



NATIONAL WILDLIFE FEDERATION®

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December 19, 2016

Christy Goldfuss
Managing Director
Counsel on Environmental Quality
722 Jackson Place, NW
Washington DC 20503

Re: CEQ Referral of the St. Johns Bayou and New Madrid Floodway Project

Dear Managing Director Goldfuss:

The National Wildlife Federation is pleased to submit these comments in support of the U.S. Department of the Interior's referral of the St. Johns Bayou and New Madrid Floodway Project (the Project), pursuant to 40 C.F.R. § 1504.3(e). The National Wildlife Federation appreciates the Council on Environmental Quality's decision to accept this referral and respectfully calls on CEQ to permanently stop this environmentally devastating and unjust project through the referral process.

The National Wildlife Federation (NWF) is the nation's largest conservation education and advocacy organization. NWF has almost six million members and supporters and conservation affiliate organizations in forty-nine states and territories. NWF has a long history of working to protect the nation's rivers, wetlands and floodplains, and the fish and wildlife that depend on those vital resources. NWF also has a long history of advocating for the protection and restoration of the Mississippi River, including by eliminating the threats posed by the Project, and on working to ensure that federal water projects are environmentally and economically sound.

Overview of Comments

The National Wildlife Federation respectfully urges CEQ to use the referral process to terminate this environmentally devastating and unjust Project. Such a decision would have far-reaching support, including from the many Members of Congress, Mayors, community leaders, conservation and social justice organizations, members of the public, and editorial boards that have called on this administration to stop this Project.

The Project's defining component – a new levee to close the last connection between the Mississippi River and its natural backwater habitat in the State of Missouri – and its related pumping plants will end backwater flooding on 75,000 acres, eliminate the most important backwater spawning and rearing habitat in the Middle Mississippi River, and destroy an area of wetlands larger in size than the District of Columbia. The Project will also increase the risk of catastrophic flooding to dozens of river communities

with large numbers of low-income and minority residents. This Administration should put an end to this destructive and unjust Project once and for all.

These comments summarize the extensive evidence supporting the U.S. Department of the Interior's (DOI) conclusions in its December 2016 referral that the Project is "unacceptable" because of: (1) "the magnitude, duration and scope of impacts;" (2) the "availability of less damaging alternatives;" and (3) the "violation of National environmental policies or statutes."

Substantial, Unacceptable Harm That Cannot Be Mitigated: There is broad-based consensus supported by extensive scientific evidence that the Project will cause substantial harm to nationally significant fish and wildlife resources and to unique and irreplaceable habitat. The U.S. Fish and Wildlife Service (FWS) has repeatedly stated that the Project will "cause substantial, irretrievable losses of nationally significant fish and wildlife resources, and greatly diminish rare and unique habitats found in southeast Missouri."¹ The U.S. Environmental Protection Agency (EPA) has concluded that the Project will cause "significant degradation" of the nation's waters.² The Missouri Department of Conservation has concluded that the impacts are so unacceptable that the Project should not be built. The U.S. Army Corps of Engineers' (Corps) own Independent External Peer Review panel has concluded that the Project will "have a significant cumulative impact on the flood-dependent system"³ and that the "loss of this last remaining connection and its ecosystem functioning would be the 'straw that broke the camel's back' in terms of the total cumulative impact."⁴ There is equally broad consensus that the Project's impacts cannot be mitigated and that the proposed mitigation is scientifically unsound and legally inadequate.⁵

Less Damaging Alternatives Are Available: There is extensive evidence demonstrating that less damaging alternatives are available. EPA has advised the Corps that it "is apparent from the information provided" in the Project's 2013 Draft Environmental Impact Statement (Draft EIS) that practicable alternatives exist that would cause less harm to the environment.⁶ The Fish and Wildlife Service has pointed to less damaging practicable alternatives identified in the Draft EIS. The National Wildlife Federation and many others in the conservation community have identified an extensive array of alternative measures that would achieve the stated purpose of the Project while also protecting and restoring the environment.⁷

The Project Violates National Laws And Policies: The Project unquestionably violates numerous federal laws, executive orders, and important National policies.⁸ For example, EPA has advised the Corps that the Project is prohibited under the Clean Water Act 404(b)(1) Guidelines, and fails to comply with statutory and regulatory mitigation requirements. The Project's environmental impact statement fails

¹ July 2013 Draft U.S. Fish and Wildlife Service Fish and Wildlife Coordination Act Report, U.S. Army Corps of Engineers, Draft Environmental Impact Statement, St. Johns Bayou New Madrid Floodway Project (July 2013) (Draft EIS) Appendix Q, Part 1.

² November 25, 2013 Letter from Karl Brooks, Regional Administrator, U.S. Environmental Protection Agency Region 7 to Col. Jeffrey Anderson, Commander Memphis District, U.S. Army Corps of Engineers.

³ Draft EIS Volume 3 Part 4, Phase III IEPR Final Comment Response Record at 61 (emphasis added).

⁴ Draft EIS Volume 3 Part 3, Phase 2 IEPR at B-43 (emphasis added).

⁵ See Section I.B. of these comments.

⁶ November 25, 2013 Letter from Karl Brooks, Regional Administrator, U.S. Environmental Protection Agency Region 7 to Col. Jeffrey Anderson, Commander Memphis District, U.S. Army Corps of Engineers (November 25, 2013 EPA Letter).

⁷ See Section II of these comments.

⁸ See Section III of these comments.

to comply with the requirements of the National Environmental Policy Act. The Project is at odds with the nation's environmental justice policies, wetlands protection policies, floodplain planning laws and policies, climate change policies, and federal conservation goals. Additional studies are unlikely to result in changes to the Project that would resolve these many violations since each and every study carried out by the Corps has recommended construction of the project's defining, and most damaging, component, the New Madrid Levee.

Detailed Comments

I. The Project Will Cause Substantial, Unacceptable Harm to Nationally Significant Fish and Wildlife Resources and to Unique and Irreplaceable Habitat

The Project will sever the last natural connection between the Mississippi River and its backwater floodplain in the State of Missouri, eliminating the natural flood regime that drives the ecological health of the system, and destroying tens of thousands of acres of wetlands and vital fish and wildlife habitat.⁹ This will cause substantial harm to nationally significant fish and wildlife resources and to unique and irreplaceable habitat.

The Project consists of a major new levee across the existing 1,500 foot gap, two enormous pumping plants, dredging to enlarge 23 miles of stream channels, and the raising of many miles of both the Frontline Mississippi River levee and the Setback levee. Under the alternative selected in the Working Final EIS (Alt. B3.1), water levels in the New Madrid Floodway will never be allowed to reach even the level of the 2-year floodplain (the area that currently has a 50% chance of flooding every year). Instead, the water levels in the New Madrid Floodway will be kept between 12.1 feet and 2.6 feet below the 2-year floodplain, depending on the season.¹⁰

A. The Project Will Cause Substantial, Unacceptable Harm

Federal and state resource agencies and independent experts have repeatedly objected to the Project because of its substantial adverse environmental impacts. Please see Appendix A for an extensive compilation of statements on the Project by federal agencies, state agencies, independent experts, elected officials, and others.

DOI has concluded that “[u]p to 53,556 acres of functional wetlands would be degraded or eliminated by the project” that “provide essential breeding and migration areas for 193 species of migratory birds, including tens of thousands of migrating shorebirds and waterfowl.”¹¹ DOI has also concluded that the Project will damage “unique and irreplaceable” habitat that supports “an extremely diverse fishery (114 species representing 22 families)” and that the “fisheries impacts have been significantly underestimated” by the Corps.¹²

⁹ November 18, 2013 Letter from the Office of Environmental Policy and Compliance, U.S. Department of the Interior to Col. Jeffery A. Anderson, Commander, Memphis District, U.S. Army Corps of Engineers (November 18, 2013 DOI Letter).

¹⁰ Working Final Environmental Impact Statement (2014) at xi and xv. According to the Corps, there are 404 acres in the 1-year floodplain of the New Madrid Floodway and 33,391 acres in the 2-year floodplain of the New Madrid Floodway.

¹¹ November 18, 2013 DOI Letter.

¹² *Id.*

FWS has repeatedly opposed the New Madrid Floodway component of the Project because it will “cause substantial, irretrievable losses of nationally significant fish and wildlife resources, and greatly diminish rare and unique habitats found in southeast Missouri.” FWS has also concluded that the “project-related wetlands losses are at odds with the federal conservation policy goals and sustainable water resources development.”¹³

EPA has concluded that the Project “will cause the greatest loss of wetlands function in EPA Region 7's history” and that the “majority of affected wetlands in the project area consist of distinctive bottomland hardwood wetlands” that provide “critical watershed functions” and “represent some of the most diverse, complex, and productive freshwater wetlands in the Nation.”¹⁴ EPA has also concluded that the Project’s impacts to wetlands, fish and wildlife would “constitute significant degradation,” and thus violate the Clean Water Act 404(b)(1) Guidelines, unless those impacts can be adequately mitigated.¹⁵ As discussed below, there is extensive consensus that the adverse impacts of the Project cannot be mitigated.

The Missouri Department of Conservation has concluded that the New Madrid Floodway portion of the Project will cause such extreme environmental harm that it should not be constructed.¹⁶ The Illinois Department of Natural Resources has also expressed “serious concerns” with the Project.¹⁷

Notably, the Corps’ own Independent External Peer Review Panel (IEPR Panel), convened pursuant to 33 U.S.C. § 2343, has concluded that the Project would “have a significant cumulative impact on the flood-dependent system”¹⁸ and that the “loss of this last remaining connection and its ecosystem functioning would be the ‘straw that broke the camel’s back’ in terms of the total cumulative impact.”¹⁹

The impacts identified by DOI, FWS, EPA, the Missouri Department of Conservation, and the IEPR Panel are precisely the type of “unacceptable adverse effect[s]” on fishery areas and wildlife that warrant a veto of this project under Section 404(c) of the Clean Water Act.²⁰ The extent of these adverse impacts

¹³ Draft Fish and Wildlife Coordination Act Report, 2013 Draft EIS Appendix Q, Part 1.

¹⁴ November 25, 2013 EPA Letter.

¹⁵ *Id.*

¹⁶ November 20, 2013 Letter from Robert L. Ziehmer, Director of the Missouri Department of Conservation to Col. Jeffrey Anderson, Commander Memphis District, U.S. Army Corps of Engineers (emphasis in original) (“The New Madrid Floodway portion of the project should not be constructed. . . . The loss of Mississippi River connectivity to the New Madrid Floodplain will result in significant impacts that cannot be addressed through mitigation. . . . The Department believes that significant project features of the New Madrid Floodway, affecting forest, fish, and wildlife resources, would result in an unacceptable reduction of seasonal flooding and connectivity to the Mississippi River.”)

¹⁷ November 16, 2015 Letter from Wayne Rosenthal, Director Illinois Department of Natural Resources to Major General Michael C. Wehr, Commander USACE Mississippi Valley Division.

¹⁸ Draft EIS Volume 3 Part 4, Phase III IEPR Final Comment Response Record at 61.

¹⁹ Draft EIS Volume 3 Part 3, Phase 2 IEPR at B-43.

²⁰ Clean Water Act § 404(c), 33 U.S.C. § 1344(c). Section 404(c) authorizes the Administrator of EPA to “prohibit, restrict, or deny the specification of any defined area in waters of the United States (including wetlands) as a disposal site for the discharge of dredged or fill material whenever it determines, after notice and opportunity for public hearing, that such discharge into waters of the United States will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas.”

and the environmental justice implications of the Project have generated extensive calls for a Clean Water Act veto by elected officials, community leaders, conservation and social justice organizations, members of the public, and editorial boards. Please see Appendix B for a comprehensive list of supporters of a Clean Water Act 404(c) veto.

B. The Substantial Harm Caused By The Project Cannot Be Mitigated

There is extensive consensus that the substantial adverse impacts of the Project cannot be mitigated.

DOI has concluded that “[a]ltering the hydrologic regime of the floodway produces a suite of complex and unsolvable challenges in providing adequate mitigation for the wetland, fishery, and floodplain impacts.”²¹ Mitigation plans for the project “are at odds with contemporary understanding of wetland and floodplain science and agency mitigation guidance.”²²

FWS has concluded that the project “would essentially eliminate a unique landscape and ecological feature in southeast Missouri and result in loss of thousands of acres of wetlands and their connection to the Mississippi River that cannot be adequately mitigated.”²³ FWS “is unaware of any feasible mitigation techniques that can provide in-kind replacement to offset the permanent loss of this habitat and associated ecological processes.”²⁴

The Missouri Department of Conservation has concluded that “[c]onnectivity between the Mississippi River and the floodplain provides important ecological interactions” and “this loss cannot be mitigated.”²⁵

Notably, Dr. Joy Zedler, Professor of Botany and Aldo Leopold Chair in Restoration Ecology at the University of Wisconsin and Chair of the National Research Council Panel on *Compensating for Wetland Losses Under the Clean Water Act*, has concluded that the Project mitigation is both scientifically unsound and “should itself be viewed as harmful”:

“The claim that the proposed mitigation for the St. Johns - New Madrid Floodway Project fully offsets project impacts on aquatic resources is **completely inconsistent with scientific understanding** of wetland functioning, wetland replacement, wetland restoration, and mitigation of other aquatic areas, as well as inconsistent with established practice under the Section 404 program. **The claim is so outside the range of reasonable scientific understanding that it cannot be seriously advanced as science-based.** It therefore should be disregarded.”²⁶

²¹ August 26, 2011 Letter from Acting Assistant Secretary for Fish Wildlife and Parks to Assistant Secretary of the Army for Civil Works.

²² *Id.*

²³ July 2013 Draft Fish and Wildlife Coordination Act Report at vi-vii, Draft EIS Appendix Q Part 1.

²⁴ March 15, 2006 U.S. Fish and Wildlife Service Supplemental Fish and Wildlife Coordination Act Report (included at pages 510-515 of the Revised Supplemental Environmental Impact Statement Number 2 for the St. Johns Bayou-New Madrid Floodway Project).

²⁵ December 15, 2001 Letter from Jerry Conley, Director Missouri Department of Conservation to Colonel Scherer, Memphis District Engineer, U.S. Army Corps of Engineers.

²⁶ January 2006 Report of Dr. Joy Zedler on the Mitigation Proposal for the St. Johns Bayou/New Madrid Floodway Project at 3, 5, 7 (emphasis added); November 25, 2013 Report of Dr. Joy Zedler on Draft Environmental Impact Statement for the St. Johns Bayou/New Madrid Floodway Project (2013). Copies of these reports are provided as part of Appendix C to these comments.

“The Corps’ claim for this project that the loss of a vast area of seasonally flooded aquatic habitat could be replaced by unnaturally extended flooding on a small area of already existing wetlands would be **an extreme example of what the NRC report recommended against.**”²⁷

“[T]he Corps has proposed to do the opposite of [the National Academy of Sciences recommendations on mitigation]. It would dramatically reduce or eliminate flooding according to a relatively natural pattern on tens of thousands of acres of wetlands and other valuable floodplain areas, and replace them primarily by artificially manipulating the hydrology on a small number of acres of already existing wetlands. **According to established understanding, that mitigation should itself be viewed as harmful, and according to accepted scientific understanding, it cannot offset the impacts of this project.**”²⁸

The IEPR Panel has also identified many significant problems that have led the Corps to underestimate the adverse impacts of the Project and overestimate the potential benefits of the proposed mitigation. The following are just some of the IEPR Panel’s final conclusions regarding the Corps’ mitigation plan:²⁹

- “Not explicitly accounting for loss of resources to reptiles, amphibians, wading birds other than blue herons, and least terns leads to an underestimate of project impacts and required mitigation.”
- “The methods used to determine the shorebird habitat value of the mitigation sites in Appendix R are inadequate because they do not consider reductions in habitat value due to relatively static water levels.”
- “The design of a stable water management plan for mitigation of waterfowl resource impacts will lead to inadequate mitigation of waterfowl resources.”
- “The current management of habitat designed to mitigate waterfowl resource impacts will be inadequate to mitigate waterfowl resource losses.”
- “The mitigation does not appear to be annualized and therefore does not account for the period of time required for functions of mitigation wetlands to fully develop.”
- “Part of the mitigation plan is the development of new wetlands; however, the mitigation plan does not take into account the loss of habitat during the time that it will take the new wetland to become fully functioning. Impacts on fish spawning and rearing are based on a study that is limited in scope and average annual habitat units (AAHUs) have been overvalued during transition periods, again resulting in a potential for underestimating the amount of mitigation needed.”

²⁷ *Id.*

²⁸ January 2006 Report of Dr. Joy Zedler on the Mitigation Proposal for the St. Johns Bayou/New Madrid Floodway Project

²⁹ Each of these quotes is from the Final Independent External Peer Review Report St. Johns Bayou and New Madrid Floodway Project, Missouri, Working Final Environmental Impact Statement (Phase 4) (February 23, 2015) (http://www.usace.army.mil/Portals/2/docs/civilworks/Project%20Planning/peer/stjohns_bayou_p4_IEPR.pdf).

- “The HGM model does not account for habitat losses to other wildlife that are not assessed in the other environmental models, therefore, the total loss of function associated with the project is not being evaluated.”
- “[I]nsufficient data are being used to develop the [mitigation] plan and therefore the adaptive management plan will not fully compensate for the impacts. Development of the current mitigation plan downplays the importance of ecosystems and uses methods, designs, and studies that are inadequate to determine the amount of mitigation that should be conducted.”
- “The mitigation plan is not based on sufficient data to ensure that the adaptive management plan can fully manage uncertainty.”

Additional analyses demonstrating that the Corps has underestimated the wetland, fisheries, shorebird, waterfowl, and other adverse impacts and significantly overestimated the benefits of the proposed mitigation for these resources can be found at pages 15 to 26 and 46 to 68 in the comments on the Draft EIS submitted by the National Wildlife Federation, Great Rivers Environmental Law Center, Kentucky Waterways Alliance, Missouri Coalition for the Environment, Missouri Parks Association, and the Sierra Club. These comprehensive comments are attached at Appendix C.

EPA has also determined that the Project’s proposed mitigation “plan” is inadequate because it does not comply with statutory and regulatory requirements.³⁰ A detailed analysis of the legal and regulatory failings of the Corps’ proposed mitigation plan can be found at pages 17 to 26 of Appendix C.

II. Less Damaging, Practicable Alternatives Are Available

EPA has advised the Corps that it “is apparent from the information provided” in the Draft EIS that practicable alternatives exist that would cause less harm to the environment.³¹ DOI and the Fish and Wildlife Service have also pointed to the existence of less damaging alternatives.

The Conservation community has likewise highlighted an array of less damaging alternatives that were either not evaluated in the Draft EIS or were improperly rejected after only superficial review by the Corps.³² These include the following reasonably practicable alternatives that would work either individually or in combination to provide extensive flood damage reduction benefits while also protecting the environment and providing benefits to the public at large:³³

1. Purchase of additional flowage easements in the New Madrid Floodway and/or modification of the terms of existing flowage easements to provide a more meaningful degree of

³⁰ November 25, 2013 EPA Letter.

³¹ *Id.*

³² See pages 10 to 13 of Appendix C to these comments.

³³ While the Corps included a cursory review of a small number of these activities in the Draft EIS, it failed to consider or evaluate most of these activities and failed to consider any alternatives that included a combination of some or all of these activities.

- compensation for smaller floods – the Federal Government currently owns flowage easements on at least 111,840 acres of land in the New Madrid Floodway;³⁴
2. Purchase of perpetual conservation easements on both cleared and forested lands in the Project area;
 3. Accelerated use of Wetlands Reserve and Conservation Reserve Programs in the Project area;
 4. Floodplain and wetland restoration in the Project area;
 5. Creation and/or expansion of fish and wildlife refuges in the Project area;
 6. Reintroduction of historic Mississippi River backwater flows into Big Oak Tree State Park as a project element (or as a stand-alone project) instead of as mitigation;
 7. Economic stimulus focused on promoting conversion of existing agriculture to flood tolerant silviculture;³⁵
 8. Economic stimulus aid for East Prairie;
 9. Targeted flood proofing and small scale flood protection projects as necessary to protect East Prairie and other communities or structures at risk from flooding, including targeted elevation of homes, businesses and roads, and voluntary relocation;
 10. Sewer and water infrastructure improvements for East Prairie;
 11. Water quality monitoring and water quality education;
 12. Nutrient trading;
 13. Use of flood hazard mitigation program options to protect flood prone structures, including programs available under: (a) the Robert T. Stafford Disaster Relief and Emergency Assistance Act of 1988,³⁶ including the Stafford Act's Hazard Mitigation Grants Program³⁷; (b) the National Flood Insurance Program (NFIP)³⁸, including the NFIP's Flood Mitigation Assistance and Severe Repetitive Loss Programs³⁹; and (c) the Federal Emergency Management Agency's Pre-Disaster Mitigation Program⁴⁰ and the Stafford Act Public Assistance program.

³⁴ By 1942, the Federal government had purchased flowage easements on 106,858 acres of land in the New Madrid Floodway. By 1974, the Federal government had purchased modified flowage easements on 80,982 acres in the New Madrid Floodway, including 76,000 acres that were under the originally purchased easements. Mississippi River Commission Information Paper, *Mississippi River & Tributaries Project: Birds Point-New Madrid Floodway*, at 7, 11. The St. John Levee and Drainage District also appears to own easements covering 57,000 acres within the backwater area. *Id.* at 10.

³⁵ The Draft EIS does identify crop conversion alternatives (i.e, converting agriculture production to silviculture, and converting to flood tolerant crops), but the Corps rejected those alternatives based on the misplaced and irrelevant claim that the cost of enrolling those lands in the Wetlands Reserve Program (WRP) would be excessive. This claim is irrelevant because: (1) the costs of enrolling in the WRP are completely unrelated to the costs of conversion to an alternative flood tolerant crop; and (2) WRP lands cannot be utilized to produce crops that can be sold in the marketplace. Crop conversion alternatives would result in the production of crops or trees that can be sold for a profit which would fundamentally alter the benefit cost analysis for such alternatives.

³⁶ 42 U.S.C. 5121-5207, P.L. 93-288, as amended, particularly through the "Public Assistance Program" and the "Section 404 Hazard Mitigation Grants Program."

³⁷ 42 U.S.C. § 5170c.

³⁸ 42 U.S.C. Chapter 50.

³⁹ 42 U.S.C. § 4104c.

⁴⁰ FEMA's PDM Program was added to the Stafford Act (42 U.S.C. 5165) in 2000, enacted under section 104 of the Disaster Mitigation Act of 2000 as amended, P.L. 106-390.

III. The Project Violates Numerous Federal Laws and Policies

The Project violates numerous Federal laws and policies, including the Clean Water Act, the National Environmental Policy Act, the benefit-cost requirement established by the Flood Control Act of 1933, Water Resources Development Act statutory mitigation requirements and Clean Water Act regulatory mitigation requirements, the National Water Resources Planning Policy, and critical Executive Orders and National policies related to environmental justice, floodplain management, wetlands protection, climate change, and restoration.

A. The Project is Prohibited Under the Clean Water Act 404(b)(1) Guidelines

The Project is prohibited under the Clean Water Act 404(b)(1) Guidelines (the Guidelines) due to the magnitude and severity of the environmental harm that would be caused, the ability to avoid those impacts through the use of nonstructural and restoration efforts, the inability to mitigate the Project's adverse impacts, and the Corps' failure to demonstrate compliance with the Guidelines.⁴¹

The Guidelines **prohibit** a project if the project triggers one of four prohibition criteria. This Project triggers all four prohibition criteria and, as a result, may not be constructed.

First, a project is prohibited by the Guidelines if it "will cause or contribute to significant degradation of the waters of the United States."⁴² As discussed in Section I of these comments, the Project will clearly cause extensive and unacceptable impacts to the nation's waters. EPA has advised the Corps that the Project's impacts to wetlands, fish, and wildlife would "constitute significant degradation" unless those impacts can be adequately mitigated.⁴³ The Project is prohibited by the Guidelines because, as discussed in Section I, there is extensive consensus that the adverse impacts in fact cannot be mitigated and that the Corps' proposed mitigation is scientifically unsound and legally inadequate.

Second, a project is prohibited by the Guidelines if a less damaging practicable alternative is available.⁴⁴ The Project is prohibited by the Guidelines because, as discussed in Section II of these comments, less damaging, practicable alternatives are available.

Third, a project is prohibited by the Guidelines if it fails to adequately minimize and compensate for wetland and other aquatic resource losses.⁴⁵ The Project is prohibited by the Guidelines because, as discussed in Section I of these comments, the Project does not—and cannot—compensate for the adverse environmental impacts to wetlands, river-floodplain connectivity, and fish and wildlife. The Project is also prohibited by the Guidelines because the Corps has not taken the steps needed to avoid or minimize the Project's adverse impacts. The Corps could avoid all adverse impacts by selecting an

⁴¹ The Corps must comply with the requirements of Clean Water Act Section 404 and the Guidelines when carrying out its civil works activities. 33 U.S.C. § 1323; 33 C.F.R. § 336.1(a).

⁴² 40 C.F.R. § 231.10(c).

⁴³ November 25, 2013 EPA Letter.

⁴⁴ 40 C.F.R. § 230.10(a).

⁴⁵ 40 C.F.R. 230.10(a)–(d). The adverse environmental impacts of all projects not otherwise prohibited by the Guidelines must be minimized to the maximum extent practicable. To this end, impacts must first be avoided if at all possible. Impacts that cannot be avoided are to be minimized by modifying the project. If modification is not possible, the impact is to be rectified by restoring the environment.

alternative that utilizes one or more wholly nonstructural activities, or that utilizes a combination of nonstructural and restoration activities.⁴⁶

Fourth, a project is prohibited by the Guidelines if the project evaluation fails to establish that the project will not have unacceptable adverse environmental impacts.⁴⁷ The Project is prohibited by the Guidelines because the Corps has not satisfied this requirement, as extensively documented by EPA, DOI, the IEPR Panel and others.⁴⁸

For example, EPA has determined that the Draft EIS “does not provide adequate information to demonstrate compliance with several aspects” of the Guidelines and that “the level of detail of the alternatives analysis and assessment of impacts is insufficient for purposes of informing a determination of compliance with these regulations given the complexity of issues, scale of the project, and the potential severity and magnitude of adverse impacts to the aquatic ecosystems.”⁴⁹

DOI has concluded that the Corps has not accounted for the full range of aquatic impacts and has not demonstrated that the project will not have unacceptable impacts.⁵⁰ For example, by failing to evaluate the impacts to wetlands and fish and wildlife from hydrologic changes above the 5 year floodplain, DOI concludes that the Corps “ignores effects to thousands of acres of wetlands that will have reduced inundation as a result of the project.”⁵¹ DOI “has consistently” told the Corps that the Hydrogeomorphic Method (HGM) that is used “did not include all of the potentially affected wetlands” and that the model is “insensitive to hydrological changes and other important factors.”⁵² DOI has also concluded that the DEIS “does not account for forested wetlands that will be lost as a result of being cleared due to post-project drainage and agricultural conversion” because the Corps has restricted “its evaluation to the construction footprint and does not include the reasonably foreseeable indirect effects to forested wetlands caused by the changes in land use and hydrologic changes.”⁵³

The IEPR Panel has identified significant problems with the “adequacy and acceptability of the economic, engineering, and environmental methods, models, and analyses used” by the Corps in the Working Final EIS.⁵⁴ The IEPR Panel identified and documented 26 areas of concern in its Final Phase 4 report, all of which demonstrate that the Corps has not fully and properly evaluated the adverse impacts of the Project. For example, the Panel determined that:

- “The adequacy and acceptability of the economic analysis and projections cannot be determined because sufficient information regarding agricultural economic modeling has not been provided.”

⁴⁶ The Corps could also help minimize impacts by selecting a less damaging operating regime. However, even with an alternative operating regime, the Project would still cause such extensive harm that it would be prohibited under the Guidelines.

⁴⁷ 40 C.F.R. § 230.1(c).

⁴⁸ See also Section III of these comments.

⁴⁹ November 25, 2013 EPA Letter.

⁵⁰ November 18, 2013 DOI Letter.

⁵¹ *Id.* at Specific Comments page 6.

⁵² *Id.* at Cover letter page 2.

⁵³ *Id.* at Specific Comments page 11.

⁵⁴ Final Independent External Peer Review Report St. Johns Bayou and New Madrid Floodway Project, Missouri, Working Final Environmental Impact Statement (Phase 4) (February 23, 2015) (http://www.usace.army.mil/Portals/2/docs/civilworks/Project%20Planning/peer/stjohns_bayou_p4_IEPR.pdf).

- “Not explicitly accounting for loss of resources to reptiles, amphibians, wading birds other than blue herons, and least terns leads to an underestimate of project impacts and required mitigation.”
- “Impacts on HGM wetland function as a result of changes to wetland classifications caused by reducing hydrologic activity have not been correctly quantified and mitigated.”
- “Relying solely on the HGM Guidebook to select the six wetland functions used in the HGM model appears to have resulted in significant ecosystem functions and services not being included.”
- “The HGM model does not account for habitat losses to other wildlife that are not assessed in the other environmental models, therefore, the total loss of function associated with the project is not being evaluated.”
- “The data collected for the HGM Functional Capacity Index appear to be inadequate because they are based on a very small percentage of the project area and were collected during the driest time of the year. . . . Increasing sample size may dramatically alter the estimates of wetland impacts, modifying the estimates of mitigation needs.”
- “Cumulative impacts on shorebird habitat are not adequately considered because it is assumed that wildlife can relocate if habitat is lost.”
- “Fish spawning and rearing impacts and associated mitigation may be underestimated due to the limited scope of the fish passage study conducted for the St. Johns Bayou Basin and New Madrid Floodway.”
- “The impacts on and mitigation planning for fish spawning and rearing habitat have not been adequately quantified due to AAHUs being overvalued during the transition periods.”
- “The overall assessment of the flood pulse and statements throughout the Working Final EIS suggesting that there is little to no value associated with river connectivity or flood pulse for environmental resources in the floodways are not well supported.”
- “The current methods used are insufficient for evaluating the full range of species in the ecosystems being affected because the HSI and other models do not adequately address reptiles, amphibians, terns, and mussels.”
- “The assumption that the future without-project conditions for agriculture will be stable may not be realistic, given that the agriculture commodity prices in recent years have been greatly influenced by productivity growth and by U.S. government ethanol policy.”
- “Residual flood risks associated with extreme flood events are not addressed in detail in the Working Final EIS.”

- “The potential for economic impacts from climate change in future years (e.g., 2069) has apparently not been considered in projecting future crop yields.”

As documented in the comments attached at Appendix C, other outside experts and conservation organizations have also documented significant problems with the Corps’ analyses of impacts.

B. The Project EIS Violates the National Environmental Policy Act

As CEQ is aware, the Corps has carried out multiple reviews of the Project, including reviews in 1976, 1982, 2000, 2001, 2002, 2006, and 2014/2016. Each of these reviews has recommended severing the river-floodplain connection by constructing a new levee. As a result, it is extremely unlikely that any additional future study would lead to a plan that does not recommend this destructive and dangerous component.

Previous Corps studies on this Project have also had significant problems. In 2007, the U.S. District Court for the District of Columbia set aside the Corps’ 2002 Revised Supplemental EIS, 2006 Revised Supplemental EIS, and 2006 Record of Decision for the Project because the Corps had “acted arbitrarily and capriciously in violation of the APA, the CWA, and NEPA in finding that its plan would fully mitigate impacts to fisheries habitat.”⁵⁵ The Court also enjoined the Corps from proceeding with the project and ordered the Corps to “deconstruct that portion of the project which it has already built.”⁵⁶

The Court’s decision was particularly scathing:

“The Corps’ manipulation of its habitat model in analyzing fish mitigation gives new meaning to the phrase “result-oriented decision-making.” The Corps has obviously worked backwards from the mitigation dollars it could afford, tweaking several of its original, fundamental understandings of its mitigation obligations so as to make the project appear to return a positive benefit-cost ratio. Many mitigation decisions seem to have been based on cost alone, with a troubling disregard for the fundamental assumptions of the HEP team model and HEP team member judgment. Several elements discussed above lack factual support or substantial evidence, but, more disturbingly, the Corps has demonstrated its willingness to do whatever it takes to proceed with this project-change definitions, abandon core assumptions-even if it means ignoring serious environmental impacts. The Corps’ conclusion that its proposal would fully mitigate adverse impacts on fisheries was neither “rational [nor] based on consideration of the relevant factors.” Exclusions from and manipulations of the HEP model infected the 2002 RSEIS and 2006 RSEIS with scientifically unsound analyses in violation of NEPA and prevented a reliable conclusion that the project satisfies the CWA. For these reasons, the agency’s deficient fish mitigation proposal is arbitrary and capricious in violation of the APA.”⁵⁷

The Draft EIS is also fundamentally flawed and fails to comply with the requirements of the National Environmental Policy Act, as documented in detail in the Conservation Organization comments attached at Appendix C. Among many other problems, the Draft EIS relies on outdated models and data and lacks scientific integrity; fails to demonstrate project need; fails to properly consider reasonable, less damaging alternatives; fails to examine the full suite of adverse impacts from the Project (for example,

⁵⁵ *Environmental Defense Fund v. U.S. Army Corps of Engineers*, 515 F.Supp.2d 69 (D.D.C 2007).

⁵⁶ *Id.*

⁵⁷ *Id.* at 85 (internal citations omitted).

the Draft EIS devotes a scant three paragraphs to the impacts of the Project on amphibians and reptiles); and fails to satisfy statutory and regulatory requirements regarding mitigation planning.

Notably, despite decades of studying the Project, the Draft EIS lacks the most basic information needed to determine whether there is even a need for a flood damage reduction project in the Project area. For example, the Draft EIS contains no data on actual flood damages in the Project area⁵⁸ and fails to identify the total number of farms that would be affected by the Project, the total value of products sold from those farms, or any estimates of crop damage or other agricultural losses caused by flooding in the Project area.⁵⁹ The Draft EIS also does not provide the elevation of farms located within the Project area even though all project benefits are linked to the reduction of flooding at specific elevations.⁶⁰

The Working Final EIS for the Project is equally flawed. For example, the IEPR identified and documented significant problems with the impacts analysis, mitigation analysis, and economics analysis in the Working Final. Examples of the many concerns raised by the IEPR Panel can be found in Sections I and III.A. of these comments, and at pages 10-13 of Appendix A.

C. The Project Violates The 1933 Flood Control Act Benefit-Cost Requirement

The Project violates 33 U.S.C. §701a (established by the Flood Control Act of 1933) because the EIS fails to adequately demonstrate that the project benefits exceed the project costs.⁶¹ Outside experts have determined that both the Draft EIS and the Working Final EIS fail to make this showing.

The IEPR Phase 4 report on the Working Final EIS concludes that the “adequacy and acceptability of the economic analysis and projections cannot be determined because sufficient information regarding agricultural economic modeling has not been provided.”⁶² The IEPR Panel classifies this problem as one of “high significance.”

⁵⁸ The Corps contends that “[r]eliable estimates of crop damage due to flooding do not exist.” Draft EIS at 9.

⁵⁹ While the DEIS does provide county-wide information on the number of farms, total commodities sold, and farm subsidy payments, this information cannot be used to demonstrate either project benefits or need because large portions of each county are located outside the Project area and would be unaffected by the Project.

⁶⁰ The Corps also fails to assess the role that the natural flood regime plays in enriching the soil in the New Madrid Floodway. At least one study strongly suggests that eliminating this flood regime would actually harm – not help – agricultural production in the Project area. This study, which examines a similar system along the lower Mississippi River, shows that soybean yields were positively correlated to the amount of area flooded two years prior to a crop, which suggests that flooding benefits soybean production from a long-term perspective. The study also found that cotton yield was positively correlated with maximum area flooded during the same year (likely due to the increased soil moisture) even though fewer acres of cotton were planted during flood years. Jackson, D. C. and Q. Ye. 2000. Riverine fish stock and regional agronomic responses to hydrologic and climatic regimes in the upper Yazoo River basin. Pages 242-257 in I. G. Cowx, Editor. Management and Ecology of River Fisheries. Fishing News Books. Blackwell Science. London.

⁶¹ This provision states: “the Federal Government should improve or participate in the improvement of navigable waters or their tributaries, including watersheds thereof, for flood-control purposes if the benefits to whomsoever they may accrue are in excess of the estimated costs, and if the lives and social security of people are otherwise adversely affected.” 33 U.S.C § 701a. This provision is made specifically applicable to the Corps by 33 U.S.C. §701a-1 and §701b.

⁶² Final Independent External Peer Review Report St. Johns Bayou and New Madrid Floodway Project, Missouri, Working Final Environmental Impact Statement (Phase 4) (February 23, 2015) (http://www.usace.army.mil/Portals/2/docs/civilworks/Project%20Planning/peer/stjohns_bayou_p4_IEPR.pdf).

A detailed economic analysis of the Draft EIS prepared by former Corps senior economist and Professor at the University of Missouri-St. Louis, Dr. Donald C. Sweeney, documents the many problems with the Corps' economic analysis of the Project and concludes that the "economic analysis should be considered unreliable and insufficient to determine whether or not the recommended alternative, or any other alternative for that matter, will likely produce a positive net economic return for taxpayers' investments."⁶³ Dr. Sweeney further concludes that:

"The economic analysis in the DEIS lacks the scope, data, detail, quality of execution and quality of presentation required to support such an important and controversial public policy decision involving the commitment of between \$58 and \$180 million of scarce resources (depending on the alternative implemented) with such potentially large environmental consequences. The analysis relies on arbitrary assumptions. Important specific and significant project-area supporting data is lacking. In many instances the descriptions of the analytical methodologies employed are insufficient to determine what was actually done, in other instances no descriptions of employed methodologies are provided at all, in still other instances, the employed methodologies appear questionable at best. Further, the economic analysis is fraught with both demonstrable and apparent errors. The results of the 2013 DEIS Economic Analysis should not be used as a basis for any public policy decision."⁶⁴

D. The Project Violates Statutory and Regulatory Mitigation Requirements

As discussed in Section I.B. above, EPA has determined that the Project's proposed mitigation "plan" does not comply with the statutory mitigation requirements for civil works projects established under the Water Resources Development Acts (33 U.S.C. § 2283) and does not comply with the regulatory mitigation requirements established under the Clean Water Act.⁶⁵ A detailed analysis of the legal and regulatory failings of the Corps' proposed mitigation plan can be found at pages 17 to 26 of Appendix C to these comments.

E. The Project Violates the Executive Order on Environmental Justice

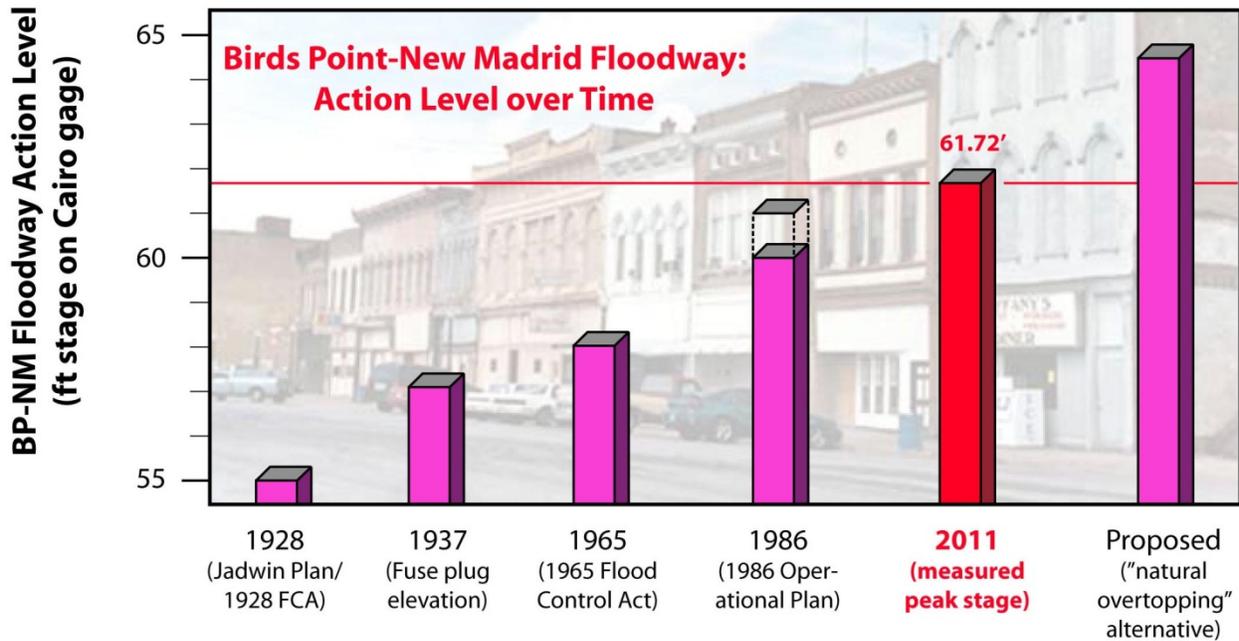
Executive Order 12898 requires that each Federal agency achieve environmental justice by identifying and addressing disproportionately high adverse human health or environmental effects of federal activities on minority and low-income populations. The Project violates this Executive Order because it will disproportionately affect the health and safety of minority and low income populations by increasing their risk of catastrophic flooding.

⁶³ Donald C. Sweeney II, Ph.D., *A Review of the Economic Analysis Presented in the St. Johns Bayou and New Madrid Floodway July 2013 Draft Environmental Impact Statement*, Prepared for the National Wildlife Federation and the Great Rivers Environmental Law Center, November 8, 2013 at 2. A copy of this report is included at Appendix C to these comments. Dr. Sweeney is eminently qualified to evaluate the Project. Dr. Sweeney was employed by the Corps for 27 years as a regional economist, supervisory regional economist and senior regional economist. He is currently a Teaching Professor of Logistics and Operations Management, an Affiliate Professor of Economics, and the Associate Director of the Center for Transportation Studies at the University of Missouri-St. Louis. He holds a Bachelor of Science degree in Mathematics and Economics from Knox College, Galesburg IL and a Ph.D. degree in Economics from Washington University, St. Louis MO.

⁶⁴ *Id.* at 22-23.

⁶⁵ November 25, 2013 EPA Letter.

The Corps is authorized – but not required – to activate the New Madrid Floodway to protect river communities whenever water levels at the Cairo gage reach 58 feet and river stages are forecast to exceed 60 feet.⁶⁶ If the New Madrid Floodway is not activated during a severe flood, the Corps’ own studies show that levees and floodwalls would overtop in dozens of river communities in Illinois, Missouri and Kentucky.⁶⁷ Despite these risks, the activation levels for the New Madrid Floodway have increased steadily overtime due to significant pressure placed on the Corps to not utilize the floodway:



Action Level Chart Courtesy of Nicholas Pinter, Ph.D., Southern Illinois University

The activation level was most recently “officially” increased through a 1986 Operating Plan. That Plan directs activation of the floodway “prior to river stages reaching 61 feet on the Cairo gage with additional stage increases forecast,” though the Corps reserved the right to activate the floodway when stages reached or exceeded 58 feet at the Cairo gage in certain situations.⁶⁸

In 2011, however, the floodway was not activated until the river reached 61.72 feet at Cairo, far above either the authorized activation level or the 1986 activation level. This delay occurred even though the Corps had extensive advance notice of the flood threat. On April 30, the National Weather Service had predicted that the flood stage at Cairo would reach 61.5 feet by May 4.⁶⁹ On May 1, the river level at

⁶⁶ Camillo, Charles A., "Divine Providence: The 2011 Flood in the Mississippi River and Tributaries Project" (2012). *US Army Corps of Engineers, Omaha District*. Paper 142 at 52 ("Divine Providence"), available at <http://digitalcommons.unl.edu/usarmyceomaha/142> (visited on December 18, 2016).

⁶⁷ St. Johns Bayou and New Madrid Floodway, Consolidated NEPA Document (consolidating the 2002 RSEIS and the 2006 RSEIS 2 for the St. Johns Bayou and New Madrid Floodway, MO Project), Appendix K. p. 13-14 (previously available at <http://www.mvm.usace.army.mil/stjohns/PeerReview/default.asp>; this document appears to have been removed from the Corps’ website).

⁶⁸ Divine Providence at 57.

⁶⁹ Divine Providence at 93.

Cairo had surged past 59.5 feet.⁷⁰ However, the floodway was not activated (by blowing up the Bird's Point levee) until May 2, 2011 at approximately 10 pm EST. By that time, the river had reached 61.72 feet at Cairo.

The delay was due in large part to a lawsuit that was filed by the state of Missouri to stop the floodway's use. "Missouri officials had fought hard to stop the plan, filing court actions all the way to the U.S. Supreme Court."⁷¹ While Missouri eventually lost its legal challenge, critical time was lost as the legal battle played out in court.

The delay in activating the floodway resulted in extensive flooding. More than 200 structures flooded in Olive Branch, Illinois. Almost 240 homes were flooded in the City of Metropolis Illinois and dozens of businesses were either closed or greatly affected by high water. Lost revenue, flood fighting and clean-up costs from the 2011 flood cost Metropolis almost \$1.4 million.⁷² The entire city of Cairo Illinois was put under a mandatory evacuation order. Residents were forced to leave their homes and find alternative places to stay, often at significant personal expense. Cairo could have been completely destroyed by any further delay. Once the floodway was used, water levels at Cairo dropped 1 foot in just 6 hours, and 2.7 feet in just 48 hours.

Construction of the New Madrid levee will promote intensified use of the New Madrid Floodway, and there is significant concern among elected officials, community leaders, conservation and social justice organizations, and members of the public that this will in turn increase the opposition and obstacles to activating the floodway to save river towns during the next big flood.⁷³

Many of the communities most likely to be affected by delays in activating the New Madrid Floodway have significant minority and low-income populations. For example:

United States Census Data ⁷⁴			
Town	Poverty Level	Child Poverty	Minority Population
Cairo, IL	44.2%	71.7%	72.4% (69.6% African American)
Charleston, MO	31.0%	54.6%	53.8% (50.9 %African American)
Metropolis, IL	31.0%	54.6%	9.4% (7% African American)
Mound City, IL	34.7%	24.3%	47.5% (46.1% African American)
Hickman, KY	26.1%	40.1%	36.1% (34.1% African American)
Paducah, KY	23.6%	40.0%	29.0% (23.7% African American)
East Prairie, MO	20.9%	18.8%	3.2% (2.7% African American)
Sikeston, MO	20.0%	28.0%	31.2% (26.2% African American)
East Cape Girardeau, IL	10.0%	14.6%	5.2% (3.4% African American)

⁷⁰ *Id.* at 94.

⁷¹ CBS St. Louis, <http://stlouis.cbslocal.com/2011/05/03/watch-blowing-up-birds-point-levee/> (visited on November 24, 2013).

⁷² July 26, 2016 Letter to President Obama from Billy McDaniel, Mayor of the City of Metropolis Illinois.

⁷³ The Corps has not carried out meaningful studies to determine whether construction of the New Madrid levee would itself increase flood heights. The Draft EIS instead relies on an evaluation conducted 23 years ago using a 1950s era physical model to evaluate the effect on flood heights of constructing the New Madrid levee. This dramatically outdated analysis is completely unreliable. The Corps instead should have evaluated this risk using modern and verified models and data.

⁷⁴ United States Census Bureau, *American FactFinder*, available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml> (last visited December 18, 2016).

While many at risk communities will bear the brunt of the increased flood risks, the primary beneficiaries of the Project will be large landowners in the New Madrid Floodway who: (1) are voluntarily operating in an area that has always flooded and that is designated as a relief valve during significant flood events; (2) have already been paid by the Federal government to allow the land to flood;⁷⁵ and (3) are clearly able to farm even after major flooding events as demonstrated by the fact that after the flood of 2011, “farmers were able to plant upwards of 90,000 acres of soybeans by the summer of 2011 and an additional 30,000 acres of soybeans or corn by spring 2012” in the New Madrid Floodway.⁷⁶ In addition, many of the landowners in the New Madrid Floodway have also already received significant federal subsidies in the form of farm subsidy payments.⁷⁷

The Project’s risks to river communities and severe environmental impacts have created broad-based opposition to the Project. Senator Richard Durbin (D-IL), Senator Mark Kirk (R-IL), Representative Mike Bost (R-IL-12), the Mayors of Cairo, Mound City, and Metropolis Illinois, the Missouri and Illinois State Conferences of the NAACP, more than 90 conservation organizations, more than 26,000 members of the public, and the St. Louis Post-Dispatch and Washington Post editorial boards are among those who have called on this administration to permanently stop the Project.

In a December 16, 2014 letter to President Obama calling for a Clean Water Act veto of the Project, dozens of elected officials and community leaders from Illinois, Missouri, and Kentucky succinctly stated their views of the Project:

“The St. Johns Bayou – New Madrid Floodway project will put our communities at even greater risk of catastrophic flooding by creating more obstacles and opposition to the Floodway’s use. We are at a loss to understand how the Corps of Engineers could determine that this is in the national interest. We certainly know that it is not in the interest of our communities.”

A copy of this letter is included in Appendix B along with a sampling of additional letters opposing the project and a comprehensive list of Project opponents.

⁷⁵ The Federal government currently owns flowage easements on at least 111,840 acres of land in the New Madrid Floodway. The St. John Levee and Drainage District also appears to own easements covering 57,000 acres within the backwater area. Mississippi River Commission Information Paper, *Mississippi River & Tributaries Project: Birds Point-New Madrid Floodway*, at 7, 10-11.

⁷⁶ Draft EIS at 8.

⁷⁷ An analysis of farm subsidy data compiled by the Environmental Working Group suggests that between 1995 and 2012, thirty entities that own land in the New Madrid Floodway received \$8.89 million in farm subsidy payments for farming carried out in the Floodway. Payments to individual entities ranged from \$17,195 to more than \$1.52 million. Of those entities that received farm subsidy payments, 8 received more than \$538,000 in payments during this period, and 21 entities received more than \$109,000. For purposes of this analysis, various owners, companies, and trusts that could reasonably be determined to belong to the same person or family were consolidated into single entities. This information is on file with the National Wildlife Federation and will be provided upon request. Additional information regarding this analysis can be found at page 41 of Appendix C.

F. The Project Violates National Policies on Water Resources, Wetlands and Floodplain Protections, Climate Change, and Restoration

The Project should not be constructed because the Project's substantial and unacceptable adverse impacts – and its fundamental purpose of draining wetlands to increase agricultural production – violate at least the following longstanding Federal policies.

The National Water Resources Planning Policy

"It is the policy of the United States that all water resources projects" should among other things, reflect national priorities and protect the environment by "protecting and restoring the functions of natural systems and mitigating any unavoidable damage to natural systems" and by "seeking to avoid the unwise use of floodplains and flood-prone areas and minimizing adverse impacts and vulnerabilities in any case in which a floodplain or flood-prone area must be used."⁷⁸ The Project violates this policy as it will do just the opposite.

National Wetlands and Floodplain Policies

A broad array of federal laws and policies promote protection of the nation's remaining wetlands and floodplains and restoration of those resources to reverse historic wetland losses. Such Federal laws include, the Clean Water Act; the 1985 and 1990 Farm Bills; the Emergency Wetlands Protection Act of 1986; the Water Resources Development Acts of 1986, 1992, and 1996; the Agriculture Credit Act of 1987; the Conservation Reserve Program; the Food Security Act of 1992; the Wetlands Reserve Program (WRP); and the Federal Agriculture Improvement and Reform Act of 1996. Longstanding Executive Orders also call for the protection of wetlands and floodplains. For example:

- Executive Order 11990 (Protection of Wetlands) directs each federal agency to provide leadership and take action to minimize the destruction, loss or degradation of wetlands, and to preserve and enhance the natural and beneficial values in carrying out agency policy.
- Executive Order 11988 (Floodplain Management) directs each federal agency to avoid, to the extent possible, the long and short-term adverse impacts associated with the occupancy and modification of floodplains; to avoid direct and indirect support of floodplain development wherever there is a practicable alternative; and "to restore and preserve the natural and beneficial values served by flood plains in carrying out its responsibilities."
- The Water Resources Development Act of 1990 establishes a wetlands protection goal for Corps civil works projects. That Act establishes "an interim goal of no overall net loss of the Nation's remaining wetlands base, as defined by acreage and function, and a long-term goal to increase the quality and quantity of the Nation's wetlands, as defined by acreage and function." 33 U.S.C. § 2317(a)(1). That Act further established "environmental protection as one of the primary missions of the Corps of Engineers in planning, designing, constructing, operating, and maintaining water resources projects." Water Resources Development Act of 1990, 33 U.S.C. § 2316(a) (emphasis added).
- Provisions referred to as Swampbuster, sections 1201-1224 of the Food Security Act of 1985, as amended, 16 U.S.C. 3801 et seq., bar participation in a wide variety of important agricultural support programs to farmers who either convert wetlands after 1985 or who plant crops on

⁷⁸ 42 USC § 1962–3.

wetlands that have been converted since 1985. Conversion has been defined by regulations at 7 C.F.R. Sections 12.-12.34, to include the additional drainage of wetlands regardless of whether it completely eliminates all wetland conditions. Under the statute and regulations, farmers are responsible for drainage done with the assistance of drainage districts, and mitigation for wetland drainage may not be done at federal expense. This project will drain thousands of acres of farmed wetlands, causing farmers to be ineligible under Swampbuster for a host of farm payments. The implications of this ineligibility are not addressed in the Draft EIS.

- The Wetland Reserve Program (WRP), administered by the USDA Natural Resources Conservation Service, is a voluntary program offering landowners the opportunity to protect, restore, and enhance wetlands on their property. The program provides technical and financial support to help landowners with wetland restoration efforts and establish long-term conservation and wildlife practices and protection. Lands eligible for WRP include farmed wetlands, prior converted cropland, riparian areas that link protected wetlands and lands that have the potential to become a wetland as a result of flooding. Lands enrolled are placed under a conservation easement and undergo restoration.
- The Conservation Reserve Program (CRP), administered by the Farm Services Agency, is a voluntary program for agricultural landowners. CRP provides annual rental payments, cost-share assistance and technical assistance to establish long-term, resource conserving covers on eligible farmland. It is often referred to as the nation's largest voluntary private lands conservation program. Eligible owners or operators may place highly erodible or other environmentally-sensitive land into a 10 to 15 year conservation contract.
- The Conservation Stewardship Program (CSP), administered by the USDA Natural Resources Conservation Service, is a voluntary program which encourages agricultural and forestry producers (including Tribal producers) to address resource concerns by: (1) undertaking additional conservation activities; and (2) improving and maintaining existing conservation systems. CSP provides financial and technical assistance to help land stewards conserve and enhance soil, water, air, and related natural resources on their land. The beneficiaries of the CSP program must refrain from damaging or draining wetlands on their lands.
- In recent years substantial funds have been provided through Supplemental Appropriations bills for the USDA Emergency Watershed Protection Program, with much of this funding being used to purchase floodplain easements to help restore previously drained or degraded wetlands and to restore naturally functioning floodplains. The Secretary of Agriculture is authorized to utilize the purchase of floodplain easements as an emergency restoration measure.⁷⁹

The Project is at odds with Executive Order 11990 (Protection of Wetlands) and Executive Order 11988 (Floodplain Management), and works against the goals and initiatives outlined above that are designed

⁷⁹ Section 216, P.L. 81-516, as amended, 16 U.S.C. § 2203 (emphasis added) ("The Secretary of Agriculture is authorized to undertake emergency measures, **including the purchase of floodplain easements**, for runoff retardation and soil erosion prevention, in cooperation with landowners and land users, as the Secretary deems necessary to safeguard lives and property from floods, drought, and the products of erosion on any watershed whenever fire, flood, or any other natural occurrence is causing or has caused a sudden impairment of that watershed.")

to protect and restore wetlands and floodplains. The Project will add significantly to – not reverse – historic wetland losses.

National Climate Change Executive Order and Policies

The scientific recognition of our changing climate has led to federal policies requiring greater consideration of the effects of climate change on federal infrastructure investment and planning.

On November 13, 2013 the President issued an Executive Order entitled “Preparing the United States for the Impacts of Climate Change.” Among other things, this Executive Order requires federal agencies to “complete an inventory and assessment of proposed and completed changes to their land- and water-related policies, programs, and regulations necessary to make the Nation’s watersheds, natural resources, and ecosystems, and the communities and economies that depend on them, more resilient in the face of a changing climate” and in recognition of “the many benefits the Nation’s natural infrastructure provides” directs agencies to focus on program and policy adjustments that promote the dual goals of greater climate resilience and carbon sequestration where possible.

In 2014, the Corps adopted the “USACE Climate Preparedness and Resilience Policy Statement” which states that it “is the policy of USACE to integrate climate change preparedness and resilience planning and actions in all activities for the purpose of enhancing the resilience of our built and natural water-resource infrastructure and the effectiveness of our military support mission, and to reduce the potential vulnerabilities of that infrastructure and those missions to the effects of climate change and variability.”

In 2012, DOI adopted policy guidance to address climate change in project planning that include: (1) promoting landscape-scale ecosystem-based management approaches to enhance resilience and sustainability of linked human and natural systems; (2) protecting diversity of habitat communities and species; (3) protecting and restoring core, unfragmented habitat areas and the key habitat linkages among them; and (4) maintaining key ecosystem services.

The Project works against the vital Climate Change Executive Order and agency resiliency policies by, among other things, significantly undermining the resiliency and sustainability of fish and wildlife populations by eliminating the natural flood regime that sustains those populations and the wetlands they rely on.

Restoration Policies and Initiatives

Restoring backwater habitat is a primary goal of the Corps’ restoration efforts under the Environmental Management Program and the Upper Mississippi River System Navigation & Ecosystem Sustainability Program. The Project works against these key restoration efforts because it will destroy vital backwater habitat.

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Conclusion

There is overwhelming support for terminating the Project. Senator Richard Durbin (D-IL), Senator Mark Kirk (R-IL), Representative Mike Bost (R-IL-12), the Mayors of Cairo, Mound City, and Metropolis Illinois, the Missouri and Illinois State Conferences of the NAACP, more than 90 conservation organizations, more than 26,000 members of the public, and the St. Louis Post-Dispatch and Washington Post editorial boards are among those who have called on this administration to permanently stop the Project.

The National Wildlife Federation respectfully urges CEQ to heed these calls and protect the environment, communities, and the region's ability to thrive in the face of a changing climate by permanently terminating the St. Johns Bayou and New Madrid Floodway Project through the CEQ referral process.

Respectfully submitted,



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Attachments

Appendix A: Compilation of Quotes from Federal, State, and Independent Expert Project Analyses
Appendix B: List of Project Opponents and Selected Letters Calling for a Clean Water Act Veto
Appendix C: Conservation Organization Comments on the Project's Draft EIS with Expert Reports