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' REPLY BRIEF IN SUPPORT OF FEDERAL DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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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
MMR	Middle Mississippi River
NEPA	National Environmental Policy Act
Project	Regulating Works Project
ROD	Record of Decision
WRDA	Water Resources Development Act

I. INTRODUCTION

This Court should grant the Corps' motion for summary judgment because Congress tasked the Corps with maintaining navigation in the Middle Mississippi River (MMR) by building and maintaining structures to minimize dredging. Plaintiffs' challenge to the Corps' Final Supplemental Environmental Impact Statement (FSEIS) for its MMR Project fails because it is based on multiple misinterpretations of the 1927 Rivers and Harbors Act (1927 RHA). The Corps' purpose and need statement and alternatives analysis were not arbitrary, and comply with NEPA, because the Corps reasonably used Congress's directives as a guide. Plaintiffs are also incorrect that the FSEIS's extensive environmental review is insufficient to satisfy NEPA. Finally, even if the Water Resources Development Acts (WRDA) and the Fish and Wildlife Coordination Act (FWCA) apply to the 100-year old Project, which they do not, the Corps complied with any requirements those acts might impose. Plaintiffs' response largely rehashes Plaintiffs' flawed opening brief and only highlights that the Corps satisfied any duties under NEPA, WRDA, and the FWCA. Plaintiffs identify no basis in the record or law for their claims that the Corps acted arbitrarily. The Corps' motion to for summary judgment should be granted.

II. ARGUMENT

A. The Corps Complied with NEPA

i. The Corps did not ignore Operations and Maintenance (O&M) activities.

Plaintiffs concede that the Corps did not ignore O&M activities as originally argued and attempt to recast the analysis as falling short of the hard look NEPA requires. Pls.' Mem. in Opp'n to Defs' Mot. For Summ. J. at 2 (ECF No. 43) (Br.). But the Corps took a hard look and analyzed O&M programmatically where appropriate. *E.g.* Defs.' Mem. in Opp'n to Pls.' Mot. For Summ. J. at 12-13 (ECF No. 40-1) (Mem.); AR 975 (difference in dredging). For example,

while the Corps determined that continuing construction would decrease negative O&M dredging impacts, its hard look at entrainment, habitat, noise, and turbidity found that dredging effects were similar across alternatives.[1] AR1089-91; AR1104-12. No more detailed analysis is needed when the Corps determines that impacts will be similar across alternatives. *City of Alexandria v. Slater*, 198 F.3d 862, 871 (D.C. Cir. 1999); *Friends of the Cap. Crescent Trail v. Fed. Transit Admin.*, 877 F.3d 1051, 1061 (D.C. Cir. 2017). And Plaintiffs fail to identify evidence that O&M impacts require more analysis. *See Sauk Prairie Conservation All. v. U.S. Dept. of the Interior*, 320 F. Supp. 3d 1013, 1031 (W.D. Wis. 2018), *aff'd*, 944 F.3d 664 (7th Cir. 2019). Plaintiffs fall short of establishing that the Corps failed to take a hard look at O&M.

ii. The Corps' Purpose and Need Statement was not arbitrary.

The FSEIS's purpose and need statement was reasonably guided by Congress's directive to maintain the MMR's navigation channel by using works, with minimal dredging. Mem. at 13-18. Plaintiffs concede that Congress's directive must guide the statement, but again misinterpret the 1927 RHA to require a rigid contraction width of "about 2,500 feet" in the MMR. Br. at 2-6. Plaintiffs' claim is unsupported by their citations, *id.*, and directly contrary to Congress's actual directive. Mem. at 13-18. Plaintiffs' misinterpretation is fatal to their claim that the Corps failed to properly incorporate Congress's directive into the purpose and need statement.

Plaintiffs misinterpret the 1927 RHA by confusing contraction width, which Congress did not legislate, and navigation channel width, which Congress did. Br. at 4. Contraction width is the distance between the "riverward tips of dikes" to the dikes or bank on the other side of the

[1] It could not analyze impacts in greater detail because the first step is to identify where dredging is needed. AR951. The Corps will then sample and coordinate with agencies to avoid impacts. AR951-52. The Corps will continue to conduct site-specific analysis for O&M activities. AR 951-54; AR960-62; AR1104-05; AR1370 (revetment); AR1380 (may let structures degrade); AR1405 (future analysis); AR8998 (analyzing "dredge disposal locations" to restore habitat).

river. AR45897. "Channel width" refers to the 300-foot wide navigation channel that boats use to travel safely up and down the Mississippi. AR46945 ¶1.[2] Congress directed an objective–maintaining a specific navigation channel through regulating works. Congress did not legislate the specific contraction necessary to achieve that objective.

Prior to the 1927 RHA, the Corps was authorized to improve the MMR navigation channel with the objective of "eventually obtain[ing]" a depth of eight feet from the Ohio River to Saint Louis and six feet from Saint Louis to the Missouri River. Mem. at 14-15. In the December, 1926 letter report, the Chief recommended modifying the existing Project objectives "to provide for a channel 9 feet deep and 300 feet wide." AR46948, ¶13. The 1927 RHA authorized the Chief's recommended modifications to the MMR navigation channel. AR46944. The Chief did not make recommendations pertaining to contraction widths. Mem. at 13-18.

Plaintiffs are incorrect, Br. at 4, 24-25, that the Chief's general concurrence with the Board of Engineers rigidly incorporated the District Engineer's calculations of contraction widths that might obtain the 300' by 9' navigation channel. Mem. at 13-18. Plaintiffs' claim that the Corps exceeded its authority is premised on contraction widths even the District Engineer acknowledged, in 1927, might be insufficient to achieve the desired navigation channel dimensions. AR46968, ¶58 ("It is not possible to predict exactly the navigable depths which will result" from the proposed works.). Regardless, Plaintiffs identify no language in the Chief's recommendation proposing a specific contraction width.

Simply put, the Chief "recommend[ed] that the existing project, which provides for a channel 8 feet deep and 200 feet wide be changed so as to provide for a channel 9 feet deep and

[2] Plaintiffs also refer to a "river width" estimate of "about 2,500 feet." Br. at 3. River width, the distance between banks, varies throughout the MMR. Regardless, the study Plaintiffs' cite clarifies that Congress provided for a nine foot deep, 300 foot wide channel. AR3570-73.

300 feet wide." AR46948, ¶13. He also recommended building structures to improve efficiency. *Id*., ¶11 ("dredging produced only temporary results, and should be reduced to a minimum"). These recommendations directly targeted the navigation channel dimensions the Chief—and ultimately Congress—wished to achieve. Plaintiffs' foundational misunderstanding of the 1927 RHA fails because the District Engineer's estimated contraction widths simply are not part of the Chief's "recommendations" authorized by Congress.

Contrary to Plaintiffs' claim, Br. at 5, the Corps does not argue that the Chief entirely rejected the District's recommendation. The Chief partially adopted it – just not the part Plaintiffs rely upon. Mem. at 14-16. The District and Chief both recommended, and Congress directed, that the Corps maintain the navigation channel with structures to minimize dredging. *Id*. at 13-17. Rather than propose a rigid contraction width, the Chief opined that there "is a strong probability that a channel 9 feet deep and 300 feet wide can be secured by the works constructed and contemplated" but that more funding might be necessary. AR46948, ¶¶12-13.[3] Plaintiffs identify no contradiction in the Corps' use of the 1927 RHA.

Relatedly, the Chief envisioned that completing construction might require more funds. AR46948, ¶12. The Corps reported annually to Congress on its continued construction, including narrowing the MMR's contraction width because the pre-1960's contraction ceased to support navigation. AR46809-12 (1937 Report); AR46804 (1938 Report focused solely on channel depth); AR46256 (low water impaired navigation in 1964); AR45618 (1974 Report that "increase in work is necessary to assure a dependable 9-foot project depth"); AR21780 (2010 Report on dike construction); AR2307-09 (contraction to maintain navigation). Indeed,

[3] While the Chief reported on contracting the MMR in 1927, Plaintiffs are incorrect, Br. at 4, that he viewed contraction width as mandated by Congress. He instead recognized that the 1927 RHA "provided for a depth of 9 feet and width of 300 feet." AR46937.

Congress provided funds annually, sometimes earmarking certain funds for the Project's continued construction. *See, e.g.,* Conf. Rep., Pub. Works Appropriations Bill at 7 (June 25, 1956) (Ex. 1); Mem. at 6, 20-21. Plaintiffs' claim that the Corps was required to achieve the mandated navigation and dredging reduction through a rigid contraction width with the structures that could be foreseen in detail in 1927 has no basis. Congress instead provided the Corps with flexibility and funds to build works to achieve the required navigation channel.

Plaintiffs are also wrong, Br. at 5-6, that the Corps contends that it need not comply with and ignored environmental laws. Mem. at 17-19. Plaintiffs cite no case requiring the Corps to state a purpose and need to comply with broadly applicable laws,[4] as opposed to MMR-specific directives. Indeed, the cases Plaintiffs cite buttress the statement's reasonableness because the FSEIS: 1) addressed the WRDA and FWCA; and 2) incorporated mitigation into every alternative. *Id*. at 17; AR975; *Vt. Pub. Int. Rsch. Grp. v. U.S. Fish & Wildlife Serv*., 247 F. Supp. 2d 495, 526-27 (D.Vt. 2002) (upholding statement that excluded reference to FWCA and site-specific statutes considered elsewhere); *Westlands Water Dist. v. U.S. Dep't of Interior*, 376 F.3d 853, 867-68 (9th Cir. 2004) (upholding narrow statement where alternatives considered measures excluded from statement). Moreover, the statement includes interagency coordination, in part to "avoid and minimize adverse effects to fish and wildlife resources to the extent practicable." AR947-54; AR960-62 (coordination to balance navigation and environmental concerns). And the statement incorporates Appendix K's analysis of environmental laws. AR945, AR966, AR2312-18. The Corps was not arbitrary because no law modified Congress's directive to use structures to maintain navigation and minimize dredging, and the Corps used that directive to inform its purpose and need statement. Mem. at 13-18.

[4] Neither the FWCA nor the WRDA are applicable to the Project. Mem. at 46-47, 49-50.

Finally, the Corps demonstrated project need simply by pointing to Congress's directives, including to minimize dredging. Regardless, contrary to Plaintiffs' claim, Br. at 6, the Corps analyzed costs of construction, dredging, and compensatory mitigation for ecological harms. AR975; AR1261-73; AR10182-203. Plaintiffs thus fall far short of establishing that the purpose and need statement was arbitrary. Congress authorized the Corps to maintain a navigation channel with specified depth and width through regulating works, to be aided by dredging, if necessary. The Corps was not arbitrary to focus on Congress's directives.

iii. The FSEIS considered a reasonable range of alternatives.

Congress required the Corps to use structures to maintain navigation and directed that dredging "should be reduced to a minimum" because it "produced only temporary results." Mem. at 4-6, 14-20. Plaintiffs' primary claim that the Corps ignored reasonable alternatives is founded on more statutory misinterpretation, as they attack the Corps' "premise that alternatives that did not reduce dredging run counter to its authority." Br. at 6-7; *id*. at 8 (claiming that "the Project . . . conflicts with" purported contraction width limitations). Plaintiffs' misinterpretation of the 1927 RHA is fatal to their claim that the Corps ignored reasonable alternatives. The Corps was not arbitrary to obey Congress's directives.

Plaintiffs' critique, *id*. at 7, of the two alternatives discussed in detail as having "similar end results" is illustrative. First, the alternatives are not so similar as to arbitrarily limit options. To the contrary, they provide a reasonable range to analyze because they focus on Congress's directive of maintaining the specified navigation channel through significantly different means – additional construction and ceasing new construction. AR931-34. Second, it was not arbitrary for the Corps to focus on alternatives that comply with Congress's directive, as opposed to analyzing in detail alternatives that run contrary to those directives. Mem. at 18-27.

Plaintiffs are wrong, Br. at 9, that the Corps ignored and "declined to consider" reasonable alternatives because they would require Congressional authorization. Mem. at 22-25. And rather than ignore suggestions to remove or modify existing structures, use alternative dredging, and minimize new structures, Br. at 9-11, the Corps incorporated these suggestions into the alternatives it considered in detail. Mem. at 25. It adopted an alternative "that minimizes new structures based on assessment of their impacts." AR975-77 (minimizing new rock); AR984 (site-specific assessment prior to construction). It adopted "alternative dredging and dredged spoil disposal" as part of every alternative. AR954 (coordinating flexible pipe use with agencies); AR977, AR982-83 (creating islands with flexible pipe); AR1111-12 (coordinating to protect resources). And it made removing and modifying structures part of all work considered. AR977, AR2316-17; AR1000 (notching dikes to create habitat); AR1020 (restoring side channels).[5] NEPA does not require separate analysis of alternatives which are not significantly distinguishable from alternatives actually considered, or which have substantially similar consequences. *N. Plains Res. Council v. Lujan*, 874 F.2d 661, 666 (9th Cir. 1989); *Headwaters, Inc. v. Bureau of Land Mgmt.*, 914 F.2d 1174, 1181 (9th Cir. 1990) (agency "reasonably concluded that [unconsidered] proposals were similar to alternatives actually considered, infeasible, or incompatible with . . . objectives"). Thus, an agency need only consider an appropriate range of alternatives, rather than every available alternative.

The D.C. Circuit itself "doubt[s] the continu[ed] vitality" of the case Plaintiffs rely upon, Br. at 7-10, to contend that the Corps should have considered in detail alternatives that would

[5] Plaintiffs are incorrect, Br. at 9-11, that the Corps ignored "upstream water level management." Modifying water control plans is not reasonable because it would not help in maintaining the MMR navigation channel. Mem. at 23. And contrary to Plaintiffs' claim that the Corps uses "obsolete techniques," Br. at 11, the Corps uses innovative structures to minimize impacts. Mem. at 25.

require Congress to reverse the 1927 RHA and dramatically change the Project's purpose. *Slater*, 198 F.3d at 869 n.4 (questioning *Nat. Res. Def. Council v. Morton*, 458 F.2d 827 (D.C. Cir. 1972)). It is well-established that the Corps need not consider in detail "[a]lternatives that are unlikely to be implemented" or "alternatives which are infeasible, ineffective, or inconsistent with . . . basic policy objectives." *Res. Ltd., Inc. v. Robertson*, 35 F.3d 1300, 1307 (9th Cir. 1993) (citation omitted); *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519, 551 (1978) ("the concept of alternatives must be bounded by some notion of feasibility."); Mem. at 20-24. The Corps is entitled to significant "administrative discretion" in feasibility determinations because they are so general. *See Lincoln v. Vigil*, 508 U.S. 182, 198 (1993). "Moreover, NEPA may not be used to broaden [an agency's] congressionally-limited role." *S. Coast Air Quality Mgmt. Dist. v. FERC*, 621 F.3d 1085, 1092 (9th Cir. 2010). Plaintiffs thus fall far short of establishing that this is the rare case where the Corps was arbitrary to exclude alternatives requiring Congress to change the Project's purpose. Mem. at 20-24.

Plaintiffs concede that the Corps is not required to examine alternatives that Congress rejected. Br. at 10. Plaintiffs instead claim that the Corps may only exclude alternatives that Congress rejected recently. *Id*. This distinction is unavailing. The 2014 WRDA reaffirmed that the Project's purpose is "for navigation." Pub. L. No. 113-121, 128 Stat. 1193, 1308 (June 10, 2014). And while the 2014 WRDA permitted the Corps to "study improvements to navigation and aquatic ecosystem restoration" in the MMR, Congress prohibited the Corps from using Federal funds to perform restoration work unless a non-federal partner shared construction, operation, and maintenance costs. *Id*. at 1308-09 (requiring recommendation to Congress if work does not fall within limited authority such as 33 U.S.C. § 2330 and 2309(a)) ; 33 U.S.C. § 2330(b-c) (requiring cost-sharing); 33 U.S.C.S. § 2309a(d) (requiring cost-sharing); AR2315-16.

Congress also repeatedly declined to provide a post-authorization change "to the project . . . so that Project construction funding could be used" for ecosystem restoration. *Id.*; AR1365-67.

Plaintiffs thus fall far short, Br. at 10, of identifying anything that renders the FSEIS arbitrary by not considering in greater detail whether Congress would add ecosystem restoration to the Project's purpose despite repeatedly rejecting such changes. Mem. at 23-25; *See* pages 4-5, above. NEPA did not require the Corps to study in detail the possibility that Congress would reverse course after repeatedly declining to add ecosystem restoration as a project purpose.

Moreover, the Corps repeatedly offered to discuss ecosystem restoration projects that comply with the directive to share costs. AR1365 (restoration requires a cost-share partner, study, legislation, and more NEPA analysis); AR 2087 (Comments 69-70 offering to speak about cost sharing); AR2094 (Comment 81 offering to discuss additional studies). Given the absence of any interest in the required cost sharing, the Corps was not arbitrary to focus on mitigation that will "accomplish the same [ecosystem restoration] items" through existing authority consistent with Congress's directives, rather than analyzing in depth the possibility that an unknown partner might fund a study that might lead Congress to change the Project's purpose or share the cost to study and implement projects. AR2315-16. In other words, the Corps was not arbitrary to conclude that Plaintiffs' ecosystem restoration proposal was either similar to more readily funded alternatives, infeasible, or incompatible. *Headwaters*, 914 F.2d at 1181.

Finally, Plaintiffs are incorrect, Br. at 10-11, that the Corps failed to evaluate a reasonable range of alternatives. Contrary to Plaintiffs' unsupported assertion, the Corps adopted many of Plaintiffs' proposals. Page 7, above. It was not arbitrary to reject the rest. *Id.* at 6-9. Plaintiffs identify no reasonable alternative the Corps failed to consider.

iv. The FSEIS adequately analyzed Project impacts.

a. The Corps took a hard look at alleged flood impacts.

Plaintiffs' assertion that the Corps ignored research, Br. at 12-13, does not withstand scrutiny. Plaintiffs do not address, much less overcome, this Court's previous findings refuting their assertion. The Corps has "continually and extensively analyzed the physical effects of river training structures," including the flood impacts that Plaintiffs claim were ignored. *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 *34-39 (S.D. Ill. Nov. 25, 2014).[6] The Corps' exhaustive analysis of available research in an appendix and summary of that research in the FSEIS's body was more than the "hard look" required. Mem. at 29-33; AR8-10.

Plaintiffs' response hinges on their assertion, Br. at 13, that analysis of flood research in the FSEIS's appendix is not part of the FSEIS. The only case Plaintiffs cite holds otherwise. *Friends of the Earth v. Hall*, 693 F. Supp. 904, 917 (W.D. Wash. 1988) (FSEIS "includ[ed] responses to . . . comment[s], and a separate volume [of] appendices."). Indeed, the entire record determines if an agency took a "hard look." *Des Plaines v. Metro. Sanitary Dist. Of Chi.*, 552 F.2d 736, 738-39 (7th Cir. 1977); *Indian River Cty. v. U.S. Dept. of Transp.*, 945 F.3d 515, 533-34 (D.C. Cir. 2019) (EIS, appendices, responses, and decision considered together); *Dania Beach v. U. S. Army Corps of Eng'rs*, No. 12-60989-CIV, 2012 U.S. Dist. LEXIS 93458, at *34 (S.D. Fla. July 6, 2012) (rejecting claim that information in appendix does not constitute a hard look).

[6] The Court identified "major errors" that belie Plaintiffs' assertions, Br. at 19, that the Corps refused to analyze "well-supported scientific facts." Mem. at 30-31 (citing *NWF I,* 2014 U.S. Dist. LEXIS 164861, at *37-39). Plaintiffs do not address *NWF I*. *See* Mem. at 3-4, 8, 16-17, 20, 23, 26, 29-31, 33, 41, 52.

Plaintiffs' claim that the Corps failed to adequately evaluate flooding impacts, Br. at 19, is also meritless. The Corps evaluated Plaintiffs' proffered research and its analysis is entitled to deference. Mem. at 10-11, 28-29, 33. Plaintiffs' claim, Br. at 13, 19, that the Corps must submit to Dr. Pinter's demands regarding data analysis would turn NEPA on its head. And their claim that the FSEIS admits that the Project causes "increased flood heights," *id.*, grossly distorts an acknowledgement that the Project impacts certain habitat. AR978. The Corps' experts instead found that the bulk of research "refutes the assertion that river training structures increase flood heights." AR2323-24. While "Plaintiffs disagree . . . [w]here, as here, the Corps has considered the issue and explained its conclusions, it has not acted arbitrarily[.]" *NWF I*, 2014 U.S. Dist. LEXIS 164861, at *28. The Corps more than met this standard.

b. The Corps took a hard look at sediment loading

The Corps addressed concerns raised by an Independent External Peer Review Panel (IEPR), including a suggestion that the Corps expand the SEIS's discussion of sediment. Mem. at 33-35. Plaintiffs contend that a "mis-rendered graphic" invalidates the FSEIS. Br. at 14. The Corps informed Plaintiffs of additions to the sediment section. AR2072. Plaintiffs requested other documents after reviewing the FSEIS but failed to comment on this formatting issue. AR16-39; AR754-55. Plaintiffs were required to request the obscured paragraph as well. *Vt. Yankee*, 435 U.S. at 553 (plaintiffs must "structure their participation so that it is meaningful"). Regardless, the obscured paragraph is available elsewhere. AR2885. And Plaintiffs' claims that the sediment data is incomprehensible and did not respond to the IEPR request, Br. at 14, are defeated by the IEPR's concurrence with the Corps' response. Mem. at 34; AR677-78.[7]

[7] Plaintiffs are incorrect, Br. at 16-17, that the Corps failed to address all of the IEPR comments. Mem. at 9, 34-35; AR672.

Plaintiffs also misrepresent the Corps' reliance on certain engineering data from 1976 to claim that the Corps ignored significant changes to the MMR's hydraulics and hydrology. Br. at 14 (citing AR997-98). The claim is belied by detailed analysis of the MMR's post-1976 hydraulics and hydrology. *Id*.; Mem. at 33 (hydrology studies); 39-40 (hydraulic models); AR 997-98 (discussing 1977, 1986, 1993, and 2013 studies); AR1002-5; AR2885-88.[8]

c. The Corps meaningfully evaluated mitigation.

The Corps modeled a 19 Mile reach to evaluate habitat changes to determine if continued construction will likely result in significant impacts that may warrant compensatory mitigation. Mem. at 38-43. Based upon this model's results, the Corps developed its Main Channel Border Habitat Model to model site-specific impacts when possible - once specific structures are identified. *Id*. Plaintiffs are incorrect, Br. at 14-16, that the Corps: 1) needed the Main Channel Border Habitat Model to study programmatic impacts; and 2) was required to study the unknowable impacts of unidentified structures with particularity. Mem. at 38-43. Simply put, the Corps took a "hard look" at what it could look at prior to identifying specific new structures.

Plaintiffs' rehashing of their arguments regarding mitigation, Br. at 20-21, remains uncompelling. Mem. at 44-46. Plaintiffs misapply *California v. Block*, Br. at 16, which supports the Corps' analyzing unidentified structures only when an irreversible site-specific decision to build is made. 690 F.2d 753, 762-63 (9th Cir. 1982). Plaintiffs also misapply *Wyoming Outdoor Council v. U.S. Army Corps of Engineers*, Br. at 21, which struck down an Environmental Assessment (distinct from the EIS challenged here) because the Corps found that its actions had

[8] Plaintiffs' claim, Br. at 2, that the FSEIS dismissed significantly changed circumstances fails. Its hard look at significantly changed circumstances since 1976 found that terrestrial habitat was unchanged. Mem. at 13; AR1042-43. NEPA required no more.

no significant environmental impact despite concluding that mitigation could not achieve the required efficacy. 351 F. Supp. 2d 1232, 1242, 1252 (D. Wyo. 2005). Plaintiffs point to no evidence that mitigation will fail here. *See Colo. Envtl. Coal. v. Office of Legacy Mgmt.*, 302 F. Supp. 3d 1251, 1269 (D. Colo. 2018). The record instead establishes that mitigation is likely to be effective. Mem. at 45-46; AR1133-34 (has and will improve habitat); AR 2079. The Corps fairly evaluated mitigation, including effectiveness, to the extent possible. It thus took the requisite hard look. *Wilderness Soc'y v. BLM*, 822 F. Supp. 2d 933, 943-44 (D. Ariz. 2011), *aff'd*, 526 F. App'x 790 (9th Cir. 2013).

d. The Nineteen Mile Modeled Reach study complied with NEPA.

Plaintiffs' critiques of the 19-mile reach model fail because they are based on multiple misunderstandings. Mem. at 39-42. Plaintiffs are incorrect, Br. at 15, that the Corps "refus[ed] to provide" information Plaintiffs requested and that NEPA required the Corps to provide any additional information. The Corps responded to Plaintiffs' comments on the DSEIS by adding Appendix J to the FSEIS. AR2071. Appendix J details the model's background, purpose, development, boundary conditions, parameters, and calibration along with the results. AR2138-2296. Plaintiffs, presented with an opportunity to review the FSEIS and appendixes, requested no more information. AR16-39. Regardless, Plaintiffs' claim fails as a matter of law. Mem. at 39; *Colo. Envtl. Coal. v. Dombeck,* 185 F.3d 1162, 1172-73 (10th Cir. 1999) (no violation of 40 C.F.R. § 1502.22(b) where plaintiffs did not establish that essential data was missing).

Plaintiffs' next present an array of purported failures, Br. at 15, none of which have merit. Plaintiffs are wrong that the Corps had to detail impacts to additional species, and they fail to address precedent establishing that a generalized discussion is sufficient. Mem. at 40-41; Br. at 15. Regardless, the Corps analyzed species in the habitat expected to be significantly

impacted: main channel border "shallow to moderate-depth, moderate- to high-velocity habitat." AR 1124-25; AR1038; AR1041-42. And it discussed both the characteristics of, and the impacts to species that rely on, this impacted habitat. AR1104-21; AR1131-1133. Plaintiffs are wrong, Br. at 15, that the Corps had to rely on Plaintiffs' 2004 pallid sturgeon study instead of dozens of other studies. Mem. at 40. And Plaintiffs are wrong, Br. at 15-16, that the habitat turtles prefer will be significantly impacted. The shallow, low-velocity habitat turtles prefer will increase. AR8981; AR1124; Mem. at 40-41 (only certain "moderate- to high-velocity" habitat will be lost); Br. at 16 (omitting velocity from quote). Plaintiffs identify no failure.

e. The FSEIS reasonably addressed baseline conditions.

Plaintiffs are incorrect, Br. at 17-19, that the Corps did not analyze baseline conditions. Mem. at 35-38. To the extent the Corps need say anything more, the FSEIS's "Affected Environment" section and analysis of "prior studies" provides a sufficient baseline. AR985-1081; AR1141-43 (studies such as Heitmeyer, AR23856-955). Plaintiffs are wrong that the Corps did not address the biological resources baseline. *E.g.* AR1035-51. Their claim that the Corps failed to address channel cutoff conditions, Br. at 18, is undone by the Corps' addressing "continuing cutoff concerns" through an ongoing project to stabilize Dogtooth Bend and potential future projects. AR1085, 1089 (future EAs); AR2094 (willing to discuss issues beyond ongoing work). And the Corps' analysis of decades of studies satisfied any duty to examine the MMR's current baseline ecological health. Mem. at 37; AR1082; AR 1141-69.

Plaintiffs, at most, establish that the Corps cannot rely on objectively false facts. Br. at 17 (citing *Or. Nat. Desert Ass'n v. Jewell*, 840 F.3d 562, 568 (9th Cir. 2016)) (agency arbitrary to base analysis on absence of species that was present). But the Corps did not do so here, instead rigorously evaluating the available data. Mem. at 35-38. Plaintiffs cite no case requiring

an expert agency to fund a party's preferred study, particularly when the agency analyzed all available data. To the contrary, the Corps' analysis of baseline conditions should be upheld because the Corps "considered the relevant factors" and made an "informed judgment." *Ohio Valley Envtl. Coal., Inc. v. U.S. Army Corps of Eng'rs*, 716 F.3d 119, 127 (4th Cir. 2013).

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

The Corps took a hard look and determined that the structures at issue here do not impact side and back channels. Mem. at 43. Plaintiffs misinterpret the FSEIS to claim, Br. at 19-20, that it disproves the Corps' conclusion that overall side channel habitat is stable. Not true. The Corps took a hard look at data that shows side channels naturally vary in depth due to natural conditions like log jams. AR1021-22. That this natural variability causes some side channels to become shallower in some years does not refute the Corps' conclusion. Mem. at 43. The record similarly belies Plaintiffs' claim that the Corps failed to take a hard look at the Project's impact on pallid sturgeon, including its side and back channel habitat. Mem. at 43-44.[9] As before, the record establishes that the Corps took a hard look at side and back channel impacts.

B. 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, and even if it did, the Corps complied with WRDA because the FSEIS mandates mitigation in the most detailed manner possible prior to identifying individual structures. Mem. at 46-49. Plaintiffs misinterpret both the statute and the Corps' mitigation plan. First, Plaintiffs contend that 33 U.S.C. § 2283(a)(1) applies to projects that were authorized prior to 1986. Br. at 21.[10] But it applies only

[9] Plaintiffs' claim that the Corps did not address "climate-change-associated Project impacts" from flooding, Br. at 20, misses the mark. The Project does not increase flooding. Mem. at 29-33.
[10] Plaintiffs concede that 33 U.S.C. § 2283(d)(1) imposes no duty. Mem. at 46-47; Br. at 21-22.

if "construction . . . has not commenced" prior to 1986. 33 U.S.C. § 2283(a)(1). Second, Plaintiffs mischaracterize the challenged decision to continue construction as a new project. Br. at 21-22. But Plaintiffs conceded that the 1927 RHA "authorized the Project" and that the challenged decision continues that construction. Br. at 5-7. The Project's authorization and construction prior to 1986 makes Section 2283(a)(1) inapplicable.

Even if WRDA applies, the Corps complied by including the most detailed mitigation plan possible. Mem. at 47-49. Plaintiffs fail to rebut these arguments, instead contending that the Corps relied on "post-hoc rationales" to avoid setting forth a detailed mitigation plan. Br. at 22. Not true. The Corps explained why it could not conduct site-specific mitigation analysis prior to identifying construction sites. Mem. at 47-49. It instead complied with any applicable requirement in Section 2283 by providing the specificity possible in a programmatic EIS, including the monitoring, contingency plan, and consultation that Plaintiffs incorrectly claim were excluded. *Id*. Plaintiffs' WRDA claim thus fails.

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

The Corps satisfied any consultation required by the FWCA by consulting with the Fish and Wildlife Service (FWS). Mem. at 49-52. Plaintiffs maintain their misguided focus on the absence of a formal FWCA report. Br. at 23-24. But Plaintiffs neither identify a case requiring a report nor any recommendation the Corps did not consider. Br. at 21-23. Nor do they address the Corps' lengthy responses to agency comments. *Id*. The Corps satisfied the FWCA by complying with NEPA and considering FWS recommendations. Mem. at 49-52; Br. at 23; *Tex. Comm. on Nat. Res. v. Marsh*, 736 F.2d 262, 268 (5th Cir. 1984). The Corps' consideration of FWS comments is fatal to Plaintiffs' FWCA claim.

Plaintiffs' efforts to distinguish the caselaw fails. Br. at 22-24. *Confederated Tribes & Bands of Yakima Indian Nation v. FERC*, 746 F.2d 466, 473 (9th Cir. 1984) refutes Plaintiffs' suggestion, Br. at 24, that the FWCA requires substantive actions by directly finding it to be procedural instead. And Plaintiffs doubly misinterpret *Envtl. Def. Fund, Inc. v. Froehlke* by suggesting, Br. at 24, that it did not consider the FWCA beyond interpreting it to compel substantive actions. *Froehlke* held instead that "if the Corps complies with NEPA in good faith, it will 'automatically take into consideration all of the factors required by the [FWCA] and it is not reasonable to require them to do both separately.'" 473 F.2d 346, 356 (8th Cir. 1972) (citation omitted). Plaintiffs' effort to locate expansive duties in the FWCA does not withstand scrutiny. *Mo. ex rel. Ashcroft v. U.S. Army Corps of Eng'rs*, 526 F. Supp. 660, 677 (W.D. Mo. 1980), *aff'd*, 672 F.2d 1297 (8th Cir. 1982). Because the Corps complied with NEPA, it complied with the FWCA. Mem. at 51-52.

III. 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 18th day of August, 2021.

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