IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

NATIONAL WILDLIFE FEDERATION, AMERICAN RIVERS, PRAIRIE RIVERS NETWORK, MISSOURI COALITION FOR THE ENVIRONMENT, and GREAT RIVERS HABITAT ALLIANCE, Plaintiffs, vs. UNITED STATES ARMY CORPS OF ENGINEERS, LT. GENERAL SCOTT A SPELLMON, Commanding General and Chief of Engineers, MAJOR GENERAL DIANA M. HOLLAND, Commander of the Mississippi Valley Division of the Army Corps of Engineers, Defendants.	CASE NO. 20-cv-00443-DWD

FEDERAL DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF FEDERAL DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

TABLE OF ABBREVIATIONS

Abbreviation	Definition
1927 RHA	Rivers and Harbors Act of 1927
APA	Administrative Procedure Act
DSEIS	Draft Supplemental Environmental Impact Statement
EA	Environmental Assessment
FSEIS	Final Supplemental Environmental Impact Statement
FWCA	Fish and Wildlife Coordination Act
IEPR	Independent External Peer Review
LMR	Lower Mississippi River
MMR	Middle Mississippi River
NEPA	National Environmental Policy Act
Project	Regulating Works Project
ROD	Record of Decision
UMR	Upper Mississippi River
WRDA	Water Resources Development Act

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I. INTRODUCTION

The United States Army Corps of Engineers ("Corps") has been tasked by Congress with maintaining navigation on the Mississippi River. In the Middle Mississippi River ("MMR") – the stretch of the Mississippi between the confluences of the Missouri and the Ohio Rivers – Congress tasked the Corps with maintaining navigation primarily by building and maintaining structures that use the river's force to scour a navigation channel. And Congress authorized the Corps to supplement these structures with dredging only to the extent necessary. The Corps discharges its statutory duties for the MMR through its Regulating Works Project ("Project") which maintains the MMR's navigation channel.

This case concerns a Final Supplemental Environmental Impact Statement ("FSEIS") the Corps completed to evaluate the environmental impacts of the Project under the National Environmental Policy Act ("NEPA"). The FSEIS supplements an Environmental Impact Statement that the Corps completed in 1976. It explains in great detail the MMR's baseline environmental conditions, management alternatives that the Corps considered, analyses that the Corps used to evaluate those alternatives, and the Corps' plan to conduct site-specific analyses to mitigate any adverse impacts prior to constructing any new structures in the MMR. The Corps used its expertise to review numerous, highly-technical elements of the Project and adopted an alternative that minimizes both new structures and dredging in a manner that is consistent with Congress's directives. The Corps adopted this alternative in a Record of Decision ("ROD").

The National Wildlife Federation and associated groups ("Plaintiffs") seek to set aside the ROD and underlying review as arbitrary and capricious under the Administrative Procedure Act ("APA"). They first challenge the scope of the alternatives the Corps analyzed, contending that the Corps should have analyzed several additional alternatives. Plaintiffs' alternatives

argument is largely based on their misidentification of a District Engineer's *rejected* recommendation as comprising Congress's direction to the Corps. In the end, Plaintiffs' claims fail because the Corps reasonably looked to Congress to guide the SEIS's scope. The Rivers and Harbors Act of 1927 ("1927 RHA") requires the Corps to use training structures to maintain the MMR's navigation channel in a manner that minimizes dredging. The Corps was not arbitrary to use the 1927 RHA to guide its determination of which alternatives were reasonable to consider in the FSEIS. And Plaintiffs' foundational misinterpretation of the 1927 RHA dooms their claim that the Corps violated that Act.

Similarly, Plaintiffs are incorrect that the SEIS's extensive environmental review is insufficient to satisfy NEPA. In a multi-year process involving multiple rounds of public comment and the development of state of the art habitat modeling tools, the Corps intensely analyzed the environmental consequences of its proposed action. That analysis thoroughly addresses all available research and incorporates the results of significant new research into the very questions of flooding and habitat impacts that Plaintiffs claim the FSEIS ignores. Plaintiffs raise no concern that was not sufficiently addressed in this painstaking review and cannot demonstrate that the review was arbitrary. The SEIS was informed by dozens of Corps technical personnel, including multiple Corps laboratories with specialized expertise, over a period of years. The result was an update that thoroughly incorporated new information to manage the MMR consistent with the 1927 Act. Plaintiffs may prefer to balance these purposes differently, or may desire a different result. But the FSEIS and ROD are neither arbitrary nor inconsistent with Congressional authorizations.

The Corps likewise complied with the Water Resources Development Acts ("WRDA") of 1986 and 2007. Plaintiffs claim that the Corps failed to include a plan to mitigate the Project's

adverse impacts as required by WRDA. But the WRDA provisions Plaintiffs' rely on apply only to projects that were not substantially complete in 1986 and reports to Congress. The Project, which Congress originally authorized over 100 years ago, fits into neither category. Even so, the FSEIS satisfies any mitigation requirement by: 1) evaluating and planning for mitigation with a sufficient level of specificity for a programmatic EIS; and 2) committing to future site-specific mitigation analyses once the Corps identifies individual structures and their associated impacts.

Finally, Plaintiffs are incorrect that the Fish and Wildlife Coordination Act applies, because projects that were substantially complete as of 1958 are excluded from the Act's consultation requirement. But even if that Act applied, the Corps more than satisfied anyits consultation requirement by, among other things, working with wildlife agencies to develop models to guide future mitigation efforts. Summary judgment should be entered for the Corps.

II. FACTUAL AND LEGAL BACKGROUND

A. Historical Background

The Mississippi River's navigability has long been "vital to the economic and commercial success of the region" that the river drains. AR2297-98. The "MMR is a critically important navigation corridor that provides for movement of a wide variety of commodities of local, national, and international importance." *Nat'l Wildlife Fed'n v. U.S. Army Corps of Eng'rs* ("*NWF I*"), No. 14-590-DRH, 2014 U.S. Dist. LEXIS 164861, at *45 (S.D. Ill. Nov. 25, 2014). Congress thus directed the Corps to improve and maintain navigation in the MMR.

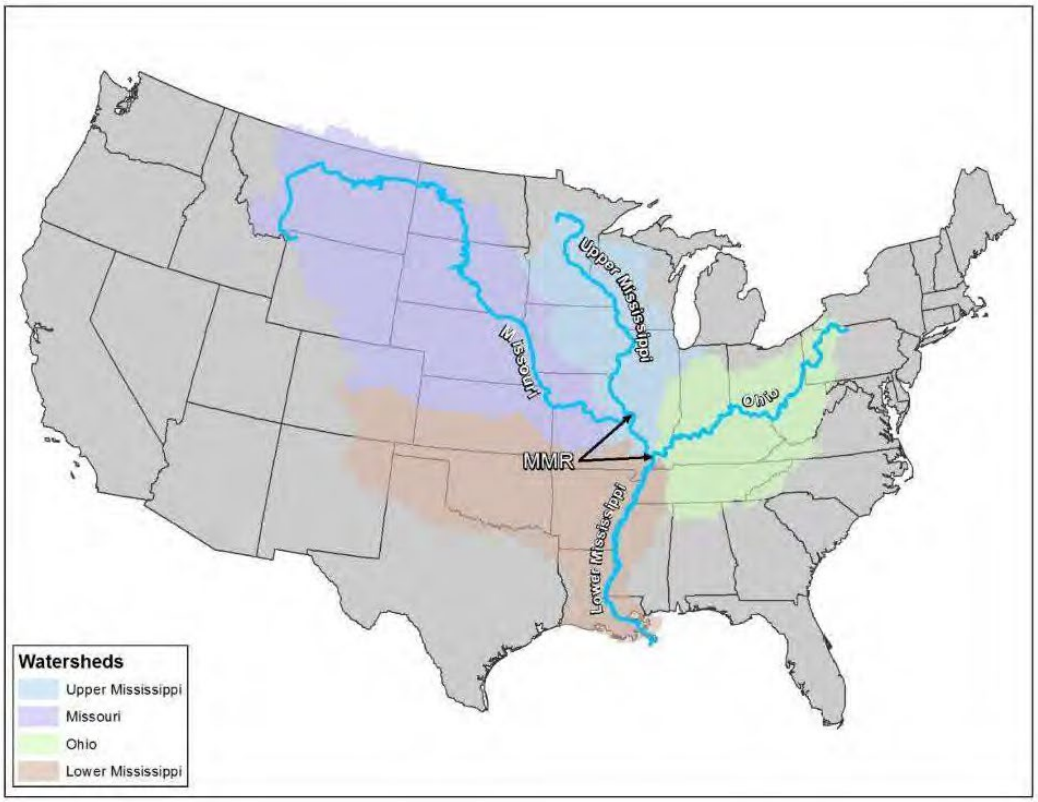
Beginning in 1824, Congress authorized the Corps to create and maintain a channel for year-round navigation of the Mississippi. *See, e.g.,* Act of May 24, 1824, 4 Stat. 32, 33; Act of Mar. 3, 1873, 17 Stat. 560; Act of June 25, 1910, Pub. L. No. 61-262, 36 Stat. 630; 1927 RHA, 44 Stat. 1010; Act of July 3, 1930, Pub. L. No. 71-520, 46 Stat. 918, 927. These Acts divide the

Mississippi into three sections, each of which "require[s] different management techniques, and thus, different projects, in order to provide a suitable navigation channel," AR943:

1) The Lower Mississippi River ("LMR"): from the Gulf of Mexico to the confluence of the Ohio River;

2) The Middle Mississippi River ("MMR"): from the confluence of the Ohio River to the confluence of the Missouri River;

3) The Upper Mississippi River ("UMR"): from the confluence of the Missouri River to Minneapolis, Minnesota.



AR 943-44; *NWF I*, 2014 U.S. Dist. LEXIS 164861, at *4-5 n.2. Congress directed that the Upper Mississippi be managed through construction of a series of locks and dams. AR 944. And in the Lower Mississippi, the Ohio River provides sufficient water to "reduce the concentration of sediment," thereby "making dredging more practicable." AR2302. The Middle Mississippi presents a different challenge, and Congress provided a different solution.

Congress first addressed the Middle Mississippi through the Rivers and Harbors Act of 1824, which focused on removing trees that obstructed navigation. AR2297-99. Between the

1820s and 1880s, the channel "deteriorated substantially . . . due to the significant increase in the average width of the river because of the erosion of riverbanks and the degradation of the riverbed caused by changes in the watershed." AR2300. The wider channel made "navigation of this commercially vital section of river at best extremely difficult and at worst" impossible. *Id*. Congress responded by creating the Mississippi River Commission to study, among other things, navigation. Act of June 28, 1879, 21 Stat 37. The Commission developed, and Congress ultimately authorized a plan in 1881, that with the exception of rocks at Grand Chain,[1] "the system to be pursued is that of contraction, thus compelling the river to scour out its bed; this process being aided, if necessary, by dredging." AR48851-53; AR2300-02.

In the early 1900s, Congress (briefly) adopted a policy to use dredging as the primary means of maintaining the channel. AR2301-03. However, relying primarily on dredging "was of limited success" because, unlike the LMR, "more frequent and extreme occurrence of low flows [on the MMR] combined with the high concentration of sediment contributed by the Missouri River" made it impracticable to maintain "a navigable channel through dredging alone." AR2302. Congress responded by ordering "[c]ontinuing improvement in accordance with the plan adopted in [1881 to] . . . obtain by regularization works and by dredging a minimum depth of eight feet from the mouth of the Ohio River to Saint Louis, and of six feet from Saint Louis to the mouth of the Missouri River." Rivers and Harbors Act, Pub. L. No. 61-262, 36 Stat. 630, 659 (June 25, 1910).

Congress revisited the problem again in 1924, directing the Corps to study the channel between the Ohio and St. Louis. AR2303. The Chief of Engineers obtained recommendations from the St. Louis District Engineer and the Board of Engineers for Rivers and Harbors.

[1] Commonly known today as the Chain of Rocks.

AR46945-48. The Board of Engineers recommended using "contraction works and bank revetment, together with such dredging as may be necessary" to provide a 9-foot deep, 300-foot wide navigation channel. AR46947. The Chief of Engineers generally concurred with the Board of Engineers and recommended that: 1) a 9-foot deep, 300-foot wide navigation channel be secured through regulating works; and 2) dredging to augment the works "should be reduced to a minimum" because it "produced only temporary results." AR46947-48.

Congress directed that the MMR be "modified in accordance with the *recommendations submitted by the Chief of Engineers*." 1927 RHA, 44 Stat. at 1012 (emphasis added). And Congress continued to fund on-going Project construction activities from 1927 to the present. *See* AR10008-15 (compiled appropriations for the Project through 2015). While Congress has funded more structures, "[t]he original plan for the [MMR channel] . . . has not changed since it was first authorized in 1927." AR518 (1974 Mem.); AR484-85 (1966 Mem. stating that Corps has operated the "existing project" to this day); AR18450-51 (2012 report finding that the Project had not substantially changed since 1927 but that engineering solutions made the Project more efficient); AR18000 (Corps' Planning Center of Expertise for Inland Navigation 2012 report finding that the "channel maintenance methods had not substantively changed over time"). The Corps continues to implement Congress's directive through the Project. *E.g*. AR2329.

B. Project Review and *National Wildlife Federation I*

The Corps has conducted numerous reviews of the Project, several of which address Plaintiffs' issues. In the late 1960s, the Corps determined that the Project's contraction width of 1,800 to 2,500 feet was insufficient to maintain a navigation channel "from mid-December and mid-February, when the lowest flows typically occurred." AR2308. The Corps therefore studied contracting the river to a width of 1,200 feet. AR2309. The Corps determined that a 1,200 foot

width "produced a deeper channel than required" and that the Corps could likely maintain a dependable channel with a contraction to approximately 1,500 feet. *Id*. The Corps thus contracted the required navigation channel based on this new information. *Id*.

Congress enacted NEPA in 1970, and in 1976, the Corps completed an EIS for the Project. The EIS concluded that, although it "was essential for maintaining the authorized navigation channel, the project, as practiced up to that time, did have a negative environmental impact." AR2310. The Corps first attempted to address these impacts by proposing to "Congress a framework to initiate a comprehensive river management plan" and pursuing "development of a postauthorization change (PAC) . . . to add fish and wildlife as an authorized project purpose." *Id*. Congress adopted neither proposal in full, leaving the Corps to use its existing authorities for mitigation. AR2312; AR 935-36.

The Corps has continued to use new research to improve the Project. Since the 1970s, the Corps has worked with the United States Fish and Wildlife Service ("USFWS") and state resource agencies to design "environmentally friendly river engineering structures in an effort to increase habitat diversity and the ecological health of the river by avoiding and minimizing the Project's impacts." AR2316; AR999-1001 (describing innovative structures and "environmental enhancement"). The Corps tested these "design adjustments" in two Corps labs, and in the river, and monitored the structures' impacts under a USFWS Biological Opinion. AR2316-17. Research shows "that these structures and the modification or removal of existing structures are performing as intended to avoid and minimize adverse environmental impacts." AR2316-18.

In 2011, the Government Accountability Office ("GAO") issued a report and recommendations in response to a congressional inquiry regarding whether training structures impact flood heights. AR2327. GAO recommended, among other things, that the Corps prepare

an Environmental Assessment ("EA") to determine if the 1976 EIS should be supplemented. *Id*. The Corps conducted the EA, which determined that the EIS should be supplemented due to new circumstances and information since 1976. AR930; AR962-65; AR2328; AR17742-43.

In 2014, Plaintiffs challenged the ongoing SEIS, as well as the Corps' approval of new construction in three areas of the Project. *NWF I*, 2014 U.S. Dist. LEXIS 164861, at *21. This Court denied Plaintiffs' motion for a preliminary injunction based, in part, on Plaintiffs' failure to "show[] that the Corps acted unreasonably in restricting its SEIS to the Middle Mississippi River segment [as opposed to the entire UMR], particularly given that both the 1976 EIS and the congressional authorization for the Regulating Works Project are directed exclusively at the MMR." *Id*. at *23-24. The Court also found that the Corps was not arbitrary to conclude, after examining conflicting studies, that training structures do not increase flood heights. *NWF I*, 2014 U.S. Dist. LEXIS 164861 at *28-29. Plaintiffs then dismissed their case.

C. The FSEIS

Between December 2013 and August 2017 the Corps considered several alternatives for managing the MMR. AR3-5. The Corps evaluated existing research and conducted 12 new studies. AR965-68; AR10259-62. The resulting FSEIS is over 1,400 pages, including appendixes. AR928-2329. The Administrative Record upon which the FSEIS is based is almost 50,000 pages. ECF No. 26.

Among other things, the Corps researched whether training structures impact flooding. The FSEIS includes a 31-page appendix analyzing all available research and concluding "that river training structures do not increase flood levels." AR1207-37 (quote at AR1229). The Corps determined that dikes, which are designed to channel water to maintain a minimum channel in low flows, "are submerged by over thirty feet during major floods." AR1214.

The Corps also considered both positive and negative impacts on habitat. AR2-3, 10-12. It created two models to analyze habitat impacts. The first modeled a 19-mile reach on a general, programmatic level. AR1121-25. The Corps also developed a second model to analyze habitat impacts in future site-specific EAs. AR384-8; AR14; AR1251-73.

The Corps held multiple public meetings and received extensive public and governmental comments on its Draft SEIS ("DSEIS"). AR5; AR968-71. The Corps considered and addressed those comments. AR1482-2106. The Corps also submitted the DSEIS to an Independent External Peer Review ("IEPR") Panel to ensure the SEIS's completeness and validity. AR692-747; AR2071-72 (explaining panel's independence). The Corps addressed the panel's concerns and incorporated its recommendations. AR670-80. The Corps then sent its Final SEIS out for comments, and incorporated those comments and the Corps' responses into its ROD. AR7-12.

The FSEIS "covers the programmatic impacts that can reasonably be anticipated to occur going forward." AR3. The Corps will conduct site-specific environmental assessments once it determines the location, configuration and types of future structures based on site-specific planning. AR3. And the Corps' regional habitat model will guide future mitigation. AR14; AR384-433; AR1251-73.

The Corps selected the "no action" alternative of continuing the century-long project of constructing and maintaining training structures to maintain navigation in the MMR. AR2, 4, 6. The Corps' decision was informed by the fact that the Corps "is charged with obtaining and maintaining a navigation channel on the [MMR] . . . by construction of revetment, rock removal, and river training structures to" ensure navigation while maintaining bank stability and reducing dredging costs. AR2.

D. STATUTORY BACKGROUND

i. National Environmental Policy Act

The National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321–4370m-12, requires federal agencies to consider and disclose the environmental effects of a proposed "major federal action." *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 371 (1989). NEPA is a procedural statute; it prescribes a necessary process rather than substantive results. *Id*. Indeed, "NEPA merely prohibits uninformed—rather than unwise—agency action." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989). NEPA requires agencies to prepare an EIS for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). An EIS must describe the action's potential environmental impacts, adverse effects that cannot be avoided, and reasonable alternatives. *Id.*

"Logic and law dictate that every time an agency prepares an [EIS], it must answer three questions in order. First, what is the purpose of the proposed project (major federal action)? Second, given that purpose, what are the reasonable alternatives to the project? And third, to what extent should the agency explore each particular reasonable alternative?" *Simmons v. U.S. Army Corps of Eng'rs*, 120 F.3d 664, 668-69 (7th Cir. 1997). Courts "owe and accord deference to the Corps on whether the Corps resolved those three questions" permissibly. *Id*. at 669 (Courts should not "second guess" the Corps); *Am. Bottom Conservancy v. U.S. Army Corps of Eng'rs*, No. 09-603-GPM, 2013 U.S. Dist. LEXIS 138705, at *4-5 (S.D. Ill. Sept. 27, 2013).

Although NEPA requires detailed consideration of the environmental consequences of federal projects, it does not mandate particular results. *Env't Law & Policy Ctr. v. U.S. Nuclear Regul. Comm'n*, 470 F.3d 676, 682 (7th Cir. 2006). "If an agency has considered the proper factors and makes a factual determination regarding the significance of environmental impacts,

that determination implicates substantial agency expertise and is entitled to deference." *Id*. Agencies are accorded particular deference on technical and scientific analysis that are within the agency's expertise. *Balt. Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 103-04 (1983). The Court must determine whether the Corps took a "hard look" at the relevant information rather than approaching the dispute as an "'environmental expert[] attempting to decide which party is correct.'" *Am. Bottom Conservancy*, 2013 U.S. Dist. LEXIS 138705, at *4-5 (quoting *Highway J Citizens Group v. Mineta*, 349 F.3d 938, 952 (7th Cir. 2003)); *Anson v. Eastburn*, 582 F. Supp. 18, 21 (S.D. Ind. 1983) ("[T]he Court may not substitute its judgment for that of the agency."). "NEPA does not require the selection of the least damaging practicable alternative. NEPA only requires that the Agencies 'rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.'" *Utahns v. U.S. Dep't of Transp.*, 305 F.3d 1152, 1186-87 (10th Cir. 2002) (quoting 40 C.F.R. § 1502.14(a)).

ii. Water Resources Development Acts

Congress has passed a series of Water Resources Development Acts ("WRDA") that include specific project authorizations, broadly provide for the "conservation and development of water and related resources," as well as the "improvement and rehabilitation of . . . water resources infrastructure." WRDA, 99 Pub. L. No. 662, 100 Stat. 4082 (1986). WRDAs are Congress's omnibus tool for authorizing the Corps' civil works activities.

iii. Fish and Wildlife Coordination Act

The Fish and Wildlife Coordination Act ("FWCA") requires agencies that are taking actions related to water resource development projects that were not substantially completed by 1958 to consult with the USFWS and state wildlife agencies. 16 U.S.C. § 662. While an agency

must consult with the USFWS and relevant state wildlife agencies, there is no requirement that it follow the reasoning or adopt the position of those agencies. *Tex. Comm. on Nat. Res. v. Marsh*, 736 F.2d 262, 268 (5th Cir. 1984). Compliance with the requirements of NEPA normally satisfies the requirements of the FWCA. *Id.*

iv. Standard of review

The substantive statutes under which Plaintiffs brought suit contain no private right of action, so Plaintiffs claims must be brought pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. § 551, *et seq. See Karst Envt'l. Educ. and Prot., Inc. v. EPA*, 475 F.3d 1291, 1295 (D.C. Cir. 2007). Under the APA, agency decisions may only be set aside if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). Review under the "arbitrary and capricious" standard is "highly deferential" and Courts must "uphold the action if the agency considered all of the relevant factors and [the Court] can discern a rational basis for the agency's choice." *Israel v. U.S. Dep't. of Agric.*, 282 F.3d 521, 526 (7th Cir. 2002). The Court's only role is to determine whether "the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). Plaintiffs hold the burden to demonstrate that an agency violated the APA. *Sierra Club v. Marita*, 46 F.3d 606, 619 (7th Cir. 1995). Review is limited to the administrative record before the agency at the time of its decision. *Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978).

III. ARGUMENT

A. The Corps did not ignore the impact of Operations and Maintenance activities.

Plaintiffs' first claim, that the Corps "ignores the Project's [operation and maintenance] activities," Mem. at 16, illustrates how Plaintiffs' critiques of the FSEIS fail as a matter of both fact and law. Plaintiffs mistakenly rely on a summary table, Mem. at 16-17 (citing AR980), to

claim that the Corps ignored the Project's operation and maintenance ("O&M") by assuming that activities such as dredging required no evaluation. To the contrary, the Corps analyzed O&M activities, including dredging and bank stabilization (revetment). AR951-55, 960-62, 966-68 (identifying updates to 1976 EIS), AR1104-12 (dredging impacts), AR1143-47, 1089-91 (water quality impacts), AR1119-21 (revetment); AR1042-55 (implementing USFWS recommendations). Plaintiffs are similarly incorrect, Mem. at 16-17, that the Corps ignored changed circumstances since the 1970s and failed to analyze alternatives to O&M or dredging. The entire point of the FSEIS was to supplement the 1976 EIS due to new circumstances. AR963-64 (summarizing "significant new circumstances and information"). Indeed, the Corps expanded its EA into an EIS because of "significant new circumstances." *E.g.* AR930; AR962-65; *see also*, AR1011-12 (bathymetric changes); AR1040 (changes in fish movement research). And as discussed below, the Corps also analyzed the alternative to dredging that Congress ordered – river training structures – as well as developments in law and science. Plaintiffs fail to identify anything that the Corps "ignored." Their claim to the contrary is without merit.[2]

B. The Corps was not arbitrary to use the 1927 Rivers and Harbors Act to guide the FSEIS's purpose and need.

An EIS must discuss alternatives to the proposed action. *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 194 (D.C. Cir. 1991).[3] But the Corps is only required to assess a reasonable range of alternatives that meets the Project's purpose and need. *Id*. at 195. In defining the project's purpose, an "agency should always consider the views of Congress, expressed . . . in the agency's statutory authorization to act, as well as in other congressional

[2] The portion of the FSEIS that Plaintiffs claim dismisses changed circumstances, Mem. at 16-17, actually supports the Corps' conclusion that the Corps' continuation of actions in the Mississippi did not significantly impact animals living on the river's banks. AR1042-43.

[3] NEPA requires only a brief specification of purpose and need. 40 C.F.R. § 1502.13.

directives." *Id*. at 196. Indeed, it is well-established that an agency's consideration of a project's purpose is constrained by Congressional authorizations. *Alaska Survival v. Surface Transp. Bd.*, 705 F.3d 1073, 1085-86 (9th Cir. 2013). Plaintiffs' claim that the purpose and need statement is too narrow, Mem. at 17-20, fails because Plaintiffs misunderstand the statutory framework. The purpose and need is dictated by Congress's directive to maintain the MMR's navigation channel by using regulating works, with minimal supplemental dredging. The Corps incorporated Congress's directives into the FSEIS's purpose and need. It did not violate NEPA by doing so.

Plaintiffs' claim that the purpose and need statement is unduly narrow is based on a misinterpretation of the 1927 RHA. Plaintiffs claim that a "1926 Chief's Report" "established very specific limits" that "once the river was contracted . . . to a width of 2,000 to 2,500 feet . . . the Corps was to maintain the navigation channel only through dredging" rather than installing any new training structures. Mem. at 5-6, 18-19, 49-50. Plaintiffs have it backwards. As discussed below, Congress: 1) ordered the Corps to obtain a navigation channel; 2) specified the depth and width of the navigation channel; 3) did not limit the River's contraction width; and 4) directed that the channel be maintained by contraction works, with a *minimum* of dredging.

Congress authorized the current Project in 1910 with specific direction to "[c]ontinu[e] improvement in accordance with the plan adopted in eighteen hundred and eighty-one, which has for its object to eventually obtain by regulation works and by dredging a minimum depth of eight feet from the mouth of the Ohio River to Saint Louis, and of six feet from Saint Louis to the mouth of the Missouri River." Rivers and Harbors Act of June 25, 1910, 36 Stat. at 659. The 1927 RHA modified the Project "in accordance with the *recommendations submitted by the Chief of Engineers* in [his] letter . . . contained in House Document Numbered 9, sixty-ninth Congress, second session." 1927 RHA, 44 Stat. at 1012 (emphasis added). In making his

recommendation, the Chief of Engineers considered letters by the Board of Engineers and the St. Louis District Engineer, each of which were enclosed with the Chief's letter. AR46945-48.[4]

The Chief "concur[red] in general with" the Board's proposal to modify "the existing project . . . to provide for a channel 9 feet deep and generally 300 feet wide . . . by contraction works and bank revetment, together with such dredging as may be necessary." AR46947-48. The Chief determined that "it is essential that additional regulating works and bank protection be carried out to a point where a minimum of dredging is required and a stable channel is available at all times." AR46946. Critically, he recommended to Congress that "dredging produced only temporary results, and should be reduced to a minimum." AR46947-48.

The Chief also reviewed, but did *not* adopt, a separate recommendation by the District Engineer, based on the contraction widths the District Engineer estimated would provide a mean depth of 8 feet at low water. AR46946; AR46952 (separate District Engineer's report). These proposed widths ranged from 2,000 to 2,500 feet, depending on location, and Plaintiffs contend they limit the extent to which the Corps is authorized to contract the river through regulating works. Mem. at 49 (citing ¶¶ 55-57, 80, and 84 of the District Engineer's recommendation on AR46967-68, 46974-75); AR46944. Plaintiffs flip the Chief's recommendation on its head.

Plaintiffs erroneously construe the District Engineer's unadopted estimates regarding necessary contraction widths as the controlling Chief's recommendation. Mem. at 18-19, 49. But rather than restrict contraction width,[5] the Chief's recommendations to Congress focused on

[4] Congress's modification in accordance with the Chief of Engineer's recommendation stands in stark contrast to its typical modification of projects in accordance with an entire report. *E.g.* 1927 RHA, 44 Stat. at 1011 (modifying 11 projects "in accordance with the report submitted"). This distinct language makes clear that the 1927 RHA did not incorporate the District Engineer's unadopted recommendation, even if that letter might be considered part of a report to Congress.

[5] The District Engineer's estimated contraction widths were understood to be an indirect and imprecise projection of the navigation objectives of the Project. *See* AR46968 ("It is not possible

using contraction works to provide a navigation channel "9 feet deep and 300 feet wide, with additional width in the bends" and with "dredging reduced to a minimum." AR46948. This "essential" objective was of such importance that the Chief declined to carry forward the District Engineer's estimated contraction widths. AR46948.

Because Congress authorized the recommendations submitted by the Chief of Engineers, the unadopted depth and width figures of the District Engineer's letter were not incorporated into the project authorization and thus imposed no contraction width limitations. AR46945-48. At bottom, the Chief rejected the District Engineer's proposal to contract the MMR to a certain width. And Congress adopted the Chief's recommendation to maintain the authorized 9-foot deep and 300-foot wide MMR navigation channel through contraction works so as to minimize dredging. AR46945-48; 1927 RHA, 44 Stat. at 1012.

Indeed, the only Courts to interpret the 1927 RHA have agreed with the Corps that the Act "specifically adopted the Corps' plan to maintain the MMR navigation channel through regulating works, with dredging only when necessary." *NWF I*, 2014 U.S. Dist. LEXIS 164861, at *45; *Riverview Farms v. United States*, 2019 U.S. Claims LEXIS 1821, at *8 ("Congress authorized river manipulation . . . through the [1927 RHA]"). Congress, rather than the Corps, narrowed the manner in which the Corps can manage the MMR. So rather than adopting or "expressly rejecting" any particular contraction width, Mem. at 49, Congress required the Corps to use contraction works to maintain a 9-foot-deep and 300-foot-wide navigation channel, subject only to the restriction that the Corps minimize dredging. And rather than "ignoring" the

to predict exactly the navigable depths which will result after completing works of the nature proposed."). The Chief's recommendations, and ultimately Congress's authorization, reasonably focused on the more direct and definite measures of the Project's objectives: specified navigation channel dimensions and long-term cost efficiencies.

authorizing legislation, Mem. at 18, the Corps tailored its environmental review to comply with Congress's directive for maintaining the MMR navigation channel.

Plaintiffs' reliance on a recommendation that Congress rejected dooms Plaintiffs' claim that the FSEIS's purpose was unduly narrow. Plaintiffs are largely correct that the "FSEIS Purpose and Need Statement assumes that only regulating works can achieve the Project's purpose." Mem. at 17. But Plaintiffs are wrong, *id*. at 17-18, that this unreasonably narrows the FSEIS's purpose. The Corps grounded the purpose and need statement on the fact that it:

> is charged with obtaining and maintaining a navigation channel . . . that is nine feet deep, 300 feet wide with additional width in bends as necessary. . . . The long-term goal of the Project, as authorized by Congress, is to obtain and maintain a navigation channel and reduce federal expenditures by alleviating the amount of annual maintenance dredging through the construction of regulating works.

AR930. The Corps was not arbitrary to comply with Congress's directive to "maintain the MMR navigation channel through regulating works, with dredging only when necessary." *NWF I*, 2014 U.S. Dist. LEXIS 164861, at *45.

Plaintiffs are also incorrect, Mem. at 18-19, that the purpose and need statement ignores environmental laws. Plaintiffs cite no case in which NEPA analysis was invalidated because an agency did not identify complying with broad environmental laws or regulations as a project purpose. Regardless, the statement incorporates Appendix K, which discusses environmental laws in detail. AR945, AR966, AR2297-2329 (discussing environmental authority at AR2312-18). And the Corps made avoiding and minimizing environmental impacts, and providing compensatory mitigation where appropriate, part of every alternative it considered, regardless of the purpose and need statement. AR975. Ultimately, the Corps' purpose was not arbitrary because no environmental law modified Congress's directive.

Finally, Plaintiffs are incorrect, Mem. at 19-20, that the Corps violated NEPA by failing to consider "other channel-maintenance options, since the current dredging regime" maintains navigation. There is nothing unlawful or arbitrary in defining the Project's purpose in a manner that implements Congress's directive to minimize dredging. And in fact the Corps did consider the alternative that Plaintiffs contend it ignored – one that would "maintain the navigation channel only by dredging and maintaining existing river training structures." AR932.[6]

The Corps reasonably examined the Project's history and defined a purpose that complies with the Rivers and Harbors Act. AR943-71. Courts "review both an agency's definition of its objectives and its selection of alternatives under the 'rule of reason.'" *Theodore Roosevelt Conservation P'ship v. Salazar* ("*TRCP*"), 661 F.3d 66, 73 (D.C. Cir. 2011). Courts will generally defer to an agency's definition of objectives as long as the agency looks hard at the relevant factors. *Grunewald v. Jarvis*, 776 F.3d 893, 903-04 (D.C. Cir. 2015). The Corps was not arbitrary to use Congress's directive to guide its purpose and need statement. *Virginians for Appropriate Rds. v. Capka*, No. 7:07CV587, 2009 U.S. Dist. LEXIS 62137, at *9 (W.D. Va. July 20, 2009) (finding it "reasonable for [the agency] to interpret Congressional intent . . . and then to include effectuation of this intent as part of the purpose and need").

C. The FSEIS considered a reasonable range of alternatives.

Plaintiffs also object that the Corps should have considered additional alternatives. None of Plaintiff's arguments are persuasive. Developing alternatives to meet Congress's purpose of maintaining the MMR navigation channel primarily through contracting works is within the Corps' technical competence, and the Corps is due deference in its treatment of alternatives.

[6] Plaintiffs are incorrect that the current dredging regime will maintain the channel in perpetuity. Mem. at 19-20. To the contrary, the "dynamic nature of the flows and sediment transport" requires continuous reassessment of dredging and structural needs. AR948-49.

NEPA requires the agency to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(2)(E). Courts owe "considerable deference to the agency's expertise and policy-making role" in reviewing the selection of alternatives. *Grunewald*, 776 F.3d at 903; *N. Slope Borough v. Andrus*, 642 F.2d 589, 601 (D.C. Cir. 1980). "If the agency's objectives are reasonable, [courts] uphold the agency's selection of alternatives that are reasonable in light of those objectives." *TRCP*, 661 F.3d at 73; *Burlington*, 938 F.2d at 196 (Courts uphold agency "discussion of alternatives so long as the alternatives are reasonable and the agency discusses them in reasonable detail"). The Corps' analysis of alternatives more than meets this standard.

i. The Corps was not arbitrary to use the 1927 Rivers and Harbors Act to guide its analysis of reasonable alternatives.

Plaintiffs' argument that the Corps arbitrarily limited its alternatives analysis fails for the same reasons that defeat Plaintiffs' attacks on the Corps' purpose and needs statement. Plaintiffs argue that the Corps improperly ignored alternatives that would require Congress to change the 1927 RHA's statutory directive. Mem. at 22-23. But it is well-established that an agency's statutory authorization constrains the range of reasonable alternatives.

> Frequently, a pertinent guide for identifying an appropriate definition of an agency's objective will be the legislative grant of power underlying the proposed action. . . . Statutory objectives provide a sensible compromise between unduly narrow objectives an agency might choose to identify to limit consideration of alternatives and hopelessly broad societal objectives that would unduly expand the range of relevant alternatives. . . . An agency need not consider "alternatives which could only be implemented after significant changes in government policy or legislation."

New York v. U.S. Dep't of Transp., 715 F.2d 732, 743 (2d Cir. 1983) (citations omitted). And "because what constitutes a 'reasonable alternative' is determined with reference to the project's objectives, the NEPA did not require the Corps to discuss a broad range of alternatives beyond

those within the Corps' authority." *Alaska Survival*, 705 F.3d at 1085-86. *See also*, *Burlington*, 938 F.2d at 195 (alternatives must be moored to notion of feasibility); *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1208 (9th Cir. 2004) ("[I]f an alternative requires congressional action, it will qualify for inclusion in an EIS only in very rare circumstances.") (quotation omitted); *Shasta Res. Council v. U.S. Dep't of the Interior*, 629 F. Supp. 2d 1045, 1060 (E.D. Cal. 2009) (agency not required to consider alternatives requiring seeking funding that was "a theoretical possibility"). In sum, "when considering agency actions taken pursuant to a statute, an alternative is reasonable only if it falls within the agency's statutory mandate." *N.M. ex rel. Richardson v. BLM*, 565 F.3d 683, 709 (10th Cir. 2009).[7]

The Corps' discussion of alternatives was guided by Congress, which "provided the manner in which the navigation channel for the MMR should be obtained and maintained via the Regulating Works Project authorization." AR 972. *See also*, AR928, AR931, AR936, AR945, AR964. Congress "specifically adopted the Corps' plan to maintain the MMR navigation channel through regulating works, with dredging only when necessary." *NWF I*, 2014 U.S. Dist. LEXIS 164861, at *45. And rather than deviate from this approach, Congress has appropriated funds for additional structures. *E.g.* AR21779-80 (identifying contracts and noting that

[7] Plaintiffs' reliance, Mem. at 23 n.6, on *Save Our Cumberland Mts. v. Kempthorne*, 453 F.3d 334 (6th Cir. 2006) is misplaced. That case involved a permit application, rather than an ongoing Congressionally-authorized project, and noted that "courts cannot condone an agency's frustration of Congressional will." *Id.* at 345. Plaintiffs' suggestion that the Corps should have included alternatives requiring repeal of the Rivers and Harbors Act, Mem. at 22 n.5, is also meritless. The sentences following the one Plaintiff quotes rejected the idea that NEPA requires "extended discussion" based on repealing foundational laws. *NRDC v. Morton*, 458 F.2d 827, 837 (D.C. Cir. 1972). And *Env't Def. Fund, Inc. v. Froehlke* required the Corps to consider acquiring land for mitigation even though it would require legislation because project construction would make it difficult or impossible "to acquire suitable land for mitigation" by increasing property values. 473 F.2d 346, 351-52 (8th Cir. 1972). *Froehlke* is inapposite here because construction in the river will not similarly limit mitigation. AR984; AR1137.

"[c]onstruction on existing project began in 1881"). The Corps was not arbitrary to tailor its alternatives analysis to comply with its Congressional authorization.

ii. The Corps' identification of two reasonable alternatives was not arbitrary.

Plaintiffs also argue that the FSEIS improperly permits only a "binary choice between the Project and no Project." Mem. at 21-22. The Corps initially considered five alternatives in some detail, with that process yielding only two *reasonable* alternatives. AR972-75. The Corps actually eliminated several options that would have required even more construction of training structures, thereby focusing its evaluation on the reasonable options that avoid and minimize environmental impacts. AR975-79.

"It is axiomatic that the Corps need not examine every conceivable alternative. Identifying, assessing and comparing alternatives costs time and money." *Simmons*, 120 F.3d at 669. Relatedly, "[w]hen Congress has enacted legislation approving a specific project, the implementing agency's obligation to discuss alternatives in its environmental impact statement is relatively narrow." *Izaak Walton League v. Marsh*, 655 F.2d 346, 372 (D.C. Cir. 1981). *Izaak Walton*, which involved replacement of locks immediately upriver of the MMR, is particularly illustrative. The Court there held that "extensive discussion of the rehabilitation alternative . . . was made unnecessary and would be inconsistent with the congressional decision to approve replacement of Locks and Dam 26." *Id*. And as in *Izaak Walton*, it would be a waste of agency resources to test alternatives that are beyond the agency's power and which do not fulfill Congress's mandate. *Id*. at 374; *Cnty. of Vernon v. United States*, 933 F.2d 532, 535-36 (7th Cir. 1991) (deferring to Congressional prioritization); *Chem. Weapons Working Grp. v. U.S. Dep't of Def.*, 655 F. Supp. 2d 18, 47-48 (D.D.C. 2009) (agency need not analyze speculative alternatives that do not fulfill Congress's mandate). An agency may "evaluate only the preferred and do-

nothing alternatives" where "Congress has expressed its intent by statute." *Burlington,* 938 F.2d at 197. Thus, it was not arbitrary for the Corps to limit its discussion of reasonable alternatives to those that did not require Congress to modify its directive to the Corps.

The Corps was not required to bring forward for fuller consideration Plaintiffs' preferred alternatives or analyze any specific number of alternatives. *Citizens for Smart Growth v. Sec'y of the DOT*, 669 F.3d 1203, 1212-13 (11th Cir. 2012) (three alternatives sufficient); *N. Buckhead Civic Ass'n v. Skinner*, 903 F.2d 1533, 1542-43 (11th Cir. 1990) (two alternatives sufficient); *Tongass Conservation Soc'y v. Cheney*, 924 F.2d 1137, 1140-42 (D.C. Cir. 1991) (no violation where 13 alternatives eliminated as unreasonable and only one was discussed in detail); *Laguna Greenbelt v. U.S. Dep't of Transp.*, 42 F.3d 517, 524 (9th Cir. 1994) ("[T]here is no minimum number of alternatives that must be discussed."). Plaintiffs' reliance on *Alaska Wilderness Recreation & Tourism Association v. Morrison*, Mem. at 22, is misplaced, as in that case a pre-existing contract reasonably constrained the alternatives an agency had to consider. 67 F.3d 723, 729 (9th Cir. 1995). Indeed, "for alternatives which were eliminated from detailed study, [the Corps must only] briefly discuss the reasons for their [elimination]." 40 C.F.R. § 1502.14(a) (2018). The FSEIS discusses in detail—certainly more than "briefly"—why options were eliminated at the screening stage. AR972-73; AR1363-68; AR2312-18. Like all environmental review decisions under NEPA, the Corps' development of alternatives is within the agency's expertise and subject to a "rule of reason." *Citizens for Smart Growth*, 669 F.3d at 1212. The alternatives discussion should be upheld unless it is arbitrary. The Corps met that standard here.

iii. The FSEIS did not ignore reasonable alternatives.

Plaintiffs' claim that the Corps ignored reasonable alternatives, Mem. at 22-24, fails as a matter of fact and law. The Corps not only considered, but adopted, many of the measures

Plaintiffs contend were ignored. The Corps was not arbitrary to reject the remainder in order to comply with the Rivers and Harbors Act's mandate to maintain navigation through regulating works, with a minimum of dredging. Pages 13-22, above.

The Corps more than fulfilled its duty to briefly discuss the alternatives it dismissed as inconsistent with its authorizations. AR972-73; 40 C.F.R. §1502.14; *Waukesha Cnty. Env't Action League v. U.S. Dep't of Transp.*, 348 F. Supp. 3d 869, 882 (E.D. Wis. 2018). The Corps took seriously Plaintiffs' proposed "alternative that maintains the authorized navigation channel by other means, including alternative upstream water level management regimes, alternative dredging . . . and the development of new, innovative techniques." Mem. at 23-24, The Corps responded directly by considering "altering water releases from the Upper Mississippi." AR973. This alternative was not feasible because: 1) it is not permissible under water control plans that maintain the UMR under separate Congressional authority and; 2) the impact of possible alterations "was not substantial enough." AR973.[8] This consideration is consistent with the regulation's directive to "briefly discuss the reasons" that measures were "eliminated from detailed study." 40 C.F.R. 1502.14 (2018).

Plaintiffs' claim that the Corps was arbitrary to eliminate an alternative that Congress already rejected, modifying the Project's purpose, Mem. at 23, is similarly without merit. The Corps recommended in 1982 that Congress initiate a program "to modify, design, and evaluate regulating works structures to benefit aquatic resources in the MMR." AR2312. Rather than modify the Project's purpose in this manner, Congress authorized the Upper Mississippi River Restoration – Environmental Management Program, a separate program that has and will

[8] To the extent that Plaintiffs here seek to revive their "broad, programmatic challenge" to the management of the Mississippi River, "such an action cannot be maintained." *NWF I*, 2014 U.S. Dist. LEXIS 164861, at *23 (citing *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990)).

continue to advance ecosystem restoration within both the MMR and the UMR regardless of any alternative considered or selected here. AR2312-15.[9] This case is thus similar to *Sausalito*, in which the agency was not required to develop alternatives that required seeking funding through legislation, in part, because the agency's past efforts to obtain funding resulted in "an informed understanding of Congress's willingness to" provide additional funds. 386 F.3d at 1208-10. Here, Congress directed the Corps to maintain a navigation channel through contracting works and declined to incorporate ecosystem restoration directly into that Project's purpose. The Corps was not arbitrary to similarly constrain its analysis.

Plaintiffs are incorrect, Mem. at 20, 22-23, that *Muckleshoot Indian Tribe v. United States Forest Service* supports requiring the Corps to thoroughly examine alternatives that required Congress to reverse statutes governing the MMR's management. In *Muckleshoot*, an agency violated NEPA by adopting an inconsistent approach to additional legislation – relying on the availability of "admittedly speculative funds" in discussing its chosen alternative's beneficial effects while ignoring similarly speculative funds that might have permitted other alternatives. 177 F.3d 800, 814 (9th Cir. 1999). In contrast to *Muckleshoot*, where the agency never requested funds that might have supported more alternatives, *id.*, here the Corps actually sought modification of the Project's purpose to no avail. *See* AR2312-16; AR41761 (Great III study recommended modifying "structures to benefit aquatic resources"); AR42024-25 (1982 proposal for ecosystem restoration); 33 USC § 652(c) (declining to authorize recommendations). The Corps was not arbitrary to decline to consider an alternative that Congress already rejected. Ultimately, Plaintiffs identify no reasonable alternatives that the Corps failed to consider. *Tenn.*

[9] The UMRR Program activities are not an alternative, as the Corps will continue to restore forests, wetlands, and side channels to the extent possible under that program's authorities. AR2312-13.

Env't Council v. Tenn. Valley Auth., 32 F. Supp. 3d 876, 889 (E.D. Tenn. 2014) (distinguishing *Muckleshoot*). Simply put, the Corps was not arbitrary to narrow its alternatives analysis to ensure compliance with the 1910 and 1927 Rivers and Harbors Acts' statutory mandate.

Rather than ignore the remainder of Plaintiffs' proposals, the Corps actually incorporated them. Plaintiffs are incorrect, Mem. at 23-24, that the FSEIS declined to consider removing or modifying existing structures. Indeed, the Corps has removed structures both to avoid and minimize site-specific impacts and pursuant to the Project's Biological Opinion, and it will consider additional removal "for potential compensatory mitigation for future construction." AR1133-34; AR1046-49 (noting past and potential habitat restoration under ongoing programs). And contrary to Plaintiffs' claim, Mem. at 24, the Corps considered an alternative that does not add new training structures. AR976. The Corps similarly not only considered, but adopted, Plaintiffs' proposal to minimize new structures and "include innovative structures to avoid and minimize impacts." AR975; AR 965; AR2062. Plaintiffs are wrong, Mem. at 24, that the Corps refused to consider innovative techniques developed over the past 139 years. To the contrary, the Corps used its expertise to develop innovative structures that both avoid and minimize impacts and reduce dredging. AR 947; AR 975; AR 999-1001 (pictures and descriptions of structures); AR1046-47; AR1114; AR1121-24; AR1128-30. Indeed, the "Continue Construction Alternative already incorporates some of [Plaintiffs'] suggestions and . . . alternatives outside of the existing authorization are not reasonable or feasible at this time." AR2062. The Corps was not arbitrary to incorporate the elements of alternatives that are consistent with Congress's directive to use regulating works to maintain the MMR navigation channel.

iv. The FSEIS provided informed and meaningful review.

The FSEIS traces the history of the Corps' management of the MMR. AR2297-329. It provides detailed information on the impacts of past, current, and likely actions on physical, biological, socioeconomic, historic, and cultural resources. AR937-38. It incorporates eleven appendixes that provide detailed analysis of flood levels, a biological assessment, and mitigation. AR939. Plaintiffs nonetheless claim, Mem. at 25-26, that the Corps fails to provide "meaningful information on the actions that will be carried out" because the FSEIS lacks detailed information regarding the criteria for future construction, the likely locations of that construction, the exact structures that will be constructed, or other site-specific impacts. Plaintiffs' challenge to the Corps' deferring consideration of site-specific impacts until they are knowable is nothing less than an objection to the nature of a programmatic EIS.

Agencies may tier site-specific EAs to a programmatic EIS. *NWF I*, 2014 U.S. Dist. LEXIS 164861, at *33 (citing *Defs. of Wildlife v. Bureau of Ocean Energy Mgmt.*, 684 F.3d 1242 (11th Cir. 2012); *Friends of Yosemite Valley v. Norton*, 348 F.3d 789, 800 (9th Cir. 2003); *Donham v. U.S. Forest Serv.*, No. 93-CV-4172-JPG, 1995 U.S. Dist. LEXIS 22530, at *28 (S.D. Ill. Jan. 24, 1995) ("site-specific impacts need not be fully evaluated until the decision on specific projects"). Indeed, "[t]he whole concept behind tiering cuts against requiring [an agency] to examine every possible project in detail when creating an EIS." *Donham,* 1995 U.S. Dist. LEXIS 22530 at *28. Here, the Corps conducted a programmatic EIS to analyze impacts because "the exact location and quantity of future dredging needs as well as the future RTS locations and designs are unknown." AR979.[10] The Corps will therefore study potential impacts

[10] Plaintiffs' claim that the FSEIS ignores flow regimes, Mem. at 26, is refuted by the portions of the FSEIS Plaintiffs cite. AR1002-08; AR1083-84. The Corps went on to address the impacts of the alternatives on, among other things, the geomorphology of main and side channels, AR 1084-

through site-specific EAs once it identifies potential locations for new structures. AR3; AR984.[11] Such tiering is well within the Corps' discretion and was not arbitrary.

v. The Corps identified the Environmentally Preferable Alternative

Plaintiffs' claim, Mem. at 26, that the Corps failed to identify the "environmentally preferable alternative" is similarly mistaken. The Corps must identify an environmentally preferable alternative in its ROD. 40 C.F.R. § 1505.2(b). The Corps did so. AR4.

D. The Corps' robust environmental review complied with NEPA

The Corps exhaustively detailed the direct, indirect, and cumulative impacts of its proposed action over hundreds of pages of analysis. Pages 9-10, above. Plaintiffs nonetheless argue that the Corps' environmental review of the Project's impacts was deficient in four respects: first, that the Corps "ignored" science; second, that the Corps failed to establish the baseline against which to evaluate its actions; third, that the Corps failed to evaluate several of the Project's purported impacts; and fourth, that the Corps failed to evaluate mitigation. Mem. at 27-42. The record belies all of Plaintiffs' arguments. The Corps evaluated all available science, used that science to establish baseline conditions, and conducted new scientific research to evaluate the purported impacts and mitigation issues Plaintiffs claim were ignored. Plaintiffs' claims should be denied because the Corps more than complied with NEPA.

"This Court's only role is to ensure that the agency has taken a hard look at environmental consequences." *Env't Law & Policy Ctr.*, 470 F.3d at 682. "If an agency has considered the proper factors and makes a factual determination regarding the significance of

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89. And the Corps devoted an entire appendix to the issue of whether river training structures impact flood levels. AR2107-37. Plaintiffs are incorrect, Mem. at 26, that the Corps "ignores the direct, indirect, and cumulative environmental impacts" of alternatives. AR1082-1174.

[11] The Corps was well within its discretion to defer considering particular structures to permit more meaningful review through site specific EAs. *See Env't Law & Policy Ctr.*, 470 F.3d at 684.

environmental impacts, that determination implicates substantial agency expertise and is entitled to deference." *Id*. "This Court cannot substitute its own judgment for that of the agency as to the environmental consequences of its actions." *Id.; Citizens for Appropriate Rural Rds., Inc. v. Foxx*, No. 1:11-cv-01031, 2015 U.S. Dist. LEXIS 4257, at *10 (S.D. Ind. Jan. 14, 2015) (court "should uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned"); *Waukesha Cnty.*, 348 F. Supp. 3d at 876 (court must deferentially examine whether agency followed NEPA's procedures instead of whether it made the right decision); *Citizens for Smart Growth*, 669 F.3d at 1211 (plaintiffs have "the burden of showing by a preponderance of the evidence that the agency did not comply with NEPA's procedures"). Deference to the agency is strongest "[w]hen reviewing scientific determinations involving special expertise." *Donham*, 1995 U.S. Dist. LEXIS 22530, at *24-25. "Thus, when specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive." *Id.* In particular, "agency determinations receive an extreme degree of deference [when] they involve complex judgments about sampling methodology and data analysis that are within the agency's technical expertise." *Alaska Airlines, Inc. v. Transp. Sec. Admin.*, 588 F.3d 1116, 1120 (D.C. Cir. 2009) (citation omitted)). So declining to use particular forecasts is not arbitrary if the agency has "articulated reasonable, if not persuasive, reasons" for its decision. *Openlands, Midewin Heritage Ass'n v. U.S. Dep't of Transp.*, 124 F. Supp. 3d 796, 805 (N.D. Ill. 2015).

Plaintiffs have not met their burden. The Corps' review was thorough and consistent with NEPA. Plaintiffs have not shown that any environmental impact was not sufficiently addressed. In particular, Plaintiffs are wrong that the FSEIS violates NEPA because it "ignores

irrefutable science and data showing project impacts." Mem. at 27-32.[12] Rather than ignore science, the Corps thoroughly researched all potentially relevant studies and used its expertise to evaluate or expand upon available science. The Corps took the requisite "hard look." *See* AR933-34 (environmental consequences summary); AR1170-73 (cumulative impacts summary). The Corps considered effects on water stages, the River's geomorphology, water and air quality, hazardous waste, and climate change. AR985-1034; 1082-1103. It considered effects on biological, socioeconomic, historical, and cultural resources. AR1035-81; 1104-73. This analysis goes well above what is required by NEPA. As in 2014, "Plaintiffs disagree with the Corps' conclusions, but it is not the province of this Court to resolve that disagreement or to choose a side. Where, as here, the Corps has considered the issue and explained its conclusions, it has not acted arbitrarily, and that is as far as the Court's inquiry can proceed." *NWF I*, 2014 U.S. Dist. LEXIS 164861, at *28.

i. The Corps thoroughly evaluated all available research on flooding.

Plaintiffs' claim, Mem. at 28, that the Corps "ignore[d] overwhelming science and data showing" that training structures cause floods is incorrect.[13] In 2014, this Court found that "[t]he

[12] Plaintiffs suggest that the Corps fell short because it did not agree with Plaintiffs about what constitutes "'high-quality' science." Mem. at 28. But the Corps is "entitled to use its own methodology, unless it is irrational." *Marita*, 46 F.3d at 621. Experts routinely disagree, and a "battle of the experts" does not establish a NEPA violation. *Earth Island Inst. v. Carlton*, 626 F.3d 462, 473 (9th Cir. 2010). For example, the Court should defer to the Corps' expertise on questions relating to the MMR's hydrology. *Marsh*, 490 U.S. at 377 (courts must defer to agency discretion where "analysis of the relevant documents 'requires a high level of technical expertise'"); *Kleppe* v. *Sierra Club*, 427 U.S. 390, 412 (1976); *Balt. Gas & Elec. Co.*, 462 U.S. at 103 (when examining scientific determinations "a reviewing court must generally be at its most deferential"); *Habitat Educ. Ctr. v. U.S. Forest Serv.*, 603 F. Supp. 2d 1176, 1183-84 (E.D. Wis. 2009) (agency "has the technical expertise required to perform the environmental analysis in the first place. This means that judicial review of an EIS must be deferential, especially when it comes to the scientific and technical details that make up the heart of the analysis.") (citation omitted).

[13] The Mississippi's floods have caused damage and loss of life for many decades. *E.g., Jackson-Greenly Farm, Inc. v. United States*, 144 Fed. Cl. 610, 615-16 (2019) (Dogtooth Bend floods on

Corps has continually and extensively analyzed the physical effects of river training structures and reasonably concluded that they do not impact flood levels." *NWF I*, 2014 U.S. Dist. LEXIS 164861, at *34-35 ("The Corps carefully considered and responded to" Plaintiffs comments."). So too here. The Corps more than satisfied NEPA's requirement that it take a "hard look" by expanding on its 2014 analysis. Indeed, the FSEIS exhaustively analyzed whether training structures impact flooding, including by analyzing "all available literature." AR1215.

Plaintiffs contend that the Corps "ignores" research by Professors Nicholas Pinter and Robert Criss asserting that training structures increase flood risk. Mem. at 28-29; 35-40. Plaintiffs are wrong. As this Court previously found:

> the source data and methodology used by Dr. Pinter contains major errors that put the conclusions into question. . . . One such example is the fact that Dr. Pinter relies on early discharge measurements (or volume of water that passes a specific location over time) data collected before the USGS implemented standard instrumentation and procedures in 1933, and this data has shown to be inaccurate by not only the Corps but the USGS and other independent researchers. . . . Dr. Pinter also relies upon studies conducted in a rigid, fixed bed plume, the limitations of which have been acknowledged by the authors . . . : "The fixed bed scenario is not a reasonable description of a natural river channel with a moving sediment bottom and is expected to yield a conservative result for the backwater effect relative to that likely to be experienced in a non-erodible boundary channel." . . . The MMR is not a fixed bed. The river bed is ever-changing, and the purpose of river training structures is to make the river bed deeper. A fixed bed model cannot replicate the changes that occur to the natural river as a result of the construction of river training structures. . . . Dr. Pinter uses daily discharge data, which is based upon estimates and is not measured or observed. This usage creates data errors because the data lacks the natural variability found in a variable channel, such as the MMR. . . . The Court finds that the Corps' rejection of Dr. Pinter's examples and data is not arbitrary or capricious.

MMR, including in 1929, 1931, and 1935); *Riverview Farms v. United States*, No. 18-1099C, 2019 U.S. Claims LEXIS 1821 (Fed. Cl. Nov. 20, 2019) (In 1920s, "historic flooding displaced 600,000 people and killed 250."); *United States v. Sponenbarger*, 308 U.S. 256, 260-61 (1939) (floods "have with relentless certainty undermined the security of life and property. And occupation of the alluvial valley of the Mississippi has always been subject to this constant hazard."); *Grier v. St. Louis M. B. T. R. Co.*, 108 Mo. App. 565, 571-72 (1904) (describing floods from 1844 to 1903).

NWF I, 2014 U.S. Dist. LEXIS 164861, at *37-39. The Corps nonetheless thoroughly reconsidered Dr. Pinter's work. AR1213-19; AR1221-24; AR1227-29. The Corps recognized that some "research purports that river training structures raise flood heights" and subjected "all of the available research" to review by both "the Corps and other external reviewers." AR1083; 1207-37. Plaintiffs' claim, Mem. at 28-29, that the Corps failed to consider studies regarding the alleged impacts of river training structures on flood heights is simply false.

The Corps also analyzed floods since this Court's 2014 decision. Plaintiffs contend that the Corps "ignored" Dr. Criss's January 2016 paper on a flood that occurred in December 2015 and January 2016. Mem. at 36-37. But the Corps has repeatedly and thoroughly analyzed Dr. Criss's five-page paper. The paper contends that "calls for more river management, including higher levees and other structures, must be rejected" because "dramatic channelization" of the MMR is one of several factors that caused the 2015 flood to be higher than recent past floods. AR9851. As the Corps noted in analyzing Dr. Criss's paper in a previous EA, Dr. Criss did "not present any analysis on instream structures and how they impact flood levels." AR8137-38.

The FSEIS took another close look at the 2016 Criss paper – agreeing with Plaintiffs on one point and providing the basis for its disagreement with Plaintiffs on the remaining conclusions Plaintiffs drew from the paper. AR2073-74. The Corps' reconsideration in the FSEIS identified several methodological flaws: "The Authors omit relevant data and analysis, mischaracterize the antecedent ground and river conditions, and evaluate incorrect data." AR1225. Among these flaws was Dr. Criss' mischaracterization of the rainfall at issue by focusing only on the period between December 21 and 28, AR9847, when the "St. Louis area received above normal rainfall throughout the month of December, resulting in record daily river stages." AR1226. The Corps analyzed data from the Chester river gage on the Mississippi and

the Pacific Gage on the Meramec that refute Dr. Criss's theory that the Corps' river training structures cause comparable flows to produce higher flood levels today than in the past. AR1225-26. Despite the Corps' continued construction of training structures, flood levels were lower at those gages in 2015 than floods produced by comparable flows in 1973 and 1993. *Id.*; AR1216. The Corps applied its expertise to thoroughly analyze Dr. Criss's work.[14]

Despite its flaws, the Corps took Dr. Pinter's work "very seriously." AR1229. The Corps repeatedly requested copies of his models and data. AR22679-80; AR22641-42; AR13738. Dr. Pinter denied those requests. AR1222-23. Contrary to Plaintiffs' claim, the Corps cannot "ignore" data that Plaintiffs' own declarant refused to provide. *See Vt. Yankee*, 435 U.S. at 553 (plaintiffs must "structure their participation so that it is meaningful").

The Corps also analyzed work by scientists indicating that "training structures do not impact flood[s]." AR 1215; AR1213, AR1219; 1224-25. It reviewed a 2012 physical model study concluding that "structures did not cause differences in reach-scale water surface evaluations." AR1213. And the Corps completed studies indicating that structures' impact "decreases" as they are submerged and they "have no impact" in high flood waters. AR1214; AR2324 ("the more submerged river training structures are, the less effect they have"). On the MMR, "dike elevations are well below the top-bank elevations and are submerged by over thirty feet during major floods." AR1215. The bulk of research thus "refutes the assertion that river training structures increase flood heights." AR2323-24. The Corps also expanded its 2014 flood analysis with modeling for its Vancill/Grand Tower Phase 5 EA, which further demonstrated that

[14] Plaintiffs try to minimize the Corps' analysis by claiming, Mem. at 37, that the Corps improperly focused on a river gage located at Chester, Illinois. Contrary to Plaintiffs' claim that the Chester gage was "scarcely mentioned" by Dr. Criss, Mem. at 38, Dr. Criss repeatedly mentioned the gage and identified it as the gage immediately downstream of the Meramec River. AR9848, 9850-51. Regardless, Dr. Criss also misused data from the Meramec gages. AR1226.

structures do not increase flood heights. AR8149-203. And Dr. Remo, one of Dr. Pinter's co-authors, complimented the Corps on the quality of this model. AR9178-79. Finally, the Corps used its expertise in hydrodynamics and hydrology to evaluate flooding issues, including those raised by Plaintiffs' comments.[15] The Corps took a hard look at all flooding research, including all available research conducted by the scientists Plaintiffs identify.[16]

As in 2014, the Corps extensively analyzed the effects of structures and reasonably concluded that they do not impact flood levels. But the relevant question is not whether the Corps is right, but whether it took a hard look at the issue. *Env't Law & Policy Ctr.*, 470 F.3d at 682. As before, while "Plaintiffs disagree with the Corps' conclusions . . . [w]here, as here, the Corps has considered the issue and explained its conclusions, it has not acted arbitrarily, and that is as far as the Court's inquiry can proceed." *NWF I*, 2014 U.S. Dist. LEXIS 164861, at *28. Under the deferential standard applicable here, the Corps' analysis was not arbitrary.

ii. The Corps took a hard look at, and fully addressed, comments from an Independent Expert Peer Review Panel.

As Plaintiffs note, the Corps also submitted the Draft SEIS to Independent External Peer Review to ensure the FSEIS's validity. AR692-747; AR2071-72 (explaining panel's process and

[15] *E.g.* AR9 (Engineering Research and Development Center ("ERDC") rejected use of structure because it increased flood stages more than .005 feet); AR10 (monitors impacts on flood levels, "reviewed and analyzed all literature on the topic, and . . . conducted numerical models to evaluate" impacts); AR935; AR949 (coordinates with agencies through River Resources Action Team and uses Hydraulic Sediment Response model to analyze structures); AR 963-64 (Planning Center of Expertise for Inland Navigation); AR1228 (validating models at ERDC); AR1229 (working with academic experts).

[16] Plaintiffs' claim that narrowing the width of water increases its height, Mem. at 24, reflects basic misunderstanding of the MMR. The Corps' contraction of the river at low flows does not narrow the river's width during floods that submerge the structures "by over thirty feet." AR 1214. The contraction instead: 1) ensures sufficient height in the navigational channel at low flows; and 2) scours, or lowers, the river bottom by removing sediment. AR1083-84; *NWF I*, 2014 U.S. Dist. LEXIS 164861, at *38. Scouring the bed increases the quantity of water that can flow through the MMR, counteracting any surface elevation impact from training structures. AR1225.

independence). Plaintiffs claim that the Corps "ignored" or "failed to address" the Panel's concerns. Mem. at 29-30, 32-33. The record belies this claim.

The IEPR Panel raised several concerns about the Draft SEIS, including the Corps' inability to identify locations for possible future structures. Mem. at 25 (citing AR6956, October 13, 2016 IEPR comments on Draft EIS). But the SEIS process did not stop with the Draft SEIS that Plaintiffs rely upon. AR704-05. The Corps addressed the Panel's concerns and incorporated its recommendations into the FSEIS. AR670-80. Notably, after receiving the Corps' explanation, the IEPR Panel concurred that the "quantity, location and types of structures to be used" in the future was unknowable due to the MMR's "dynamic nature." AR672; AR1262 (locations dependent on future sediment load, dredging, climate change, and other factors). The Panel's concurrence defeats Plaintiffs' claims that the Corps ignored the IEPR panel and failed to provide meaningful analysis.[17]

Plaintiff is also correct that the IEPR Panel recommended that the Draft SEIS be revised to include information on sediment properties. Mem. at 29-30. Indeed, the IEPR specifically recommended that the Corps "place a sediment data set" in Chapter 3 of the SEIS. AR677. The Corps concurred with the Panel recommendation and significantly expanded Chapter 3. AR677-78. The Corps also significantly expanded the SEIS's geomorphology section to include a "sediment" section. Compare AR7270-90 (Draft SEIS) with AR995-1025 (FSEIS).[18] Among other things, the expanded sediment section included the requested sediment data and analyzed numerous post-1976 sediment, bathymetric, and connectivity studies. AR1002-25.

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[17] The panel's concurrence also disposes of Plaintiffs' argument, Mem. at 25-26, that the Corps failed to provide "informed and meaningful" review of alternatives. The Corps provided the review that is possible in a programmatic EIS and necessarily deferred future site-specific analysis.

[18] This expansion also addressed Plaintiffs' request for more sediment information. AR2070-71.

Plaintiffs misrepresent the IEPR's comment to claim that the FSEIS "omits essential data." Mem. at 30. The Panel found the opposite in the very sentence Plaintiff cites: "**Although** the SEIS has little information on the hydraulic and hydrologic engineering data for the MMR**, the 1976 EIS . . . was reviewed for this data and it was found to be complete and suitable**." AR 6964 (highlighted portions omitted). Plaintiffs identify no deficiency.

Plaintiffs are incorrect, Mem. at 32-33, that the Corps "never addressed [the panel's] recommendations." The Corps submitted the DSEIS to the Panel to test the DSEIS. The Panel raised concerns. And the Corps fully addressed those concerns, including by adding additional analysis to the FSEIS. AR670-680. Indeed, the Panel concurred with the Corps' efforts to address *all* of the panel's comments. AR670-680. So rather than demonstrate a lack of essential information, the IEPR process demonstrates that the Corps took a hard look at available information and that its robust analysis was not arbitrary.[19]

iii. The FSEIS Properly Addressed Baseline Conditions

The Corps devoted dozens of pages to thoroughly analyzing the Project's baseline conditions. AR985-1081. This analysis includes all of the issues that Plaintiffs claim, Mem. at 33-34, the Corps failed to analyze.[20] It satisfies any requirement to analyze baseline conditions, particularly because the APA "requires substantial deference to the agency, not only when

[19] Plaintiffs' claim that the Corps violated WRDA by failing to provide a written response to the IEPR, Mem. at 45, fails because the Corps met any such requirement. AR670-680.

[20] Plaintiffs cite two cases for the proposition that the Corps must establish baseline conditions in the FSEIS. Mem. at 33. But one of those cases upheld a decision that did not include such baseline decisions in an EIS. *Half Moon Bay Fishermans' Mktg. Ass'n v. Carlucci*, 857 F.2d 505, 511-12 (9th Cir. 1988) (Corps satisfied NEPA's requirement to consider impacts where EPA report issued after EIS but before decision "states that 'baseline survey . . . has been conducted and the site will be monitored during and after disposal"). And the other hinged on an EIS illogically assuming that the public would comply with an "unenforced . . . unmarked and undisclosed" no-wake zone. *Friends of Back Bay v. U.S. Army Corps of Eng'rs*, 681 F.3d 581, 588 (4th Cir. 2012).

reviewing decisions like what evidence to find credible . . . but also when reviewing drafting decisions like how much discussion to include on each topic, and how much data is necessary to fully address each issue." *Sierra Club v. Flowers*, 526 F.3d 1353, 1361 (11th Cir. 2008); *Protect Our Cmtys. Found. v. Jewell*, 825 F.3d 571, 583 (9th Cir. 2016) (a reviewing court should not substitute its judgment for the agency's determination "founded on reasonable inferences from scientific data"). Indeed, "judgments regarding the development of the baseline against which alternatives would be assessed are the sorts of expert analytical judgments to which courts typically defer." *Vill. of Bensenville v. FAA*, 457 F.3d 52, 72 (D.C. Cir. 2006).

Plaintiffs are incorrect, Mem. at 34, that the FSEIS "lacks baseline data on flood heights" and "dismisses extensive and highly credible information." To the contrary, the FSEIS extensively analyzed all available historical and modern information on flooding. AR992-94; AR1207-29. The Corps' reasoned judgment – that Plaintiffs' preferred data is flawed – is the type of judgment to which the Court should defer.

Plaintiffs' claim that the FSEIS "lacks baseline data on the potential impacts of channel cutoffs" at places such as Dogtooth Bend, Mem. at 34, is also illustrative. Plaintiffs cite to the DSEIS, which recognized the baseline risk of a possible cutoff at Dogtooth Bend. *Id*. (quoting AR6504).[21] The Corps responded to this risk with a project to "stabilize the bankline and scour hole and pursue a long-term construction solution to reduce the risk of a channel cutoff." AR7755-860. And the subsequent FSEIS addressed both the baseline risk of channel cutoff and the Corps' effort to stabilize the banks to prevent cutoff. AR960-62; AR1085. The Corps

[21] River training structures do not cause channel cutoffs, but the Corps considered cutoffs because they impair the navigation channel. Indeed, rather than supporting Plaintiff's assertion that "the Project poses the potential for a channel cutoff," Mem. at 34, the study Plaintiffs' rely upon notes that "the Mississippi River has a long history of continually changing course." AR1546.

modified its discussion of Dogtooth Bend – the location of Len Small Levee – to reflect the new baseline, which includes bankline repairs and stabilization of priority locations along the scour hole formed by flood waters. AR961-62. Plaintiffs identify no baseline data that the Corps failed to analyze. The full record demonstrates that the Corps took a hard look at the potential impact of channel cutoff at a programmatic level.[22]

Plaintiffs' claim that the Corps lacks baseline data on sedimentation, Mem. at 34, is similarly meritless. See page 34, above (expanded sediment discussion in response to IEPR). And Plaintiffs' assertion that the Corps "merely references past studies" documenting an alleged decline in the MMR's health, Mem. at 34-35 (citing AR1141-42), misses that the Corps analyzed those studies, including some demonstrating that the Corps has addressed the decline. AR1143-69. The Corps took a hard look and determined that past work on the Project:

> likely significantly adversely affected some segments of the MMR environment as discussed in the 1976 EIS, [but] the current practices employed in obtaining and maintaining a navigation channel integrate lessons learned from past experience and emphasize avoiding and minimizing environmental impacts to the greatest extent practicable. The additional analyses as part of this SEIS show that these measures have had the intended effect of avoiding and minimizing the impacts that were identified in the 1976 EIS. . . . [Work, including] innovative river training structure designs and District restoration efforts, has contributed to a substantial reduction in adverse effects and equilibrium in many habitat conditions."

AR1169. The Corps did not fail to take a hard look at the MMR's ecological health.

Plaintiffs' remaining critiques of the baseline data as lacking particularized information about impacts on species and habitat from unidentified new structures, Mem. at 34, are meritless. Plaintiffs are incorrect, *id*. at 33, that 40 C.F.R. § 1502.22 required the Corps to obtain additional baseline data unless the cost of doing so was "exorbitant." *See Sierra Club*, 46 F.3d at 623 (Section 1502.22 neither requires agencies to use a methodology that it "reasonably found

[22] The Corps also conducts site-specific analysis of potential channel cutoff issues. AR7755-860.

lacking in certainty of application" nor authorizes Courts to resolve scientific "disagreements"). The Corps nonetheless conducted new analyses, including constructing a model to study the general impacts of training structures on habitat, fish and wildlife. AR2138-296; AR1121-36; AR10259-62. The Corps used that model to determine that training structures generally increase shallow, low-velocity habitat and decrease "shallow- to moderate-depth, moderate-to high-velocity habitat." AR1124-25. While the Corps cannot obtain information about specific locations at this time, it constructed a second model to identify and mitigate site-specific impacts through future site-specific analysis. AR1255-56; AR366-69; AR383-433. The Corps used all available information and was not arbitrary to defer site-specific questions.[23]

iv. The Corps was not arbitrary to develop two models: one to model available information and one to model future site-specific impacts once structures are identified.

Where "incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives," an agency must either "include the information" unless the cost is exorbitant or state that the information is unavailable. 40 C.F.R. § 1502.22 (2017). "Agencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses" and may identify the methodologies they use by discussing them "in an appendix." 40 C.F.R. § 1502.24 (2017). The Corps did just that here, first constructing a three-dimensional model of a 19-mile reach of the MMR, which determined that structures may significantly impact certain habitat. The Corps then constructed a model to identify, quantify,

[23] *Cf. N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1079, 1097-98 (9th Cir. 2011) (EIS with "reasonably foreseeable development plan" that included specific railroad routes must include baseline data for those routes). Even so, courts must defer to the Corps' analysis of technical information, even if Plaintiffs disagree. *Id.* at 1085, 1097-98.

and mitigate site specific impacts once the Corps determines locations for future structures. The Corps' construction of these two models more than satisfies NEPA.

Plaintiffs' claim that the FSEIS lacks critical information regarding the 19-mile reach that the Corps modeled to determine impacts on fishery resources, Mem. at 31, is also without merit. The Corps described the model's results, validated the model and the study results, and added the model study report as Appendix J. AR1121-34; AR2071 (comment 29); AR2138-296. Plaintiffs claim that this robust description is inadequate because the Corps did not present 11 categories of information as Plaintiffs desire. Mem. at 31. But the one case Plaintiffs cite merely holds that the Corps cannot misrepresent its assumptions, such as by misleadingly assuming construction of an unbuilt project into a no-build baseline. *Coal. to Pres. McIntire Park v. Mendez*, 862 F. Supp. 2d 499, 532 (W.D. Va. 2012) (distinguishing *N.C. Wildlife Fed. v. N.C. Dep't Of Transp.*, 677 F.3d 596 (4th Cir. 2012)). Plaintiffs' "flyspecks" of the manner in which the Corps described the 19-mile reach model identify no similar misrepresentation or failure to disclose assumptions. *Cf.* Mem. at 39-40 (relying on model's conclusion that future structures will likely have a "significant adverse effect"). They are not sufficient to overcome the significant deference accorded to the Corps' decisions regarding how to model impacts of the MMR's incredibly complex hydrology on fish, much less demonstrate that the FSEIS relied on it arbitrarily.

While the Court need proceed no further, the FSEIS's robust discussion of the model disclosed its assumptions and constitutes the necessary hard look. The Corps assumed that a three-dimensional model would more accurately replicate flow patterns around structures than previous two-dimensional hydraulic models. AR1121. It analyzed impacts on fisheries at multiple depths under multiple flow conditions based on the assumption that such modeling would provide a representative assessment of those impacts. AR1123 (disclosing depths and

velocities). It analyzed traditional and innovative structures separately based upon the assumption that different structures would produce different impacts. AR 1124. And it determined that structures generally increase shallow, low-velocity habitat but reduce "moderate depth, moderate- to high-velocity habitat." AR 1124-25. The Corps presented its findings in charts that detail the habitat gains and losses produced by both traditional and innovative structures. AR1126-30. The Corps both disclosed potential habitat loss and incorporated that habitat loss as an assumption for its mitigation plan. AR1132; AR1253.[24] Plaintiffs identify no basis for overcoming the deference accorded to the Corps on such technical matters.

Plaintiffs' second critique of the 19-mile reach study, that the "FSEIS fails to evaluate" the impact of the main channel border habitat loss on "many species", Mem. at 37-40, fares no better. Contrary to Plaintiffs' assertion, the Corps analyzed anticipated harms and benefits to dozens of specific species and families in an appropriate manner for a programmatic EIS. AR1104-36. For example, Plaintiffs are incorrect, Mem. at 39, that the Corps failed to address potential impacts to pallid sturgeon. The Corps analyzed its ongoing efforts to protect pallid sturgeon under a FWS Biological Opinion. AR1043-51. It analyzed dozens of studies, many of which post-date a 2004 study that Plaintiffs claim, Mem. at 39, the Corps ignored. AR1047-49, AR1114-15, AR1145-46, AR1184, AR1188, AR1190, AR1202. And the Corps analysis of impacts to reptiles such as turtles was not arbitrary because, 1) the MMR's planform and side channel width has not changed since the 1976 EIS, AR1042-43, AR995, AR1009; and 2) the shallow, low-velocity habitat that is important to turtles, Mem. at 39, actually increases under the

[24] To the extent Plaintiffs argue that the Corps violated NEPA by not disclosing the information in the DSEIS and providing opportunity to comment, they are wrong. The Corps need not engage in a never-ending circle of comments. *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 548 (8th Cir. 2003). Regardless, the Corps invited comments on the FSEIS. AR7-12.

Continue Construction Alternative. AR982. This analysis was more than sufficient to constitute a hard look. *TRCP*, 661 F.3d at 75-76 (generalized recognition that "big game hunting" and "various game bird species" would decrease was sufficient).

Importantly, "the changing nature of the river" made it impossible for the Corps to identify and model "specific locations and design of structures" in the FSEIS. AR1255. The Corps could only roughly forecast the "likely impacts resulting from additional river training structures." *Id*. The Corps can only analyze future impacts once it identifies specific structures, determines the quantity of acreage that such structures will impact, and determines the nature of that habitat. *Id*. at 1255-56. The Corps was not arbitrary to analyze the programmatic-level impacts and state that it will develop mitigation plans based on future site-specific EAs. *Id*.

The Corps thus developed a second model to mitigate any future impacts to the only habitat type that is likely to be adversely impacted by future structures – moderate depth, moderate- to high-velocity habitat found primarily as part of the border of the main navigation channel. Plaintiffs' claim that the Corps should have waited to complete the FSEIS until completing its main channel border habitat model, Mem. at 30-31, offers a new, but similarly meritless, spin on their claim that tiering to a programmatic EIS is inappropriate. Plaintiffs are correct that the Corps intends to use the model to determine site-specific impacts. Mem. at 30-31. As EPA noted, the border habitat model "can be used to quantify habitat loss and to guide compensatory mitigation" in future site-specific EAs. AR14. Such tiering remains entirely appropriate. *See NWF I*, 2014 U.S. Dist. LEXIS 164861, at *31-33.

Plaintiffs' remaining claims – that the Corps failed to accurately assess the "extent and locations of adverse impacts to main channel habitat" because it did not complete its site-specific border habitat model, Mem. at 37-38 – are based on misunderstandings. Plaintiff are incorrect,

Mem. at 38, that the "incomplete main channel border habitat model" was applied to the 19-mile reach model. The Corps developed the separate 19-mile reach model first to conduct its programmatic analysis. AR2202-03. Plaintiffs are also incorrect, Mem. at 38, that the FSEIS understated the likely habitat impact by determining that 1,100 acres of main channel border habitat will likely be impacted. Plaintiffs' mistake is illustrative, as the Corps rejected "maximum dredging reduction" options that would have added 6.5 to 8.5 million tons of rock to the MMR and likely impacted 1,774 acres of habitat. AR1264. The Corps instead selected the "Minimize dredging while incorporating avoid and minimize measures and potentially implementing compensatory mitigation" alternative, which will add only approximately 4.4 million tons of rock and likely impact only 1,100 acres. AR975, 977. Finally, Plaintiffs are incorrect, Mem. at 39-40, that the Corps failed to analyze cumulative impacts. AR1141-69.

The Corps developed the 19-mile reach model to analyze unknowable impacts and concluded that "continued conversion to structured main channel border habitat is expected to have a significant adverse effect on the MMR fish community, and . . . may warrant compensatory mitigation" AR1132. The Corps not only disclosed that it could not determine site-specific impacts until particular locations and structures are identified, it also incorporated that future analysis into the FSEIS by developing the main channel border habitat model. AR1255-56; AR366-69; AR383-433. The one case Plaintiffs cite, Mem. at 31, found a NEPA violation when an agency: 1) made a decision without information that was "essential to make a reasoned choice among alternatives"; and 2) the agency did not "make clear in the final impact statement that the study was not undertaken." *Sierra Club v. U.S. Dep't of Transp.*, 962 F. Supp. 1037, 1043 (N.D. Ill. 1997). In contrast, the Corps here used modeling to obtain the essential information for its programmatic FSEIS and disclosed that the model it planned to use for site-

specific analysis was incomplete. AR1132; AR2071 (Comment 28). This hard look, and open deferral of site-specific analysis until specific sites are known, was not arbitrary.

v. The FSEIS took a hard look at impacts to side and back channels.

Plaintiffs also incorrectly claim, Mem. at 40, that the Corps did not take a hard look at impacts to side and back channels. But the Corps took a hard look and determined that training structures, particularly the structures the Corps intends to build, do not impact this habitat. AR1005-23; AR1084-88. Past predictions that training structures would lead to river stage decreases and the loss of side channels through sedimentation did not materialize. AR 1084. "[M]ost MMR side channels appear to be very stable . . . with very little change occurring since the mid-1900s." AR1021; AR1035. This is because the Corps developed innovative structures such as chevrons to avoid and minimize side and back channel impacts. AR1000; AR1020-21. Nonetheless, the Corps took a hard look at whether structures will impact side and back channel habitat during low flow conditions and determined that any impact from additional structures will be "minor and inconsequential" because of the small amount of stone that will be placed and compensatory mitigation for that stone. AR1087-88.[25]

The single example of pallid sturgeon that Plaintiffs cite, Mem. at 40, is illustrative. Rather than ignore pallid sturgeon habitat, the Corps robustly considered the impacts of side channel habitat on pallid sturgeon and continues to implement the FWS's recommendations. AR1044-50. Indeed, the section of the EA that Plaintiffs rely upon, Mem. at 40, concludes that the Corps' innovative structures "should result in diversification of aquatic habitats," including

[25] The Corps similarly evaluated the possibility that climate change will increase the frequency and magnitude of low water events. AR1100.

those that Plaintiffs claim the FSEIS did not address. AR14048. The Corps took the requisite hard look at side and back channel impacts.

vi. The FSEIS meaningfully evaluates mitigation

The Corps was not arbitrary to defer site-specific mitigation analysis until sites are identified. Pages 38-43, above. Plaintiffs' claim that the Corps was required to demonstrate with particularity that the effects of unidentified structures on unidentified stretches of the MMR will be fully mitigated, Mem. at 41-42, fails for several reasons. The Corps was not "required to analyze the effectiveness of mitigation measures for site specific actions because none were approved" by the programmatic FSEIS. *Wilderness Soc'y v. U.S. BLM*, 822 F. Supp. 2d 933, 944 (D. Ariz. 2011). Indeed, NEPA does not "demand the presence of a fully developed plan that will mitigate environmental harm before an agency can act." *Robertson*, 490 U.S. at 353.[26]

Plaintiffs rely on cases, Mem. at 41, that are inapposite because they involved final approval for specific new activities. Critically, specific mitigation analysis was appropriate where an agency permitted specific activities without further action. *S. Fork Band Council v. U.S. Dep't of Interior*, 588 F.3d 718, 722 (9th Cir. 2009) (new gold mining). In contrast, a programmatic EIS evaluates the environmental impacts of broad actions and may appropriately defer additional site-specific analysis to be performed prior to construction. *See Wilderness Soc'y*, 822 F. Supp. 2d at 944 (distinguishing *S. Fork Band Council and Neighbors of Cuddy Mtn. v. U.S. Forest Serv.*, 137 F.3d 1372 (9th Cir. 1998)). "[W]hen a programmatic EIS is prepared, site-specific impacts need not be fully evaluated until a 'critical decision' has been

[26] Plaintiffs suggest that *Robertson* requires the FSEIS to demonstrate that "proposed mitigation will be ecologically successful." Mem. at 41. *Robertson* instead drew a "distinction . . . between a requirement that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated, on the one hand, and a substantive requirement that a complete mitigation plan be actually formulated and adopted." *Robertson*, 490 U.S. at 352.

made to act on site development." *N. Alaska Env't Ctr. v. Lujan*, 961 F.2d 886, 891 (9th Cir. 1992) (internal quotations omitted). In *Cuddy Mountain*, a "two-paragraph mitigation discussion" was struck down as "perfunctory," in part because the agency's "own experts found the mitigation plan so vague as to render it useless." *Nat'l Parks & Conserv. Ass'n v. U.S. Dep't of Transp.*, 222 F.3d 677, 681-82 (9th Cir. 2000) ("possible environmental damage [from unidentified species], if any, is purely speculative. It was therefore appropriate for the EIS to focus on broad mitigation measures"). Here, the Corps thoroughly analyzed mitigation to the extent possible and constructed and implemented a model to address future site-specific impacts at a more appropriate juncture – when sites are identified.

Plaintiffs' claim, Mem. at 41-42, that the FSEIS violates a purportedly mandatory mitigation requirement fails because the FSEIS actually treats mitigation as mandatory. As an initial matter, the Corps has already "altered existing dike configurations in multiple locations in the MMR to provide environmental benefits." AR1134. The Corps factored mitigation costs into the FSEIS. AR975. The FSEIS included a "future implementation" section guaranteeing that site-specific EAs would "include a detailed mitigation plan and associated adaptive management and monitoring that is required based on the impact assessment." AR984. The plan is designed to "ensure adverse effects from the project are offset" despite the fact that specific "impacts cannot be definitively identified until specific future plans are developed." AR1252-53. And contrary to Plaintiffs' claim, Mem. at 42, the Corps "anticipate[s] pursuing mitigation" for forecasted habitat changes. AR1256. The Corps' adoption of adaptive mitigation, based on an "ongoing cycle of learning," is appropriate for a programmatic EIS. AR1257; *Wilderness Soc'y*, 822 F. Supp. 2d at 941.

The Corps conducted the most comprehensive mitigation analysis possible with the information that is available prior to identifying actual structures for actual sites, and guaranteed that it would conduct appropriately site-specific mitigation analysis when possible. AR984; AR1255-56; AR14; AR369.[27] The analysis was reasonably thorough, supported an informed decision, and laid the foundation for future site-specific decisions. No more was required.

E. The Corps Complied with the Water Resources Development Acts

The Water Resources Development Acts' requirement that the Corps complete a mitigation plan for new projects and reports to Congress does not apply here, because the Corps is simply supplementing its NEPA analysis for a project that Congress mandated over 100 years ago. But even if Plaintiffs were correct, Mem. at 42, that 33 U.S.C. §§ 2283(a)(1) and (d)(1) mandate mitigation here, Plaintiffs' claims still fail because the FSEIS mandates mitigation in the most detailed manner possible prior to identifying site-specific structures.

First, Plaintiff is incorrect that 33 U.S.C. § 2283(a)(1) requires the Corps to prepare a detailed mitigation plan here. Section 2283(a)(1) applies only to projects that had not yet commenced construction on November 17, 1986. 33 U.S.C. § 2283(a)(1). As discussed above, the Project has been in construction for over 100 years.

Section 2283(d)(1) similarly does not mandate mitigation here.[28] Plaintiffs' claim hinges on their interpretation, Mem. at 42, that the FSEIS is a "report." But Section 2283(d) does not

[27] Plaintiffs again complain that the Corps did not finish its site-specific mitigation model prior to completing the FSEIS. But an "EIS's proposed mitigation measures 'need not be legally enforceable, funded or even in final form to comply with NEPA's procedural requirements.'" *Protect Our Cmtys. Found.*, 825 F.3d at 582. Even so, the model was completed and merely waiting approval when the ROD was executed. AR366-69; AR383-433.

[28] 33 U.S.C.S. § 2283 provides in relevant part that after "1986, the Secretary shall not submit any proposal for the authorization of any water resources project to Congress in any report, and shall not select a project alternative in any report, unless such report contains (A) a recommendation with a specific plan to mitigate for damages to ecological resources, including terrestrial and

apply to the FSEIS because it applies "only to 'reports' submitted to Congress." *In re ACF Basin Water Litig.*, 467 F. Supp. 3d 1323, 1333-34 (N.D. Ga. 2020); *id*. at 1334 (EIS's are not "reports" under WRDA "because they are not documents submitted to Congress for authorization of a water resources project.").[29] Plaintiffs' claim should be denied because the Corps has no mandatory duty to mitigate environmental impacts.

Plaintiffs' WRDA claims, like their NEPA claims, fail because the Corps included the most detailed mitigation plan possible. *See New Jersey v. U.S. Army Corps of Eng'rs*, No. 09-5591, 2011 U.S. Dist. LEXIS 3463, *42 (D.N.J. Jan. 13, 2011). Plaintiffs' claim that the FSEIS violated WRDA because it lacks "a specific plan to mitigate . . . adverse impacts," Mem. at 44, is another twist on their argument that programmatic EIS's are arbitrary. The "quantity, location and types of structures to be used" in the future is unknowable due to the MMR's "dynamic nature." AR672; AR1262 (specific locations dependent on future sediment load, dredging,

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aquatic resources, and fish and wildlife losses created by such project, or (B) a determination by the Secretary that such project will have negligible adverse impact on ecological resources and fish and wildlife without the implementation of mitigation measures."

[29] Plaintiffs cite to the 1986 WRDA. Mem. at 42. WRDA has been amended several times. Section 2283, for example, was amended in 2007. Plaintiffs omit the portion of the statute that limits the mandatory mitigation requirement to reports to Congress:

> "**After November 17, 1986, the Secretary shall not submit any proposal for the authorization of any water resources project to Congress in any report, and** shall not select a project alternative in any report, unless such report contains (A) a recommendation with a specific plan to mitigate for damages to ecological resources, including terrestrial and aquatic resources, and fish and wildlife losses created by such project, or (B) a determination by the Secretary that such project will have negligible adverse impact on ecological resources and fish and wildlife without the implementation of mitigation measures.

33 U.S.C.S. § 2283 (omitted language in bold); *see In re ACF Basin Water Litig.*, 467 F. Supp. 3d at 1330-34. And the legislative history of the 2007 amendments supports the Corps' interpretation. *In re ACF Basin Water Litig.*, 467 F. Supp. 3d at 1334 ("[T]he Senate version of the bill that would have expanded the Section 2283(d) mitigation plan requirement to any final 'record of decision, environmental impact statement, or environmental assessment' was rejected in conference. *See* S. Rep. 110-58 (April 30, 2007).").

climate change, and other factors). The Corps thus was not arbitrary to construct and then mandate use of its main channel border habitat model to mitigate adverse impacts once the Corps is able to determine the nature and extent of those impacts. Pages 38-46, above. Implementation will "detail any compensatory mitigation planning and associated adaptive management and monitoring that is required" based on site-specific impact assessments. AR934-35; AR933 (impacts may necessitate mitigation).[30] The mitigation plan complies with any applicable requirement in Section 2283 by providing the specificity possible in a programmatic EIS. AR1252 (applying WRDA mitigation plan requirements in a "broad, programmatic" manner because "specific project impacts cannot be definitively identified until specific future plans are developed"); *See Env't Def. v. Army Corps of Eng'rs*, No. 04-1575, 2006 U.S. Dist. LEXIS 47969 (D.D.C. July 14, 2006) (Section 2283 permits "process that will result in concurrent work on, and completion of, the project and its required mitigation"). WRDA does not require that a programmatic EIS include more than the FSEIS's plan to conduct future site-specific analysis and adaptive management to address possible future impacts from unidentified structures.

The record belies Plaintiffs' remaining mitigation-related claims. Plaintiffs are incorrect, Mem. at 43-44, that the FSEIS includes neither monitoring nor a contingency plan. The FSEIS includes monitoring and an adaptive management plan that adopts an iterative approach to evaluating mitigation efforts. AR1257-59. And contrary to Plaintiffs' claim, Mem. at 43, the FSEIS provides for consultation with other agencies to evaluate mitigation. AR1252; AR1256; AR1258. Finally, the Corps need not include a plan to acquire land for mitigation because "[a]ll

[30] The Corps even committed to using the newly created habitat model to reevaluate its impacts analysis in recent EAs and mitigate adverse effects. AR965; AR1253.

land in main channel border habitat" where mitigation is proposed "is under federal jurisdiction." AR1260. Plaintiffs thus fail to identify any deficiency in the mitigation plan.

F. The Corps did not violate the Fish and Wildlife Coordination Act

Plaintiffs' claim that the Corps failed to conduct consultation required by the FWCA, Mem. at 46-49, fails as a matter of both fact and law. The Act does not apply to the Project because it was over 60% complete when the Act was passed in 1958. Nonetheless, the Corps satisfied any consultation required by the FWCA by consulting with USFWS.

The FWCA is not "applicable to any project . . . authorized before" the Act's enactment "if the construction of the particular project . . . has been substantially completed." 16 U.S.C. § 662. The Act defines "substantially completed" to mean that "sixty percent or more of the estimated construction cost has been obligated for expenditure." *Id*. As Plaintiffs recognize, the Corps has interpreted the FWCA's cost-exemption to require measurement of whether a project was substantially completed "as of FWCA's enactment in 1958: 'The [FWCA] of 1958 is applicable to any project where less than 60 percent of the estimated construction cost had been obligated as of'" August 12, 1948. Mem. at 48 (quoting AR 41606).[31] Plaintiffs contend that the FWCA is applicable here because the Project was modified after 1958. Mem. at 46-49. Plaintiffs' claim fails because the Project was substantially complete in 1958, and the Project has not significantly changed since 1927.

[31] The FWCA's legislative history reinforces the FWCA's focus on the Corps' "backlog of 650 active authorized projects . . . ***on which construction has not yet started***. . . . ***It would make good sense to have the policies and procedures of the Coordination Act applicable to them*** in order that the wishes of the Congress in acting the 1946 statute and the proposed amendments can be observed." S. Rep. 85-1981, 85th Cong., 2d Sess., 1958 U.S.C.C.A.N. 3446, 3449 (July 28, 1958) (emphases added). Thus, "[u]nder the bill suggestions regarding changes could be made ***previous to the commencement of construction***." *Id*. at 3446 (emphasis added).

Plaintiffs misapply the Corps' determination that a different "1912 project" on a different river, the Missouri, was not substantially complete in 1958. Mem. 48 (citing SAR542). Indeed, that decision emphasizes the Corps' consistent application of the FWCA to focus on whether a project was estimated to be complete in 1958. SAR542. In 1976, the Corps determined that the Project was estimated to be approximately 82% complete in 1958 and that the Act therefore is "not applicable to the basic project as authorized" in 1958. AR44379. Further, the Corps has consistently determined that the Project has not changed since 1927. Page 6, above.[32]

Even if the FWCA applies, the Corps satisfied it by consulting with USFWS and state agencies.[33] Plaintiffs' mistakenly focus on the absence of a formal FWCA report, Mem. at 45-49. But the FWCA's requirement to consider fish and wildlife resources is met when "agencies responsible for management of natural resources consult with federal and state wildlife agencies prior to authorizing a project." *Confederated Tribes & Bands of Yakima Indian Nation v. FERC*, 746 F.2d 466 (9th Cir. 1984) (citing 16 U.S.C. § 662 and noting that FWCA imposes only procedural obligations). So if the Corps "complies with the requirements of NEPA, it will also have satisfied the provisions of the FWCA." *Tex. Comm.*, 736 F.2d at 268; *Env't Def. Fund*, 473 F.2d 346; *Mo. ex rel. Ashcroft v. U.S. Army Corps of Eng'rs*, 526 F. Supp. 660 (W.D. Mo. 1980); *New Jersey*, 2011 U.S. Dist. LEXIS 3463 at *40. In sum, any coordination required by the FWCA need not take the form of a formal FWCA report.

The Corps consulted with and seriously considered the recommendations of USFWS, as well as Illinois' and Missouri's natural resources agencies. Plaintiffs' claims that the Corps

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[32] USFWS took no position on whether actual, as opposed to estimated, post-1958 costs should be used to determine whether the Project was 60% complete in 1958. AR1331; AR6424. And GAO stated only that the Corps should follow applicable laws. Mem. at 48 (quoting AR29036).

[33] The Corps' FWCA coordination is reviewed under the APA's arbitrary and capricious standard *Sierra Club v. U.S. Army Corps of Eng'rs*, 935 F. Supp. 1556 (S.D. Ala. 1996).

violated the FWCA are undermined by the Corps' lengthy responses to USFWS's comments on the draft EIS. AR1312-35; AR1357-86; *New Jersey*, 2011 U.S. Dist. LEXIS 3463 at *41 ("Claims that the Corps failed to give full consideration to the reports and recommendations of FWS . . . are undermined by the numerous responses the Corps provided to each concern the services raised"). The Corps thoroughly responded to all federal and state agency comments. AR1310-415. Moreover, the Corps coordinated with the same resource agencies to address habitat impacts. AR9872; AR3888-95. The Corps satisfied any FWCA consultation requirement because "[t]he record contains correspondence and reports indicating consultation." *Rhoads v. Zirschky*, No. 95-10834, 1997 U.S. App. LEXIS 42933 (5th Cir. Feb. 5, 1997); *Enos v. Marsh*, 616 F. Supp. 32 (D. Haw. 1984) (FWS "was given a copy of the draft EIS, and . . . had the opportunity to comment on the project. These comments were included and considered."). Indeed, the Corps provided agencies with an opportunity to comment on the FSEIS. AR5.

Neither NEPA nor the FWCA "require the Corps to adopt all suggestions made by USFWS." *Tex. Comm.*, 736 F.2d at 268. *Cty of Bergen v. Dole*, 620 F. Supp. 1009, 1063 (D.N.J. 1985) (agency complied with FWCA by consulting with USFWS and state agency, despite those agencies' disagreement), *affirmed*, 800 F.2d 1130 (3d Cir. 1986); *Lake Erie Alliance v. U.S. Army Corps of Eng'rs*, 526 F.Supp. 1063, 1081 (W.D. Pa. 1981) ("There is no requirement that the Corps follow the advice of the federal agencies or adopt their positions."), *affirmed*, 707 F.2d 1392 (2d Cir. 1983). The Corps thus meets the FWCA's "requirements if it gives serious consideration" to the USFWS' views. *Tex. Comm.*, 736 F.2d at 268; *Sierra Club v. Alexander*, 484 F. Supp. 455, 470 (N.D.N.Y. 1980) (FWCA requires only that views of wildlife agencies "be given serious consideration"), *affirmed*, 633 F.2d 206 (2d Cir. 1980). Where, as here, "the Corps considered the recommendations of the USFWS and articulated its reasons for

rejecting those recommendations . . . it fulfilled its statutory obligations." *Tex. Comm.*, 736 F.2d at 268. Plaintiffs' FWCA claims thus fail as a matter of fact and law.

G. Plaintiffs confuse the MMR with the UMR.

The MMR is governed by distinct Congressional authorizations and managed through distinct techniques. AR 943-44. Congress authorized the Regulating Works Project in the MMR and locks and dams in the upstream UMR. AR972-73; AR2090. Plaintiffs improperly conflate or challenge the Corps' St. Louis and Rock Island Districts' management of the upstream portions of the UMR that are outside the FSEIS's scope. Mem. at 1, 6 (conflating EIS for each districts' distinct river portions and the upstream locks and dams with the MMR's river training structures), 9-13. For example, Plaintiffs rely on a 2008 Report regarding "effects of locks and dams" that are outside the MMR. Mem. at 11 (addressing "impounded zones").[34] Plaintiffs are incorrect that reports governing the entire UMR are wholly applicable to the distinct MMR.

This Court rejected Plaintiffs' effort to require the Corps to prepare an SEIS for the entire UMR, in part, because "there is no proposed action in the" UMR and "both the 1976 EIS and the congressional authorization for the Regulating Works Project are directed exclusively at the MMR." *NWF I*, 2014 U.S. Dist. LEXIS 164861, at *22-24. The reasoning behind this Court's rejection of Plaintiffs' prior challenge still applies. The FSEIS reasonably confines its geographic scope to the 195-mile MMR. AR11. To the extent that Plaintiffs' claims are based on the operation of upriver locks and dams, those claims must again be denied.[35]

[34] Plaintiffs' confusion regarding the MMR's features is undercut by their acknowledgement that the FSEIS addresses the Project, rather than upstream locks and dams. AR171, 175.

[35] Plaintiffs filed declarations to establish standing. Mem. at 5. Such post-decisional declarations should not be considered for any other purpose. *See Bodo v. McAleenan*, 17-CV-9254, 2019 U.S. Dist. LEXIS 135223, *15 (N.D. Ill. Aug. 12, 2019) (decision must stand or fall based on the administrative record already in existence).

H. The Corps complied with the 1927 Rivers and Harbors Act.

Plaintiffs' final argument, that the Corps violated the 1927 RHA, highlights their foundational misunderstanding of the statute. Plaintiffs are correct that: 1) the Corps' authority "is limited by its authorizing legislation"; and 2) the 1927 RHA limited the Corps' management of the Project by adopting the Chief of Engineers' recommendations. Mem. at 49. Critically, Plaintiffs misidentify a rejected District Engineer's Report as the controlling "Chief of Engineers Report." Plaintiffs' claim that the Corps violated the 1927 RHA is undone by the actual Chief of Engineers' report, which was all that was authorized by Congress. *See* pages 5-6, 14-17, above.

Plaintiffs' claim founders on another misunderstanding of the Rivers and Harbors Act's directive to maintain the navigation channel. Plaintiffs assert, Mem. at 49-50, that: 1) the Act limited the MMR's contraction width to between 2,500 and 2,000 feet; and 2) the Corps violated the Act by building "structures to reduce dredging costs associated with maintaining the navigation channel even where . . . contraction widths have been achieved." Plaintiffs base this assertion on the St. Louis District Engineer's *Recommendation*. Mem. at 49. But the Chief of Engineers and Congress rejected the suggestion that contraction width should be limited. Pages 14-17, above. The 1927 RHA did not task the Corps with "achieving" a particular contraction width, which is the distance between the riverward tip of a dike and the opposite bank. AR45897. Indeed, where current structures are insufficient to maintain the 9-foot-deep, 300-foot-wide channel, the Corps must maintain that channel regardless of the current contraction width. The Act directs the Corps to use contracting works as the primary tool to maintain the navigation channel. AR46947-48; AR45895 ("navigation depths were to be obtained primarily by confining flows within the main stem of the river by dikes . . . so as to cause the resultant increased velocities to scour the riverbed and thus deepen the channel"). And Congress adopted

the Chief of Engineers' recommendation that "dredging produced only temporary results, and should be reduced to a minimum." AR46948. Congress thus rejected the artificial contraction width Plaintiffs base their claims on, and instead gave the Corps flexibility to contract the MMR to any width that achieved the Act's goal – a 300-foot wide, nine-foot deep navigation channel.

Plaintiffs' misplaced reliance on the unadopted District Engineer's report pervades their claims. The Corps is complying with the Chief of Engineers' recommendations by using structures to maintain the navigation channel with a minimum of dredging, regardless of the contraction width. The Corps thus complies with the Rivers and Harbors Act.

IV. CONCLUSION

For the foregoing reasons the FSEIS and ROD should be upheld and summary judgment should be entered for the Federal Defendants.

Respectfully submitted this 14th day of May, 2021.

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