

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

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| In re: Operation of the Missouri River |) | No. 03-MD-1555 (PAM) |
| System Litigation |) | |
| |) | |
| STATE OF MISSOURI, ex rel. Jeremiah W. |) | |
| (Jay) Nixon, |) | |
| |) | |
| vs. |) | Civil No. 0:06-cv-01616-PAM |
| |) | |
| UNITED STATES ARMY CORPS OF |) | |
| ENGINEERS, FRANCIS J. HARVEY, |) | |
| SECRETARY OF THE ARMY, UNITED |) | |
| STATES DEPARTMENT OF DEFENSE, |) | |
| and BRIGADIER GENERAL |) | |
| GREGG F. MARTIN |) | |
| |) | |
| Defendants. |) | |
| |) | |

**MEMORANDUM IN SUPPORT OF MISSOURI’S
MOTION FOR SUMMARY JUDGMENT**

The United States Army Corps of Engineers (“Corps”) violated the letter and spirit of the National Environmental Policy Act (“NEPA”) when it hastily revised the Master Water Control Manual (“Master Manual”) without preparing an environmental impact statement (“EIS”).

The revision¹ constitutes a substantial departure from the Master Manual previously adopted by the Corps and approved by this Court and the Eighth Circuit. The two spring rises proposed by the Revision were not analyzed in the final environmental impact statement (“FEIS”) issued in March 2004 in connection with the adoption of the Master Manual. The Corps

¹Missouri River Master Water Control Manual, Revision 1, Incorporation of Technical Criteria for Bimodal Spring Pulse Releases from Gavins Point Dam (“Revision”)

has acknowledged that the Revision poses significant adverse impacts to the natural or human environment.² NEPA, therefore, requires an EIS analyzing the Revision.

Rather than comply with NEPA, however, the Corps attempts to avoid its requirements by relying on the virtually unlimited “range of alternatives” studied in the FEIS process. All of these alternatives were rejected by the Corps when it adopted the Master Manual. None of these alternatives included the features of the plan adopted by the Revision. The Corps provides no explanation in the EA why these rejected alternatives should now be the standard by which the Revision - and all future adaptive management efforts - should be judged. Accepting this justification would allow the Corps to operate the Missouri River in ways radically different from the 2004 Master Manual without further NEPA analysis. Therefore, Missouri requests the Court to enter judgment requiring the Corps to prepare an EIS and otherwise comply with NEPA before further implementing the Revision or any other spring rise plan.

STATEMENT OF FACTS

_____The State of Missouri depends on the Missouri River for many uses. The River serves as the water supply for approximately one-half of Missouri’s 5.6 million citizens. More than half of the water delivered by public water supplies to Missourians is for domestic use. Thousands of acres of Missouri farm land are adjacent to or otherwise directly affected by the flow of the Missouri River, particularly when the river rises. Of the 1.4 million acres of flood plain below the Gavins Point Dam, 1 million acres are located in Missouri. A substantial portion of that flood

²Environmental Assessment for the Inclusion of Technical Criteria for Spring Pulse Releases from Gavins Point Dam (February 2006) (“EA”) § 6.0 (Ex. 3088, 091351). All citations to the record are to the administrative record filed by the Corps, either in connection with this complaint or the prior multidistrict litigation, unless otherwise indicated.

plain has been designated prime farm land by the United States Department of Agriculture. The River also has important commercial, recreational, and fish and wildlife attributes. A number of Missouri cities - including the two largest, St. Louis and Kansas City - are located on the Missouri River. Because of Missouri's dependence on the Missouri River, any significant change in the management of the river will significantly affect the human environment in Missouri. Affidavit of Mike Wells ¶ 4.

The Corps operates six dams and reservoirs on the main stem of the Missouri River. Those dams and reservoirs are Fort Peck in Montana, Garrison Dam and Lake Sakakawea in North Dakota, Oahe in North Dakota and South Dakota, Big Bend Dam and Lake Sharpe in South Dakota, Fort Randall Dam and Lake Francis Case in South Dakota, and Gavins Point Dam and Lewis and Clark Lake in Nebraska and South Dakota. Complaint ¶ 12; Answer ¶ 7.

Pursuant to the Flood Control Act of 1944, the Corps adopted and published a Master Water Control Manual in 1979 for the purpose of systematically operating the main stem Missouri River reservoirs. The Corps revised the 1979 Master Manual on March 19, 2004 . Complaint ¶ 13; Answer ¶ 8. As part of the process required by NEPA, prior to adoption of the Master Manual, the Corps issued the FEIS. The FEIS was produced only after 14 years of study and public input and at least four draft environmental impact statements. Ex. 1943, 063018. The multidistrict litigation with which this Court is intimately familiar ensued swiftly. Unfortunately, the Corps chose not to present a final master manual to this Court in 2004 - reserving for today the controversial spring rise.

The Revision and the Spring Rises

Despite this tortured history, the Revision makes a major change in the Master Manual that was not analyzed in the FEIS. This change was made in just a few months with little public participation and inadequate study of the change, despite the fact that the Corps stated when it adopted the 2004 Master Manual - nearly two years before adopting the Revision - its intention to implement a spring rise in 2006. Ex. 3088, 091323.³

The Revision establishes a bimodal spring rise. *Id.* at 091324. The first rise (“March rise”) is scheduled to take place on or about March 23 of each year. The March rise will not take place if the system storage as of March 1 is less than 36.5 million acre-feet (“MAF”) for the first March rise, or 40 MAF in years after the first March rise occurs. *Id.* at 091325. System storage as of March 1, 2006 was less than 36.5 MAF, so no March rise occurred this year. Ex. 3091, 091933.

The second rise (“May rise”) is scheduled to occur in May. The May rise is subject to the same basic system storage limitations as the March rise. Ex. 3088, 091325. System storage as of May 1, 2006 exceeded the 36.5 MAF limitation. The May rise occurred this year beginning on May 12. MO Ex. 1, 1.⁴

As set forth in the Revision, the May rise was designed to begin between May 1 and May 19, depending on the Missouri River water temperature. The initiation date was also supposed to

³A description of the process devised by the Corps to supplant NEPA can be found at Ex. 3088, 091341-42. Public involvement did not begin until June 2005, *id.*, more than a year after adopting the 2004 Master Manual. There was no public review or comment on the EA, which was not made public until February 2006, just weeks before the first scheduled spring rise.

⁴Missouri exhibits (“MO Ex.”) are filed simultaneously with this memorandum.

take into consideration the potential for a “take” of protected plovers and terns. Ex. 3088, 091326. This year, however, the Corps waited nearly two weeks for the temperature to rise before conducting the May rise. As a result, fourteen plover nests with 34 eggs were lost, or 27 percent of the Corps’ permitted take pursuant to the 2003 Amended Biological Opinion (“Amended BiOp”) from the United States Fish and Wildlife Service (“FWS”). MO Ex. 2, 8; FWS⁵ Ex. 1457, 033774-75.⁶

The May rise increased the flow from the Gavins Point Dam incrementally until it reached the full magnitude of the release, 9,000 cubic feet per second (“cfs”) per day above the 16,000 cfs that was being provided to support minimum navigation. At that point, the flow rate of 25,000 cfs was maintained for 2 days. The rate was then gradually reduced over the course of ten days until the flow rate reached the target flow support rate pursuant to the Master Manual. MO Ex. 1, 1; *see* Ex. 3088, 091325-26.⁷

⁵This is a citation to the FWS administrative record filed in the original multidistrict litigation before this Court.

⁶ It is unclear whether the FWS will consider these losses as part of the permitted take or will increase the permitted take. Either way, it highlights the problems with the Corps’ failure to comply with NEPA. If it is considered part of the take allowed, the Corps’ flexibility in managing the river pursuant to the Master Manual will be limited because of concerns about exceeding the permitted take of plovers. If the permitted take is increased, the plover is put at greater risk for a process that the FWS merely hopes may someday benefit the pallid sturgeon. As important as these issues are, the EA does not even mention them.

⁷The description of the May rise is based on the Corps’ press release issued prior to the rise. Although the actual rise differed from this description in that the reduction in flow rate did not occur as planned, there is nothing in the record or otherwise available to Missouri that would support a description of the rise as it actually occurred. Missouri requested the Corps to supplement the record to provide this information, but the Corps refused.

The magnitude of the May rise was calculated in a two-step process. The first step was based on the May 1 system storage. Under the first step, the minimum May rise is 12,000 cfs, increasing to a maximum of 16,000 cfs as the May 1 system storage amount increases. In the second step, the first step amount can be increased or decreased by as much as 25% depending on the Mainstem Calendar Year Runoff Forecast for the Missouri River basin above Sioux City, Iowa. As the runoff forecast increases, the amount of the May rise also increases. *Id.*⁸

Although the FEIS considered a number of alternatives other than the plan the Corps ultimately adopted as the Master Manual, it did not consider or study the impact of the Revision or any plan substantially similar to the Revision. Some of the alternatives included short-term increases in the amount of water released from the Gavins Point Dam during the spring. The alternative selected by the Corps and adopted in the Master Manual, however, did not include a spring rise. Ex. 1970, 08266

All of the spring rise alternatives considered in the FEIS differed from the Revision in a number of significant ways:

- A. All of the alternatives were for a single release during the spring. The Revision includes two spring releases a month or more apart.
- B. None of the alternatives considered a rise in March. The Revision includes a March rise.
- C. All of the alternatives were for longer duration rises than the Revision.

⁸It greatly concerns Missouri that the Corps' plan actually increases releases when the Corps forecasts higher runoff. This is a counterintuitive (and counterproductive) way to operate a flood control system.

- D. None of the alternatives based the amount of the spring rise on the amount of water in the reservoir system. The rises in the Revision are expressly limited by the level of the reservoir system storage.
- E. None of the alternatives based the amount of the spring rise on forecasted upstream runoff. The Revision does: As upstream runoff increases, so does the amount of the spring rise.

Ex. 3088, 091323.

These are not minor distinctions. As the Court no doubt surmised from its 2004 Missouri River “Voyage of Discovery” through the multidistrict litigation, the timing, frequency, and duration of water management operations are profoundly significant to the people of the basin. For example, the river is higher on average in May than in most other months. When the Corps increases releases in May, people in Missouri are concerned. But if the same operations were proposed for April, those living upstream who depend on rising lake levels for a strong smelt hatch may be equally concerned about losing more water from the reservoirs. Consequently, the differences between the Revision and the alternatives in the FEIS are more than words on a page: They are concrete reasons why the Corps should have published a new or supplemental EIS instead of its Reader’s Digest EA.

The Environmental Assessment

_____ The Corps acknowledges in the EA that the Revision presents an increased risk of flooding over the Master Manual. *Id.* at 091332, 091345. The Revision also substantially reduces the water supply benefits to those who rely on the upstream reservoirs and the river for water due to the reduction in reservoir levels as a result of the spring rise. *Id.* at 091333-34. In

fact, compared to the current Master Manual, the Corps acknowledges that the Revision would have a negative impact on 8 of the 15 categories it examined. *Id.* at 091332-39.

These problems are obscured by the way the Corps chose to present the data comparisons in the EA. The Revision is a change to the current Master Manual and any measure of the risks and benefits of the Revision can only be determined in comparison to the current Master Manual, which is supposed to govern the Corps' management of the river. *See In re Operation of the Missouri River System Litigation*, 421 F.3d 618, 625 (8th Cir. 2005), *cert. denied*, *North Dakota v. U.S. Army Corps of Engineers*, 126 S. Ct. 1879 (2006), *Nebraska Public Power District v. U.S. Fish & Wildlife Service*, 126 S. Ct. 1880 (2006), *North Dakota v. U.S. Army Corps of Engineers*, 126 S. Ct. 1568 (2006); *South Dakota v Ubbelohde*, 330 F.3d 1014, 1027-29 (8th Cir. 2003), *cert. denied*, *North Dakota v. Ubbelohde*, 514 U.S. 987 (2004). Although the EA sometimes compares the Revision to the current Master Manual, at other times the EA inexplicably compares it to the 1979 Master Manual.⁹ *Compare, e.g.,* Ex. 3088, 091332-39 with *id.* at 091345-46. The latter comparison is completely irrelevant and masks the true impact of the Revision.

The Corps also acknowledges the existence of a new factor raised for the first time in the course of preparing the EA: The United States Department of Agriculture ("USDA") has stated that federal crop insurance will not cover any losses from flooding as a result of the spring rise. *Id.* at 091346. The impact of flooding farm land along the river as a result of the Revision,

⁹ The EA does not explain why it uses the obsolete 1979 Master Manual as its baseline. It is possible that it was easier to use calculations prepared for the FEIS, when the 1979 Master Manual was the governing document, rather than undertake a new analysis of the data. If true, this procedural shortcut is hardly the hard look required by NEPA.

therefore, presents a substantially increased risk of uncompensated loss, which would be devastating to farmers along the river. *See, e.g.*, Ex. 3058, 090776-77; Ex. 3031, 089237, 089239, 089244-46, 089249-51; Ex. 3012, 088654, 088665, 088731, 088749-50. Despite this new information, the EA did not include any additional analysis of the impact of the rises on the drainage of prime farmland and increased risk of flooding and loss. *Id.* at 091346.

The Corps did not conclude that the Revision did not have a significant adverse impact on the natural or human environment. Rather, the Corps stated that there were “no significant adverse impacts to the natural or human environment *beyond those previously presented in the FEIS for the spring rise alternatives.*” *Id.* at 091351. (emphasis added). That is not the standard under NEPA for when an agency may forego an EIS. The Corps may dispense with an EIS when it makes a finding of no significant impact (“FONSI”), a conclusion it was unable to reach here.

The Corps based its conclusion that the Revision was “close enough for government work” on its finding that the Revision fell within the “range [of] impacts shown for the spring pulse alternatives previously considered in the FEIS.” *Id.* However, this finding is incorrect. In two of the fifteen categories compared in the EA, the impacts anticipated from the Revision fall outside the range of impacts of the compared alternatives. *Id.* at 091340. (navigation benefits higher than all alternatives; water supply benefits lower than all alternatives).¹⁰ So even if the Corps had applied the correct standard for not completing an EIS, it made important factual errors in its haste.

¹⁰This presumes the table at 091340 is correct. The text of the EA discussing water supply benefits contradicts the table and states that the “benefits fall within the range of the FEIS spring pulse alternatives.” *Id.* at 091333. Both cannot be correct. Again, this reflects the inappropriate haste with which the Corps acted.

The sole justification offered by the Corps for the Revision is its attempt to comply with the Amended BiOp. The FWS opined that some form of spring rise was necessary to protect the pallid sturgeon, an endangered species. *Id.* at 091321. However, neither the Amended BiOp nor the FEIS even considered the spring rises adopted by the Revision. Furthermore, while the EA discusses fish habitat in general, *id.* at 091336-37, it does not contain any analysis of the effect that the particular spring rises adopted in the Revision will have on the pallid sturgeon. Nor do any of these documents provide any legal excuse for failing to comply with NEPA today. And that is the principal problem: If the Corps believed a spring rise was required to comply with the Amended BiOp, it had the time and the means to adopt one in compliance with NEPA. There is no excuse in this record for its failure to do so.

ARGUMENT

I. STANDARD OF REVIEW APPLICABLE TO THE CORPS' ACTION

The actions of the Corps are subject to review to determine whether they are arbitrary and capricious, an abuse of discretion or not in accordance with law. *In re Operation of the Missouri River System Litigation*, 421 F.3d at 628. An act is arbitrary and capricious if it is based on factors not intended by Congress to be considered, fails to consider an important aspect of the problem, offers a basis for the decision that is contradicted by the evidence, or is so implausible that it cannot be attributed to a difference in view or the product of agency expertise. *Id.*

II. THE ADOPTION OF THE REVISION DID NOT COMPLY WITH PROCEDURES REQUIRED BY NEPA AND ITS IMPLEMENTING REGULATIONS, AND IS THEREFORE, NOT IN ACCORDANCE WITH THE LAW.

NEPA and implementing regulations -- including the Corps' own regulations -- establish that the Corps failed to follow the appropriate NEPA procedure in adopting the Revision. NEPA, 42 U.S.C. § 4332(C), requires that the implementing agency must prepare an environmental impact statement ("EIS") for any federal action significantly affecting the human environment. The Revision is a federal action significantly affecting the human environment; the Corps has never disputed this. *See* Ex. 3088, 091351.

Regulations under NEPA require an agency to prepare a supplement to an EIS if:

- A. The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or
- B. There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

40 CFR § 1502.9(c)(1). The Revision is a substantial change in the Master Manual that is relevant to environmental concerns. Raising the river level during the time in which flooding is most likely to occur downstream is highly relevant to environmental concerns. The potential lack of federal crop insurance coverage for damages that result from flooding due to a spring rise is significant new information relevant to environmental concerns and bearing on the Revision or its impacts. Of course, the very reason stated for the change - to benefit an endangered species -

is also an environmental concern. Understandably, the Corps did not make a finding of no significant impact.

Under NEPA, therefore, the Corps was required to prepare a new EIS or a supplement to the FEIS and comply with all the requirements of the NEPA regulations regarding analysis, notice, and comment prior to adopting or implementing the Revision. Rather than comply with NEPA, however, the Corps relied solely on the EA and the dated analysis in the earlier FEIS that lead the Corps to reject all of the spring rise alternatives in 2004. Interested parties, including Missouri, were not given a full analysis of the proposed action as required pursuant to NEPA regulations. 40 C.F.R. Part 1502. Perhaps more important, interested parties were denied a full and fair opportunity to comment on the proposed action after such analysis. *Id.* Part 1503. As noted previously, the EA contains at least one obvious error, stating that water supply benefits are within the range of previously studied alternatives when data elsewhere in the EA indicates that this is untrue. A full review and comment period likely would have helped the Corps to correct this error, as well as others yet undiscovered, and address the many other shortcomings of the EA analysis, discussed more fully in Point III.

The Corps' actions undermine Congress' purpose in enacting NEPA:

NEPA promotes its sweeping commitment to “prevent or eliminate damage to the environment and biosphere” by focusing Government and public attention on the environmental effects of proposed agency action. 42 U.S.C. § 4321. By so focusing agency attention, NEPA ensures that the agency will not act on incomplete information, only to regret its decision after it is too late to correct. [citation omitted] Similarly, the broad dissemination of information mandated by NEPA permits the public and other government agencies to react to the effects of a proposed action at a meaningful time.

Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 109 S. Ct. 1851, 1858 (1989). In adopting the Revision in the manner it did, the Corps purposefully evaded the focus required by NEPA, both by the agency and the public.

There is no provision in NEPA for any way to comply other than an EIS, a categorical exclusion, or an EA accompanied by a FONSI. *See Rhodes v. Johnson*, 153 F.3d 785, 788 (7th Cir. 1998); *Sierra Club v. Babbitt*, 65 F.3d 1502, 1505 (9th Cir. 1995); *see also* 40 CFR § 1501.4. But instead of coloring inside the lines, the Corps has taken a giant red crayon to NEPA and crafted a wholly new, non-statutory exception to the detailed statement requirement. This new exception is premised on the offensive notion that the now-dated FEIS was “close enough” for NEPA purposes to justify the belated supplementation of an apparent straw dog - the 2004 Master Manual - with a Revision that has only the most modest conceptual similarities to the “range of [rejected] alternatives” in the FEIS. This Court should reject the Corps’ presumptuous “horseshoes and hand grenades” exception. This is a court of law, and the proper management of the Missouri River is a national interest. The Corps must get it right.

Under the NEPA regulations applicable to the Corps, there are essentially two types of agency action: those that require an EIS, and those that do not (categorical exclusions and actions with no significant impact on the environment). 40 CFR § 1501.4(a). If the action does not necessarily or normally require an EIS, and is not categorically excluded by the action agency’s own regulations, then the agency must prepare an EA. 40 CFR § 1501.4(b). The agency next must decide whether to prepare an EIS based on the EA. 40 CFR § 1501.4(c). If the agency determines that an EIS is not required, it must prepare a finding of no significant impact, which

indicates that the agency has determined that the proposed action will not have a significant effect on the environment. 40 CFR §§ 1501.4(e) and 1508.13.

Ignoring this simple process, the Corps has fabricated a fourth way - one not found in the statute or regulations - to dispense with NEPA's pesky and time-consuming requirements. Rather than fully examining the spring rise proposed by the Revision as required by NEPA, the Corps has marched inexorably to a pre-ordained end. The Corps had ample time to comply with NEPA, analyze the proposed spring rise, and allow sufficient public comment. Adoption of a spring rise was anticipated when the Corps adopted the Master Manual in March 2004. Ex. 3088, 091323. Instead of immediately beginning the NEPA process, the Corps chose to undertake a quasi-public process of its own devising, which it only began after lengthy hand-wringing. *See, e.g.*, Ex. 3088, 091341-42; Ex. 2705, 084743-44. The Corps' failure to promptly begin the NEPA process does not provide a rationale for simply ignoring that process altogether.

It appears the Corps never intended to comply with NEPA. An early draft of the schedule for adoption of the Revision, which is remarkably close to the way events actually occurred, does not contemplate preparation of an EIS. Ex. 2710, 084805-06. Nor does that schedule allow sufficient time to prepare an EIS should the Corps have concluded one was required. Therefore, the Corps must have decided from the outset that the EA would be the final product, rather than a tool for determining whether an EIS was necessary. *See* Ex. 2545, 082565 (stating that as long as the spring rise impacts are within range presented in FEIS, no EA is even necessary).

This contravenes the Corps' own rules, which specify that the only purpose of an EA is to provide a basis for determining whether to prepare either an EIS or a FONSI. 33 C.F.R. § 230.10(a). The Corps did neither. Rather, it concluded that there was a significant impact, but

the impact was within the “range of alternatives” in the FEIS. The Corps thus attempts to substitute the EA for full NEPA compliance - as it intended from the outset, but in violation of its own rules. *See also Anderson v. Evans*, 371 F.3d 475, 494 (9th Cir. 2004) (“[A]n EA can never substitute for preparation of an EIS, if the proposed action could significantly affect the environment.”). This action is not in accordance with the law.

This raises an important question: What exactly is this “range of alternatives” on which the Corps relies? The phrase apparently encompasses more than the specific alternatives actually studied and rejected in the FEIS. This must be so, because the Revision was not one of the five defunct spring rise alternatives that were specifically identified in the FEIS. The range must include at least all of the possible permutations of a spring rise bounded by the extreme outer limits of the identified alternatives. Perhaps it extends to any alternative considered in the entire 14-year Master Manual review and update. In either event, the universe is broad indeed. It may not be infinite and ever-expanding like the cosmos, but it nonetheless requires Stephen Hawking-like comprehension to fully grasp its scope. That is not acceptable, and it is not what Congress envisioned when it adopted NEPA.

The Corps’ reliance on the “range of alternatives” presented in the March 2004 FEIS does not satisfy NEPA’s requirement that the Corps take a hard look at the environmental impacts of proposed actions, including the Revision. *See Arkansas Wildlife Federation v. U.S. Army Corps of Engineers*, 431 F.3d 1096, 1101 (8th Cir 2005). During the process leading up to adoption of the Master Manual, the Corps considered a range of alternatives from no change from the prior manual, Ex. 1943, 063483, up to and including allowing the river to run its course as if the dams did not exist, Ex. 1972, 070040. All of these alternatives, including all spring rise alternatives,

were rejected by the Corps when it adopted the Master Manual. If the Corps is now allowed to adopt an entirely new action without complying with NEPA because the action arguably fits within the extremely broad “range of alternatives” considered by the Corps in the prior NEPA process, the Corps would have unfettered discretion to make virtually any change to the Master Manual without NEPA compliance.

Even if the Corps limits the “range of alternatives” to those that fall between the various spring rise alternatives expressly described in the FEIS, the Revision still violates NEPA. The Corps has not taken a hard look at all of the alternatives that fall between the specific alternatives described in the FEIS. Narrowing the “range of alternatives” to an unstudied and nearly limitless pool of alternatives bounded only by the extremes of the studied spring rises included in the FEIS still would frustrate the Congressional mandate of NEPA.

This is not a theoretical concern. The Corps reserves the right to change its spring rise plan virtually at will. *See* Ex. 3088, 091646 . If it is permitted to do so simply by finding that a proposed plan falls within the previously rejected “range of alternatives” considered in the FEIS, the Corps will be able to exercise unfettered discretion to ignore the Master Manual in the name of a spring rise.¹¹ The Corps will thus be able to reclaim the discretion to act with the impunity it was rightly denied by the Eighth Circuit in *South Dakota v Ubbelohde*. 330 F.3d at 1027-29.

The adoption of any substantial change in the Master Manual is a federal action significantly affecting the human environment. Any such change therefore requires the preparation of an EIS to comply with NEPA. Reliance on the “range of alternatives” in the FEIS

¹¹The Corps could apply its “range of alternatives” approach with equal vigor to water conservation measures, tribal cultural concerns, water supply to power plants, or navigation season length, as a few examples.

does not constitute compliance with NEPA because the Corps previously rejected those alternatives. If the Corps were now to suggest that one of those alternatives is acceptable or preferable, it could do so only if it fully complied with NEPA, provided the necessary analysis, and provided a full and fair opportunity for all interested parties to comment on the new analysis and the Corps' change of position. It cannot avoid that obligation by adopting a completely new plan and justifying its choice by reference to the rejected alternatives.

III. THE EA CONTAINS FACTUAL ERRORS, FAILS TO CONSIDER CHANGES IN APPLICABLE CONDITIONS SINCE THE FEIS, AND FAILS TO ADDRESS SUBSTANTIAL NEW ISSUES PRESENTED BY THE REVISION BUT NOT ADDRESSED IN THE FEIS, AND IS THEREFORE, ARBITRARY AND CAPRICIOUS.

The Revision exemplifies the risk that ignoring NEPA creates. The Corps acknowledges that the spring rise increases the risk of flooding and reduces the benefits under the Master Manual in seven other categories. Ex. 3088, 091332-39, 091345. By avoiding the procedures mandated by NEPA, the Corps has eliminated the possibility that a full analysis and discussion of the proposal might lead to better ways to achieve the Corps' goal of benefitting the pallid sturgeon while also eliminating or reducing the risk of potentially disastrous flooding in Missouri and the other adverse consequences associated with the Revision.

Even more fundamentally, the Corps expressly predicates its decision on its conclusion that all of the measured risk/benefit analyses fell within the "range of [rejected] alternatives." *Id.* at 091351. This conclusion simply is wrong. The Corps' analysis shows that navigation benefits are higher,¹² and that benefits for water supply are lower. *Id.* at 091340. Admittedly, the EA

¹²Missouri disputes this conclusion. Already in 2006, despite the promise of navigation support, barges were forced off the river by low flows. MO Ex. 3, 13; *see also* Ex. 3060, 090809 (spring rise shortens navigation season in 2 out of 3 scenarios). The spring rise may not have

contains contradictory statements regarding water supply benefits. *See* n.10, *supra*. But this only reinforces the conclusion that the EA, by evading the more thorough and deliberative EIS process, suffers not only from a seriously flawed process, but also presents serious questions regarding whether its analysis is also flawed as a result. Under the circumstances, the deference usually accorded agency expertise is unwarranted. *See Sierra Club v. Bosworth*, 352 F. Supp. 2d 909, 923 (D. Minn. 2005) (“A court must defer to agency conclusions that are ‘fully informed and well-considered,’ but it need not rubber stamp ‘a clear error of judgment.’”)

The Corps’ reliance on the previously rejected alternatives is puzzling, at best. Why should any rejected alternatives be considered a standard by which new federal action is judged? The Corps rejected the alternatives because they were deemed to be less appropriate than the plan adopted by the Corps in the Master Manual. The EA fails to explain the transformation from reject to standard. This transformation only two years later, however, suggests that the alternative selected in 2004 was a mere place holder until the Corps could implement its real plan without being burdened with the niceties of NEPA compliance. This raises profound questions about the entire process, beginning in 1987.

Furthermore, the alternatives considered in the FEIS differ from the spring rise adopted in the Revision in at least five significant respects. All of the alternatives were for a single spring rise, rather than the two rises contained in the Revision. None of the alternatives call for a March rise, like the Revision. All of the alternatives were for a longer duration than the Revision. None of the alternatives predicated a spring rise on the amount of water in storage, like the Revision. None of the alternatives predicated the amount of the spring rise on the amount of upstream

caused the de facto closure due to low flows, but it certainly did not benefit navigation in 2006.

runoff, like the Revision. Ex. 3088, 091323 (distinguishing the Revision from the spring rise plans discussed in FEIS). The EA does not explain how these differences impact the analysis of the risks and benefits of the new spring rise. Nor does it discuss how these changes impact the sole reason for doing a spring rise at all - propagation of the pallid sturgeon.

There is no evidence in the EA that the spring rise planned by the Corps will have the desired impact on the pallid sturgeon, because the Corps has not undertaken the kind of analysis of this spring rise required by NEPA. We do know, however, that the May rise resulted in a substantial loss of plovers, another endangered species. MO Ex. 2, 8. Yet these conflicting priorities are not even mentioned in the EA. It may be that the Corps can choose to sacrifice one endangered species in the hope of helping another, but not without any consideration or documentation of such a sensitive issue.

Nor does the EA analyze the impact of the USDA stating that any losses caused by flooding resulting from the spring rise will not be covered by federal crop insurance. The EA acknowledges this fact, Ex. 3088, 091346, and the fact that the Revision increases the risk of flooding, *id.* at 091332, 091345. Although this is an entirely new risk not known at the time of the FEIS, the Corps did not include in the EA any additional analysis of potential interior drainage problems in light of this new risk. This is not what Congress had in mind when it adopted NEPA.

Even the data underlying the Corps' FEIS analysis has changed, but the Corps' analysis does not acknowledge the change. The FEIS was based on an estimate that users annually consume approximately 12 MAF of water from the Missouri River. MO Ex. 4, 17. In 2005, however, the U.S. Bureau of Reclamation, which provided the original estimate, advised the

Corps that it now estimates that depletion is more than 15 MAF per year, MO Ex. 5, 26, a greater than 25% increase. The Corps incredibly made no allowance for this substantial change in concluding the Revision falls within the “range of alternatives” in the FEIS.

Finally, the record is clear that the Corps knew it was relying on some bad data:

The hydrologic model has been providing flawed navigation data for the spring rise runs, *and time constraints have not allowed the required hand changes to the raw data files from the hydrologic model.* The tern and plover data for the river reaches are also suspect because the model is based on habitat that was available in the early 1990s. This habitat has changed dramatically and new habitat has been constructed and will continue to be constructed by the Corps.

Ex. 2872, 086558 (emphasis added); *see also* Ex. 3064, 090919 (annual navigation economic effect values “are based on inaccurate service level and season length files from the DRM [Daily Routing Model]”). Time constraints cannot excuse failure to comply with NEPA, particularly when any time pressure resulted from the Corps’ failure to address the spring rise in the 2004 Master Manual and its choice not to promptly begin the NEPA process immediately after the adoption of that manual.

IV. THE REVISION ATTEMPTS TO INCORPORATE ADAPTIVE MANAGEMENT TECHNIQUES IN THE MANAGEMENT OF THE MISSOURI RIVER WITHOUT CONGRESSIONAL AUTHORIZATION OR NECESSARY PROCEDURAL SAFEGUARDS, AND IS THEREFORE, NOT IN ACCORDANCE WITH THE LAW.

The elephant in the room that the Corps has deftly avoided for years is its lack of authority for adaptive management on the Missouri River.¹³ To better understand the Corps’

¹³The Corps avoided this question in the original litigation before this Court by assuring the Court, contrary to its conduct in adopting the Revision, that it would comply with NEPA in the event of any major policy change. On that basis, the Court declined to disturb the Corps’ adaptive management approach “[a]bsent evidence that the adaptive management process actually results in the Corps’ evasion of NEPA obligations.” *In re Operation of the Missouri River System Litigation*, 363 F. Supp. 2d 1145, 1164 (D. Minn. 2004), *aff’d*, 421 F.3d 618, 625

problem hiding this elephant, one needs to look outside the room at another monumental environmental restoration effort – the Everglades.

On December 11, 2000, Congress adopted the Comprehensive Everglades Restoration Plan (“CERP”) as part of the Water Resources Development Act of 2000, Pub. L. 106-542. Before learning a little about CERP, it is vital to recognize that it has no Missouri River counterpart.¹⁴ By adopting CERP, Congress expressly authorized and funded an adaptive management program for the River of Grass. Congress likewise required the Corps to adopt regulations governing same. The Corps did so, in spades.

With sweeping regulations that would have been envied by the Prince himself, the Corps addresses nearly every possible aspect of adaptive management in the Code of Federal Regulations. *See* 33 CFR § 385. Of course, not a single word in any federal law or the Code is devoted to the adaptive management of the Missouri River. In any event, with respect to the Everglades, Congress’ expectation was “adaptive management.”

The Committee does not expect rigid adherence to the Plan as it was submitted to Congress. This result would be inconsistent with the adaptive management principles in the Plan. Restoration of the Everglades is the goal, not adherence to the modeling on which the April 1999 Plan was based. Instead the Committee expects that the agencies responsible for project implementation report

(8th Cir. 2005), *cert. denied*, *North Dakota v. U.S. Army Corps of Engineers*, 126 S. Ct. 1879 (2006), *Nebraska Public Power District v. U.S. Fish & Wildlife Service*, 126 S. Ct. 1880 (2006), *North Dakota v. U.S. Army Corps of Engineers*, 126 S. Ct. 1568 (2006); *South Dakota v. Ubbelohde*, 330 F.3d 1014, 1027-29 (8th Cir. 2003), *cert. denied*, *North Dakota v. Ubbelohde*, 514 U.S. 987 (2004). We now have that evidence.

¹⁴The Corps apparently recognized this lack and considered seeking the necessary Congressional authority to adopt adaptive management for the Missouri River. Ex. 2873, 086571; Ex. 2545, 082566. Although some aspects of the legislation considered by the Corps are contained in legislation recently passed by the Senate, S.728, 109th Cong., 1st Sess. § 5008, authority for adaptive management is not. The House has not passed a similar provision.

formulation and Plan implementation will seek continuous improvement of the Plan based upon new information, improved modeling, new technology and changed circumstances.

S. Rep. No. 106-362, 106th Cong., 2d Sess. 41 (2000). The Corps embraced this mission in its regulations, but with many important safeguards for the people of Florida. Most notably, 33 CFR § 385.37(b) expressly requires the Corps to show that existing flood protection “will not be reduced by implementation of the project.” In addition, the Corps “shall consider opportunities to provide additional flood control protection.” 33 CFR § 385.37(c). There is nothing in the EA or Master Manual to reassure the people of the Missouri River basin that the Corps will not reduce flood control. In fact, the Corps is intentionally reducing flood control by implementing the spring rise. Ex. 3088, 091332, 091345.

The Corps provided for “independent scientific review” and “quality control” in the CERP regs, but not in the EA or Master Manual here. *See* 33 CFR §§ 385.22 and 385.21. The Corps also has formal public outreach and comment in CERP, but not here. *See* 33 CFR § 385.18. The Corps is also committed to formal consultation and coordination with Florida state agencies through the CERP rules, but not with Missouri River basin state agencies by any specific guarantee in the Master Manual or EA before the court. *See* 33 CFR § 385.10.

Moreover, even with the Congressional blessing of CERP, the Corps requires an EIS by regulation whenever it makes “significant changes to the System Operating Manual [i.e., for the Missouri River, the Master Manual]” and “significant changes to Project Operating Manuals” related to the Everglades. 33 CFR §§ 385.14(b)(1)(ii) and (v). Here, the Corps is sidestepping the issue with a hasty EA in which it did not find that the changes to the Master Manual were insignificant or that they would have no significant impact on the quality of the human

environment. Instead, the Corps relied on the stalking horse candidates analyzed and rejected in the earlier EIS process approved by this Court - with such approval expressly predicated on the Corps' commitment to comply with NEPA in the future. Absent Congressional authorization, the spring rise as adopted through the illusory adaptive management components of the Master Manual cannot stand.

CONCLUSION

For the foregoing reasons, Missouri requests the Court enter a temporary restraining order and preliminary injunction enjoining the Corps from implementing the Revision or any other change to the Master Manual based on the "range of alternatives" in the FEIS without full NEPA compliance, award Missouri its costs and expenses incurred in this matter, and provide such further relief as the Court deems proper.

Respectfully submitted,

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