from its tobacco settlement proceeds to fund water development projects. *See* N.D. CENT. CODE, § 54-27-25 (2001).

Under the National Environmental Policy Act, the Corps must consider reasonably foreseeable future developments. Garrison and its progeny are such developments, yet the RDEIS virtually ignores the impacts of these depletions. The Corps should conduct a more thorough depletion analysis in order to comply with NEPA.

2. Adaptive Management: Recognizing its NEPA responsibility to prepare an EIS regarding major federal actions significantly affecting the quality of the human environment, the Corps published its RDEIS for potential revisions to the Master Manual. Indeed, a change in the management of the Missouri River is a major federal action. However, the RDEIS proposes a deviation from the Congressionally-mandated NEPA process.

All the Master Manual alternatives in the RDEIS include a concept called Adaptive Management. This feature of the RDEIS could foreclose future meaningful public comment on Missouri River management. In fact, Corps publications regarding the RDEIS leave the distinct impression that the Corps believes it is employing Adaptive Management already. *See* RDEIS Summary at 4-5.

One can try to define Adaptive Management, but it is difficult. It is impossible, however, to define with any certainty what will result from Adaptive Management. With Adaptive Management, the Corps will be able to “test hypotheses” and “explore changes” in the operation of the Missouri River system. Indeed, its language is the language of uncertainty with jargon like: “flexibility,” “adapt,” “operational changes,” “on average,” and “as conditions allow.” In one word, vague. The Corps envisions future management of the river under this new scheme by working with the USFWS through the Agency Coordination Team. Perhaps the Corps will render these decisions subject to public participation, peer review, and judicial review. However, if decisions are made

which constitute a “major federal action,” the Corps will violate NEPA if it attempts to use Adaptive Management as an excuse for circumventing the NEPA process. The Corps must also consider that it is an agency, and when it makes a “final decision,” that decision is subject to review under § 5 of the APA. 5 U.S.C. § 702.

The RDEIS forecasts a murky future after a new Master Manual is in place. We are concerned that the 2002 Master Manual may be the last Master Manual in the eyes of the Corps. In the future, if the Corps can simply make operational changes as “new information becomes available,” it may not want to engage the public in this process again. The Corps appears to suggest that Adaptive Management might be applied to the problem of ecosystem restoration, funneling public involvement through a stakeholder group. RDEIS § 6.5.7. The establishment of a stakeholder group raises a host of questions. While delegation of decision-making power to a stakeholder group may be appealing to some, it would likely constitute an unlawful delegation of agency authority. A stakeholder group may be subject to the application of the Federal Advisory Committee Act. Will consensus be supported by science? What is the measure of success? These are questions the RDEIS fails to either ask or answer. While the Corps may prefer the incrementalism of Adaptive Management to the NEPA/APA process, incrementalism and NEPA/APA are at odds. NEPA and the APA offer certainty, openness, fairness, accountability and predictability.

3. Public Comment: The Corps did not provide the public with a meaningful opportunity to comment. Although the Corps ostensibly established a comment period of 6 months, the Corps has not provided the public with sufficient time to study this matter and make meaningful comments. While we received a copy of the 29 page Summary of the RDEIS (“RDEIS Summary”) soon after its August 2001, publication date, we did not obtain a complete copy of the RDEIS until the day of the first Public Workshop/Public Hearing in Missouri, which took place on November 1, 2001, in St. Joseph. Even then, the two volume RDEIS we procured was the only copy the Corps had on hand that day. While the Summary touts a 6-month public comment period following

publication of the RDEIS, running from August 2001, to the end of February, 2002, as a practical matter the comment period has been much shorter due to the unavailability of the RDEIS document. The nation's policy goal to ensure informed decision-making cannot be achieved with such a brief comment period in the face of such complex and far-reaching issues. Considering the complexity of the issues, coupled with the fact that the Corps published the RDEIS much later than it promised, the opportunity for comment which the Corps provided is inadequate to achieve the goals of NEPA. The comment period should remain open at least another ninety (90) days. This would not be an unusual time frame for a project of this magnitude. After all, the Corps took years to assemble the data. Requiring the public to digest and intelligently comment on the RDEIS in a few short months does nothing to accomplish the goals of NEPA.

Contrary to popular opinion, there is no deadline for concluding this review.<sup>1</sup> The Corps has allowed an arbitrary date set by the U.S. Fish & Wildlife Service (USFWS) to rush this process to a conclusion. The origin of this date is the USFWS' November 2000, Biological Opinion (BiOp) on the Corps' current operation of the river. The BiOp sets March 2003, as the date by which a revised Master Manual must be implemented to preclude jeopardy of three species, the interior least tern, the piping plover, and the pallid sturgeon. The Corps believes it must comply with the BiOp by meeting this "deadline." *See* RDEIS Summary at 5. The legislation which gives rise to the BiOp is the Endangered Species Act (ESA), yet nothing in the ESA requires the Corps to respond to a BiOp within a certain period of time. However, the effect of the USFWS' arbitrary deadline is to force the Corps to rush the process to comply with several intermediate deadlines under NEPA so that it can make the March 2003 deadline set by the USFWS. The Corps has borrowed time from the public simply to meet this arbitrary deadline.

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<sup>1</sup>Various stakeholders have been informed by federal officials that a "court-imposed deadline" requires the Corps to act. We have attempted to ascertain the existence of such a court order, and have determined that none exists.

One example of the way in which the rush to respond to the BiOp has harmed the public's ability to participate are the several studies the Corps is presently undertaking in response to stakeholder requests for information. These studies, which should provide insight into impacts on tern and plover habitat, navigation on the Missouri and Mississippi rivers, dredging costs, conflicts with a Biological Opinion regarding the Mississippi River, and power at risk, will not be completed until after the RDEIS comment period has closed. This information should be made available to allow the public a meaningful opportunity to comment before a decision is reached by the Corps.

4. "Take" under the Endangered Species Act: The ESA makes it unlawful for any person to "take" an individual member of an endangered species. 16 U.S.C. 1538(a)(1)(B). "Take" has been broadly interpreted by the Service and the courts to include actions that result in modification of habitat for an endangered species. See, e.g., Sierra Club v. Yeutter, 926 F.2d 429 (5<sup>th</sup> Cir. 1991) (even-aged forest management modified habitat and resulted in a "take" of red cockaded woodpecker); Palila v. Hawaii Dep't of Land and Natural Resources, 649 F.Supp. 1070 (D. Hawaii 1985)(introduction of exotic species, mouflon sheep, resulted in habitat modification and a "take" of endangered palila). In this instance, the Corps is faced with both habitat modification threats under the alternatives to the CWCP, and the reasonable and prudent alternative suggested by the Service provides no relief since these threats were not addressed in the BiOp.

Construction of the reservoirs, obviously, resulted in modifications to habitat relied on by the pallid sturgeon, interior least tern, and the piping plover. The walleye, like the mouflon sheep that resulted in a modification of the endangered palila's habitat, is not a species native to the Missouri River ecosystem. Management changes that are intended to benefit exotic species rather than native ones must be given strict scrutiny under the ESA's "take" provision.

Certain reservoir management strategies evident in the alternatives are intended, at least in part, to benefit the upstream reservoir walleye fisheries. Whether these changes may result in a "take" in violation of the ESA by modifying the habitat of the pallid sturgeon, interior least tern or

pipng plover should be evaluated in further section 7 consultations. For example, the alternatives under consideration all include higher reservoir levels and thereby would inundate habitat for the interior least tern and critical habitat for the piping plover adjacent to the reservoirs.<sup>2</sup> This habitat loss, no matter how modest, no matter what the duration, constitutes a “take” in violation of the ESA irrespective of any incidental take below Gavins Point. Accordingly, these alternatives should be subject to further section 7 consultation and must be given equally strict scrutiny.

5. Farmland takings: The Corps did not consider the substantial devaluation of prime farmland adjacent to the Missouri River that will result from the ill-conceived "spring rise." When the federal government raises a navigable stream like the Missouri River and maintains it continuously at that level, the Government is liable "for the effects of that change (in the water level) upon private property beyond the bed of the stream." See United States v. Kansas City Life Insurance Co., 339 U.S. 799, 800-801 (1950)(change in river level caused by lock and dam is an unconstitutional taking of flooded Missouri farm, including damages caused solely by impeded interior drainage); United States v. Dickinson, 331 U.S. 745, 749-751 (1947)(raise in river level is an unconstitutional taking of the flooded land and the land which washes away as a result); and United States v. Cress, 243 U.S. 316 (1917)(an improvement on a navigable stream causing flooding on a non-navigable tributary is an unconstitutional taking of land along tributary). These concerns should have been addressed in the RDEIS.

6. Mississippi River impacts: The impacts of flow management changes on the Missouri River are important to Mississippi River states because the Missouri River provides as much as 60% of the Mississippi River’s flow at times. A reduction in this flow support to Mississippi River

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<sup>2</sup>While the Service has taken steps to designate critical habitat surrounding the reservoirs for the piping plover, including substantial acreage far in excess of the paltry 69 acres attributed to the potential Gavins Point flow modification alternatives, it has not taken steps to designate critical habitat for the interior least tern or pallid sturgeon. Presumably, what is critical habitat for the piping plover is likely critical habitat for the tern as well.

navigation could be enormously costly. Case in point: the reach between St. Louis and Cairo, Illinois, is a transportation bottleneck, particularly during low flows.

How do flow management changes impact the bottleneck? The RDEIS fails to answer this question for several of the alternatives. However, the Missouri Department of Natural Resources has analyzed the Modified Conservation Plan's (MCP) impact on the Mississippi River. It concluded that low flows on the Missouri River due to the MCP will coincide with low water on the Mississippi River at a frequency that translates into an impact on Mississippi River flows in 30 out of every 100 years. In stark contrast, the present Master Manual impacts Mississippi River flows in only 7 out of every 100 years.

Some question the Corps' legal authority to manage the Missouri River for the incidental benefit of the Mississippi River, yet the Corps' authority is clear. First, the authorizing legislation gives the Corps authority to operate the Missouri River mainstem reservoir system to support navigation. The Pick-Sloan Plan does not specify that the Corps' authority is limited to supporting Missouri River navigation. Moreover, the Flood Control Act of 1944 speaks about the "Nation's rivers," not just the Missouri River. *See* 33 U.S.C. § 701-1. Second, the government has consistently taken the position that the reservoirs can be used to support navigation on both rivers. The legislative history bears this out. *See, e.g.*, H.R. Doc. 475, pp.17-18, 78th Cong., 2d Sess. (1944). Furthermore, in 1952, a joint working group from the Bureau of Reclamation, Regions 6 & 7, and the Missouri River Division published a report on the operation of the mainstem reservoirs. At page two, the report reflected the consensus that the reservoirs are to be operated for "the control of floods on the Missouri River below Fort Peck Dam and to lower flood crests on the Mississippi River; ...[and] to provide adequate controlled releases for navigation on the Missouri River and connecting inland waterways[.]" The Corps has relied on the work group's report as recently as 1990.

Flow reductions could also have disastrous impacts on fish and wildlife on the Mississippi. For example, reduced flows require more frequent channel dredging, and this may affect the

endangered pallid sturgeon. The potential for a conflict between the pallid sturgeon and Mississippi River commerce is more likely under Master Manual alternatives that provide for a low summer flow or split navigation season. However, the RDEIS offers only a passing glance at these impacts. Although the organizational structure of the Corps geographically divides division responsibilities at the confluence of the Missouri and the Mississippi, this is not a justification for a clear failure to examine the environmental impacts of the proposed alternatives which occur outside of the Missouri River basin.<sup>3</sup>

The RDEIS does not correctly or adequately attempt to evaluate the impacts of the various alternatives on the Mississippi River system. There is an undeniably interdependent relationship between the Missouri and Mississippi Rivers which the RDEIS fails to acknowledge. The management of the Missouri River can have drastic impacts on the Mississippi River as the Missouri Department of Natural Resources' (MDNR) evaluation of the Mississippi River modeling has shown. These impacts must be correctly evaluated and discussed in much greater detail than in the RDEIS. They must be evaluated for each alternative. The technical errors made by the Corps in its analysis, as detailed by MDNR, must also be corrected. A Supplemental RDEIS should be used to address these shortcomings of the RDEIS.

Ordinarily, a Supplemental RDEIS might be a piecemeal document that only addresses a particular issue like Mississippi River impacts or interior drainage. In this case, a piecemeal document that only addresses selected issues will not fulfill the goals of NEPA. The proposed action is far too broad and complex to tackle one issue at a time. To truly evaluate the cumulative effect of impacts, a single RDEIS must be subjected to public comment which adequately addresses all the issues. Otherwise, the public will not have any opportunity to comment on the cumulative impacts

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<sup>3</sup>The Corps should look to the Mississippi River for strategies to protect endangered species. The St. Louis District has a wildly successful "smart engineering" program that demonstrated that the needs of native river species and humans can be met. See Environmental River Engineering on the Mississippi, USACE, St. Louis District.

of the proposed action and the Corps will not have the benefit of the public's collective wisdom to make its difficult decision.

Throughout this document, when we refer to a Supplemental RDEIS, we mean a second draft of the RDEIS which comprehensively and accurately addresses all the issues, not just particular issues singled out by the Corps for piecemeal treatment in a Supplemental RDEIS.

7. Power supply impacts: The RDEIS fails to provide the public with an understandable and detailed analysis about the alternatives' effect on powerplants that depend on Missouri River water for cooling and discharging heated water. The Corps' analysis assumes that these 25 powerplants will simply decrease power production to avoid violating their NPDES permits. This is a problem with an answer that is not as simple as the RDEIS assumes. Utilities have offered and will offer the Corps with their perspectives on this problem. Many utilities may try to retrofit their facilities at significant cost. Costs may be passed along to electric ratepayers. Retrofits may not be finished before the first summer low. Exorbitant replacement power costs or blackouts could result, either during retrofitting or prior to it. Utilities may find that they have no choice but to violate their NPDES permits, harming Missouri River fish and wildlife, contrary to the goals of the BiOp and the Corps. The Corps must consider these potential impacts to the environment, yet the RDEIS does not even consider that there might be impacts other than decreased power production and reduced utility profits from these lost sales.

8. Interior drainage and agricultural impacts: The RDEIS does not adequately consider the impacts of the various alternatives on interior drainage and Missouri agriculture. As is evident from the many hearings held by the Corps, interior drainage is a primary concern of the people of Missouri who took the time to attend a hearing and put in their two cents worth. In fact, this comment was not restricted by state lines and was heard in several states. Even the South Dakota Legislature has objected. *See* SD H.C.R. 1002, 77<sup>th</sup> Leg., Reg. Sess. (2002). While the studies conducted by the Corps at a few selected locations indicate that impacts would be greater under the

Gavins Point alternatives, these studies do not inform the public what the total expected damages will be, nor do they tell a farmer what he can reasonably expect in his reach of the river. Executive Order 12630 requires federal agencies to conduct a takings analysis, yet we see no evidence of such an analysis in the RDEIS.

9. Tributary flood control impacts: The RDEIS does not consider the impact the proposed action will have on tributary flood control projects like Harry S. Truman Dam and Reservoir here in Missouri, or the Kansas River Reservoirs in Kansas. The Corps obtained flowage easements on private land adjacent to the Truman project based on the probability that the adjacent land would occasionally flood because of system operations. The Gavins Point alternatives change the probability of flooding-- which the private landowners bargained for with the Corps to obtain the necessary easements. Consequently, private landowners may be deprived of the benefit of the bargain they struck with the Corps. Ironically, the Corps may be just as responsible for such a deprivation as it was for the initial, authorized and compensated taking. This issue should have been considered.

10. NEPA policy goals: The RDEIS does not adequately explain how the alternatives considered in it and decisions based on it will or will not achieve the policy goals of NEPA. 40 CFR 1502.2(d). This should have been addressed.

11. Other alternatives: The RDEIS does not consider reasonable alternatives not within the jurisdiction of the Corps but which may more effectively remedy the need to which the Corps says it is responding. 40 CFR 1502.14(c). The Corps, which is not intended to be the federal expert in fish and wildlife management, has identified the preservation of certain protected fish and bird species as a need. The Corps is considering manipulating river flows in hopes of accommodating these species. The Corps has not considered any alternatives that do not simply alter the water flow regimen.

In fact, flow manipulation may be counterproductive. A recently completed USGS census indicates that fluctuating water levels on rivers can be devastating to the piping plover. While piping plovers are declining elsewhere, the census indicated dramatic increases along the Missouri River, possibly attributable to favorable habitat conditions. Yet the Gavins Point alternatives propose to change these habitat conditions. Moreover, low lake levels appear to be favorable to the birds, and higher lake levels are part and parcel of all of the alternatives except the CWCP.

Changing river flows is not the only way to try to help the pallid sturgeon, interior least tern, and piping plover. Captive breeding programs, like Missouri's successful pallid sturgeon program, combined with off-channel habitat improvements and restorations, are not even considered in the RDEIS. They are the mainstays of conservation, however, and have been for years. Obviously, alternatives like these are reasonable ones which should have been considered by the Corps at least insofar as the Corps wants to help species which are listed as endangered. These alternatives should have been considered. MDNR will provide the Corps with other reasonable alternatives which the Corps should have evaluated and considered. These, and the "smart engineering" already being applied by the Corps to other similar problems, are solutions which merit serious consideration.

12. Benefits to species: The RDEIS does not make clear that information is lacking about the supposed benefit of the proposed action to native riverine fish and bird species. Several stakeholders, including the State of Missouri, have notified the USWFS of their intent to sue regarding this deficiency and others in the BiOp. To name a few, the USFWS touts its BiOp as having a basis in sound science, yet contains hundreds of citations to "personal communications."<sup>4</sup> The BiOp's proposed hydrograph deviates significantly from the natural hydrograph it supposedly mimics. Higher reservoir levels are counterproductive to species recovery—is this a solution in search of a problem? Perhaps most significantly, Corps analysis confirms the BiOp's failure to achieve desired features.

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<sup>4</sup>We understand that there is no documentary record of these "personal communications."

13. Discussion of alternatives: In general, the discussion of alternatives in the RDEIS is inadequate. The discussion of alternatives is the "heart" of the detailed statement requirement. 46 Fed. Reg. 18026, 18208. The RDEIS does not consider a sufficient range of alternatives considering the magnitude of the proposed action. See Natural Resources Defense Council v. Morton, 458 F.2d 827 (D.C. Cir. 1972). The RDEIS does not provide "information sufficient to permit a reasoned choice of alternatives. . . ." Id. The "rule of reason" requires an analysis of impacts to accompany each alternative. See id. The discussion of alternatives and environmental consequences is blurred making comparison difficult. See 46 Fed. Reg. 18026, 18028. The RDEIS does not provide adequate details of environmental consequences. See 40 CFR 1502.16. The RDEIS does not include appropriate mitigation measures for each alternative. See 40 CFR 1502.14(f). The RDEIS does not explain what alternatives were considered and summarily rejected or why they were rejected. See 40 CFR 1502.14(a).

The RDEIS contains an inadequate discussion of the socioeconomic impacts of the alternatives. See 40 CFR 1508.14. The discussion which appears in the RDEIS is general and non-specific. It does not tell a member of the public how the proposed action might actually affect them. The RDEIS treats socioeconomic impacts like mere words on a page and does not acknowledge that the proposed action will have a devastating effect on real people in terms of real dollars and cents. It will change people's lives. These impacts are very real and must be considered.

In short, a more comprehensive, less disjointed and better organized analysis of alternatives would have facilitated comparative review.

So far, this memo has been an overview of general legal observations about the RDEIS. To the extent that we have used specific examples to illustrate our points it is important to understand that the examples were only used for demonstrative purposes. Simply because we failed to mention many of the finer technical points addressed in MDNR's comment does not mean that we disagree with their observations. In fact, we concur fully with the technical comments made by MDNR.

When the specific, technical comments are viewed in connection with our general legal objections to the RDEIS, it is apparent that the RDEIS is woefully deficient.

The Corps is at a crossroads. The intersection the Corps has arrived at is one of very different interests and national policies. Many of the policies at this crossroads are in conflict. The RDEIS does not recognize these policies or the conflicts that exist between them. The following discussion identifies some of these conflicting policies.

### **Farmland Protection Policy Act**

The purpose of this Act is "to minimize the extent to which Federal programs contribute to the unnecessary and irreversible conversion of farmland to nonagricultural uses, and to assure that Federal programs are administered in a manner that, to the maximum extent practicable, will be compatible with State, unit of local government, and private programs and policies to protect farmland." 7 U.S.C. § 4201(b). Although it is difficult to say because the Corps failed to adequately consider the impact of the alternatives on interior drainage, it appears likely that the adoption of any of the alternatives to the CWCP would result in the conversion of farmland to nonagricultural uses. It is not difficult to say that the Corps wholly failed to comply with the Act in the RDEIS.

The Natural Resources Conservation Service has promulgated regulations pursuant to the Act which provide guidelines and criteria for the Corps to follow to comply with the Act. See 7 CFR 658.4 and 7 CFR 658.5. The guidelines make it clear that the Corps cannot exempt itself from complying with the guidelines and criteria or the Act. See 7 CFR 658.4(e). The Corps should simply withdraw the RDEIS and go back to the drawing board and try to comply with the Act. Since that's probably not going to happen, the Corps must immediately comply with the Act and prepare a Supplemental RDEIS.

In enacting the Farmland Protection Act, Congress made of number of findings the Corps would do well to note. Congress wisely found, in part, that:

... continued decrease in the Nation's farmland base may threaten the ability of the United States to produce food and fiber in sufficient

quantities to meet domestic needs and the demands of our export markets ... and ... Federal agencies should take steps to assure that the actions of the Federal government do not cause United States farmland to be irreversibly converted to nonagricultural uses in cases in which other national interests do not override the importance of the protection farmland nor otherwise outweigh the benefits of maintaining farmland resources.

7 U.S.C. § 4201(a). The Corps has treated the management of the Missouri River as a basin-wide issue, but it is much larger than that. People outside the basin depend on crops grown in the region and shipped via the Missouri and Mississippi Rivers. Our nation depends on the basin's prime farmland to "feed the world." The Corps needs to accept the fact that the management of the Missouri River has these far-reaching implications and evaluate the impact the proposed action would have on grain prices, productivity, and our ability to compete on the international market.

#### **Intermodal Surface Transportation System Policy**

The policy governing transportation in this country is:

. . . to develop a National Intermodal Transportation System that is economically efficient and environmentally sound, provides the foundation for the United States to compete in the global economy, and will move individuals and property in an energy efficient way.

49 U.S.C. § 5501(a). Congress envisions the National Intermodal Transportation System as the "centerpiece of a national investment commitment" which will "reduce energy consumption and air pollution while promoting economic development and supporting the United States' preeminent position in international commerce." 49 U.S.C. § 5501(b)(1) and (9). These policies were strongly reaffirmed when the transportation laws were the subject of comprehensive reform in 1994. See 108 Stat. 848 and 108 Stat. 1379.

The RDEIS ignores these policies by understating the value of navigation to the Nation's goals of energy efficiency and global competitiveness. The Corps needs to reexamine the importance of navigation to this Nation and take steps to facilitate rather than hinder the congressional vision of a National Intermodal Transportation System.

### **Submerged Lands**

The lands and natural resources beneath the Missouri River as it flows through Missouri belong to the State of Missouri. See 43 U.S.C. § 1311(a)(1). Missouri also has the right and power to manage the lands and resources beneath the Missouri River. See 43 U.S.C. § 1311(a)(2). Missouri's rights are subject to the navigational servitude. 43 U.S.C. § 1311(d) and 43 U.S.C. § 1314(a). The navigational servitude or "superior navigation easement" is "the privilege to appropriate without compensation which attaches to the exercise of the 'power of the government to control and regulate navigable waters in the interest of commerce.'" See United States v. Virginia Electric and Power Co., 365 U.S. 624, 627-628 (1961) quoting United States v. Commodore Park, 324 U.S. 386, 390 (1945). The United States retains only "its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of *commerce, navigation, national defense, and international affairs*". See 43 U.S.C. § 1314(a). The United States has not reserved any other powers. Therefore, any other power over navigable waters and the land beneath them belongs to the states. See U.S. Const. Amend. X; and United States v. Rands, 389 U.S. 121, 127 (1967).

The proposed changes to the current CWCP enhance western recreational opportunities at the expense of navigation. Congress has only authorized the Corps to engage in works of improvement on the Missouri River for flood control and navigation. The preferred alternative subverts the navigational servitude contrary to the intent of Congress and the framers of the Constitution and it does this at the expense of rights reserved to the states.

### **Flood Control Act of 1944**

In the RDEIS, the Corps tells us that it is striving to do three things in revising the MM: identify a Water Control Plan that (1) serves the contemporary needs of the basin; (2) complies with current environmental laws; and (3) serves Congressionally-authorized purposes. We understand what the latter two are, and appreciate the fact that the Corps must comply with federal law.

However, we are left to wonder what the Corps means by the “contemporary needs of the basin.” What are these contemporary needs? Is there a consensus regarding what they are and how best to serve them? Are they something other than Congressionally-authorized purposes? If so, why is the Corps striving to serve them? Shouldn’t Congress tell the Corps what the needs of the basin are?

We think so. In fact, Congress has told the Corps what the needs of the basin are. The act of Congress that authorized the construction of the majority of the mainstem reservoir system we have today is known as the Flood Control Act of 1944. See Flood Control Act, ch. 665, § 1, 58 Stat. 887 (1944). The title says it all, evidencing the fact that for decades, Congress has wisely recognized the dangers floods pose to our Nation. The federal government has consistently and valiantly fought to protect the public from the dangers of flooding. In recognition of the fact that "destructive floods" are a "menace to national welfare," Congress has dedicated the Nation's resources to flood control "if the benefits to whomsoever they may accrue are in excess of the estimated costs, and if the lives and social security of the *people* are otherwise adversely affected." 33 U.S.C. § 701a (emphasis added). The Corps must remember the *lives of people* when it deliberates about contemporary needs.<sup>5</sup>

Flood control is a policy of paramount importance, however. In the declaration of policy of the 1944 Act, Congress said why they were authorizing the building of these dams:

In connection with the exercise of jurisdiction over the rivers of the Nation through the construction of works of improvement, *for navigation or flood control*, as herein authorized ...

33 U.S.C. § 701-1 (emphasis added). The 1944 Act admits of only two purposes: flood control and navigation. This indicates the intent of Congress to authorize the works of improvement *for navigation or flood control*, not for recreation. Recreation is a secondary, incidental benefit rather than a project purpose or a national policy of comparable importance to navigation or flood control.

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<sup>5</sup>The latest census data indicates that the vast majority of the people in the basin live below Gavins Point Dam, and most of them live in Missouri.

This is the Congressional intent that defines what the needs of the basin are. If they are no longer contemporary, Congress will tell us. They have not.

Congress goes on to provide the following:

The use for navigation, in connection with the operation and maintenance of such works [of improvement] herein authorized for construction, of waters arising in states lying wholly or partly west of the ninety-eighth meridian shall be only such use as does not conflict with any *beneficial consumptive use*, present or future, in states lying wholly or partly west of the ninety-eighth meridian, of such waters for *domestic, municipal, stock water, irrigation, mining, or industrial purposes*.

33 U.S.C. § 701-1(b) (emphasis added). This indicates the intent of Congress to make flood control the predominant policy behind the authorized works of improvement because Congress did not place the same restrictions on the use of the works for flood control. Although Congress believed certain vested rights should take precedence over navigation, by negative implication, those vested rights are subservient to flood control, as is navigation. Congress only intended to prevent the destruction of state-created water rights. See Turner v. Kings River Conservation District, 360 F.2d 184 (9th Cir. 1966). It did not intend to create any new rights. Id.

Moreover, recreation west of the 98th meridian is not a beneficial consumptive use with priority. Even if recreation were a purpose of the Act, which it is not, recreation would not prevail over navigation and flood control because it is not a prior beneficial consumptive use.

The life and death importance of the policy favoring flood control is not adequately reflected in the RDEIS. Despite the lessons learned in the great floods of the 1990s, the RDEIS surprisingly returns to several alternatives include an annual man-made flood in the spring that could further jeopardize persons and property already subject to seasonal flooding. The Corps needs to carefully reconsider why the important policy of flood control, which has been the backbone of the Corps' civil works responsibilities for decades, was subjugated to the luxury of recreation.

"Congress in enacting NEPA, however, did not require agencies to elevate environmental concerns over other appropriate considerations." Baltimore Gas & Electric Co. v. Natural Resources

Defense Council, Inc., 462 U.S. 87, 97, 103 S.Ct. 2246, 2255, 75 L.Ed.2d 437 (1983). Although the policy goals set forth in NEPA are noble, they are really no more admirable than the policy goals articulated above. The Corps needs to remove its blinders and balance the competing policies.

### **Endangered Species Act**

The ESA requires all agencies to insure, in consultation with the Secretary of the Interior, that their actions are not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or modification of their habitat. 16 U.S.C. § 1536(a)(2). Here, the Corps has engaged in these consultations (called § 7 consultations in reference to the ESA section which requires them) with the Secretary, i.e., the USFWS. The ESA also requires the Secretary to provide a written opinion to the agency following these consultations (the BiOp). 16 U.S.C. § 1536(b)(3)(A). The ESA states that if jeopardy or adverse modification of critical habitat is found, the Secretary should suggest those reasonable and prudent alternatives which the Secretary believes would not jeopardize the species or modify their habitat. *Id.* The USFWS went far beyond making suggestions following the round of § 7 consultations which culminated in the BiOp.

The Corps' management of the dams is a complex feat of engineering. There is no better-qualified agency on the world for accomplishing this Herculean task than the Corps. On the other hand, the expertise of the USFWS lies in other branches of science. Instead of simply suggesting to the Corps what habitat or conditions the three endangered or threatened species need to recover, the USFWS has attempted to do the Corps' job instead of its own. The USFWS has stated that specific flow regimens are necessary, and suggest dire consequences if their recommendations are not followed. These changes in water releases from Gavins Point dam are no less than mandates. The USFWS defined a problem and dictated a solution. Only the former is within its authority under the ESA. Moreover, the USFWS' inability to do the Corps' job is repeatedly shown by detailed Corps analysis which clearly demonstrates that these flow mandates fail to achieve what the USFWS

says is biologically necessary. The Corps should recapture its control of the management of the Missouri River by considering the suggestions of the USFWS and developing alternatives that employ proven methods and achieve features that can recover endangered species instead of adopting flow modifications that are doomed to failure. Missouri believes that we can recover endangered species with habitat modifications and improvements, and has consistently demonstrated its commitment to this by doing it.

### **Conclusion**

The RDEIS is deficient in a number of respects. The Corps has failed to comply with NEPA. The Corps should withdraw and abandon the RDEIS, because even if the defects we have raised are corrected, the suspect merit of an underlying decision to pursue an alternative to the CWCP will remain the same. The publication of a comprehensive Supplemental RDEIS is absolutely necessary to attempt to correct these defects if the Corps elects to proceed.