

## St. Johns–New Madrid Project Violates Federal Law and Policy

The St. Johns-New Madrid project violates federal law and policy and is fundamentally at odds with modern science.<sup>1</sup> The Corps' current Assistant Director of Civil Works has aptly described the project as an "economic dud" with "huge environmental consequences."<sup>2</sup> The project ignores the lessons of the 2011 floods, which make clear that public safety requires more floodplain lands, not less. The Corps of Engineers plans to build the exact same project stopped by a U.S. District Court in 2007.

The project's defining component – a new levee to close the last connection between the Mississippi River and its natural backwater habitat in the State of Missouri – will end backwater flooding on 75,000 acres and eliminate the most important backwater spawning and rearing habitat in the Middle Mississippi River. This will "result in significant losses of nationally important fish and wildlife resources" that cannot be mitigated.<sup>3</sup>

**Violates the Clean Water Act and National Water Policy:** The Clean Water Act prohibits construction of a federal project that would cause or contribute to significant degradation of water quality, including as measured by impacts to aquatic ecosystem diversity, productivity, and stability, such as loss of fish and wildlife habitat. 40 C.F.R. § 230.10(c). National water policy requires that federal water projects protect and restore the environment and seek to avoid the unwise use of floodplains. 42 USC § 1962–3. **The project will cause significant harm to the environment, including loss of fish and wildlife habitat, and will encourage intensified use of the floodway.**

- ✘ *U.S. Fish and Wildlife Service:* The project "will result in significant losses of regionally and nationally important fish and wildlife resources"<sup>4</sup> by eliminating "a major area of river-floodplain connectivity in this region of the River and the very last area of its kind in the State of Missouri."<sup>5</sup> This connection "is absolutely vital to maintaining a healthy, sustainable fishery in this section of the Mississippi River."<sup>6</sup>
- ✘ *Environmental Protection Agency:* The project "could potentially have the largest negative impact on wetlands and streams of any project ever proposed in Region 7."<sup>7</sup>
- ✘ *Corps Independent Review Panel:* The "loss of this last remaining connection and its ecosystem functioning would be the 'straw that broke the camel's back' in terms of the total cumulative impact" to the natural ecosystem.<sup>8</sup>

**Violates Mitigation Law and Policy:** The Corps may not select a project alternative unless the study contains a specific and legally adequate plan to mitigate losses to fish and wildlife resources. Harm to bottomland hardwood forests must be mitigated in-kind, and harm to other habitat types must be mitigated to not less than in-kind conditions. Mitigation lands must be purchased before any construction begins. 33 USC § 2283. **The damage from this project cannot be mitigated; the proposed mitigation is scientifically unsound; mitigation lands will not be purchased prior to beginning project construction; and the mitigation "plan" fails to include critical statutorily mandated plan elements.**<sup>9</sup>

- ✘ *Department of the Interior:* "Altering the hydrologic regime of the floodway produces a suite of complex and unsolvable challenges in providing adequate mitigation for the wetland, fishery, and floodplain impacts."<sup>10</sup> Mitigation plans for the project "are at odds with contemporary understanding of wetland and floodplain science and agency mitigation guidance."<sup>11</sup> The Fish and Wildlife Service "is unaware of any feasible mitigation techniques that can provide in-kind replacement to offset the permanent loss of this habitat and associated ecological processes."<sup>12</sup>

- ✗ *Missouri Department of Conservation:* “Connectivity between the Mississippi River and the floodplain provides important ecological interactions” and “this loss cannot be mitigated.”<sup>13</sup>
- ✗ *Renowned Scientific Expert:* The Corps’ mitigation “should itself be viewed as harmful” and “cannot offset the impacts of this project.”<sup>14</sup> The Corps’ claim that the proposed mitigation “fully offsets project impacts on aquatic resources is completely inconsistent with scientific understanding of wetland functioning, wetland replacement, wetland restoration, and mitigation of other aquatic areas, as well as inconsistent with established practice under the Section 404 program.”<sup>15</sup>

**Violates Benefit-Cost Requirements:** Federal flood damage reduction projects must have a positive benefit-cost (B-C) ratio that accounts for the full cost of mitigation and utilizes the discount rate established by 42 U.S.C. 1962d-17.<sup>16</sup> **The project violates these B-C requirements.**

- ✗ The New Madrid levee would not pass the B-C test using the correct discount rate. The Corps has improperly relied on an extremely low 2.5% discount rate to produce a positive B-C ratio.<sup>17</sup>
- ✗ The new proposal would not pass the B-C test even using the improper 2.5% discount rate. Benefits will be less because at least 7,450 acres of cropland will be removed for mitigation (the 2002 RSEIS showed that removing even 1,500 acres of cropland would prevent a positive B-C).<sup>18</sup> Costs will be higher because at least 4,700 more acres of mitigation have been proposed; higher mitigation costs will be revealed upon completion of the detailed mitigation required by law (in 2006 only two mitigation scenarios achieved a barely positive B-C for the levee closure at 1.02 and 1.01);<sup>19</sup> and construction costs continue to increase.

**Increases Flood Risks for Communities:** Protecting communities from flooding is a fundamental objective of the MR&T program and timely activation of the floodway is an essential tool to protect communities. Corps studies show that levees and floodwalls would overtop in dozens of river communities in Illinois, Missouri and Kentucky if the New Madrid floodway is not used during a severe flood.<sup>20</sup> **The project will promote intensified use of the floodway and make it even harder to operate the floodway to save towns in the area during the next big flood.**

- ✗ In 2011, Missouri sued to stop use of the floodway and the resulting delay has been implicated in the flooding of Olive Branch. After the floodway was activated in 2011, water levels at Cairo dropped 2.7 feet in just 48 hours. In 1983, a lawsuit was filed that enjoined use of the floodway until April 1984. In 1937, the National Guard had to be called in to quell armed opposition to the floodway’s use.

**Causes Disproportionate Impacts:** Executive Order 12898 requires that each Federal agency achieve environmental justice by identifying and addressing disproportionately high adverse human health or environmental effects of federal activities on minority and low-income populations. The 2010 census shows that almost 70% of Cairo residents are Black or African American and almost 33% of the city’s population lives below the poverty level. **The project will disproportionately affect the health and safety of minority and low income populations, including in Cairo, by making it harder to utilize the floodway to reduce the risk of catastrophic flooding during severe floods.**

**Undermines Restoration:** Restoring backwater habitat is a primary goal of the Corps’ restoration efforts under the Environmental Management Program and the Upper Mississippi River System Navigation & Ecosystem Sustainability Program. **The project will destroy vital backwater habitat.**

## Endnotes

<sup>1</sup> In the Corps' own words, "the overall project purpose is to protect the region from backwater flooding from the Mississippi River." <http://www.mvm.usace.army.mil/stjohns/overview/default.asp>. This purpose is fundamentally at odds with modern knowledge regarding the critical ecological and flood protection values of backwater habitat.

<sup>2</sup> December 27, 2002 Email from Larry Prather, then the Chief, Legislative Management Branch, U.S. Army Corps of Engineers, and currently the Corps' Assistant Director of Civil Works (Legislation and Planning).

<sup>3</sup> June 6, 2002 U.S. Fish and Wildlife Service Supplemental Fish and Wildlife Coordination Act Report at E-2, E-9 (Consolidated 2009 NEPA Appendix E 11). The Consolidated 2009 NEPA Appendix is available at [http://www.mvm.usace.army.mil/stjohns/2009\\_update/IEPR\\_Documents/4f\\_App\\_E\\_FWCAR.pdf](http://www.mvm.usace.army.mil/stjohns/2009_update/IEPR_Documents/4f_App_E_FWCAR.pdf).

<sup>4</sup> *Id.*

<sup>5</sup> March 15, 2006 U.S. Fish and Wildlife Service Supplemental Fish and Wildlife Coordination Act Report (included at pages 510-515 of the Revised Supplemental Environmental Impact Statement Number 2 for the St. Johns Bayou-New Madrid Floodway Project) (2006 FWCA Report).

<sup>6</sup> 2006 FWCA Report.

<sup>7</sup> February 23, 2011 Email from EPA Region 7 Watershed Planning & Implementation Branch Manager.

<sup>8</sup> November 5, 2010, Battelle Memorial Institute, Addendum to Final Independent External Peer Review Report St. Johns Bayou and New Madrid Floodway, Missouri Project Work Plan, Phase 2 Environmental, Economic, and Hydrologic and Hydraulic Review at B-43 (available at [http://www.mvm.usace.army.mil/stjohns/PeerReview/SJNM\\_TCN09150\\_Addendum%20to%20Final%20IEPR%20Report.pdf](http://www.mvm.usace.army.mil/stjohns/PeerReview/SJNM_TCN09150_Addendum%20to%20Final%20IEPR%20Report.pdf)).

<sup>9</sup> Among other failings, the Corps' plan fails to identify: the lands to be acquired, the basis for determining that such lands will be available, specific mitigation actions, ecological success criteria; a detailed monitoring plan; and a contingency plan.

<sup>10</sup> 2011 Department of the Interior Letter.

<sup>11</sup> 2011 Department of the Interior Letter.

<sup>12</sup> 2006 FWCA Report.

<sup>13</sup> December 15, 2001 Letter from Jerry Conley, Director Missouri Department of Conservation to Colonel Scherer, Memphis District Engineer, U.S. Army Corps of Engineers.

<sup>14</sup> January 2006 Report of Dr. Joy Zedler on the Mitigation Proposal for the St. Johns Bayou/New Madrid Floodway Project at 3, 5, 7 (2006 Zedler Report). Dr. Zedler is a Professor of Botany and Aldo Leopold Chair in Restoration Ecology at the University of Wisconsin. Dr. Zedler chaired the National Research Council Panel on *Compensating for Wetland Losses Under the Clean Water Act*.

<sup>15</sup> 2006 Zedler Report.

<sup>16</sup> *Environmental Defense Fund v. Marsh*, 651 F.2d 983, 1001-05 (5th Cir. 1981) (enjoining waterway for violation of § 1962d-17(d) absent preparation of new EIS); *Burkey v. Ellis*, 483 F. Supp. 897, 907-08 (N.D. Ala. 1979) (same); *State ex rel. Baxley v. Corps of Engineers*, 411 F. Supp. 1261, 1272-73 (N.D. Ala. 1976) (same).

<sup>17</sup> 2006 Revised Supplemental Environmental Impact Statement 2 for the St. Johns Bayou/New Madrid Floodway Project at 135, 137.

<sup>18</sup> The Corps' 2006 benefit-cost analysis improperly claimed crop benefits on thousands of acres of land that were to be removed from farming for mitigation purposes.

<sup>19</sup> 2006 Revised Supplemental Environmental Impact Statement 2 for the St. Johns Bayou/New Madrid Floodway Project at 135, 137; see Admission of the Corps of Engineers in the Corps' Answer to Amended Complaint ¶ 52 in *Environmental Defense Fund v. Corps of Engineers*, 515 F.Supp.2d (D.DC 2007).

<sup>20</sup> St. Johns Bayou and New Madrid Floodway, Consolidated NEPA Document (consolidating the 2002 RSEIS and the 2006 RSEIS 2 for the St. Johns Bayou and New Madrid Floodway, MO Project), Appendix K. p. 13-14 (available at <http://www.mvm.usace.army.mil/stjohns/PeerReview/default.asp>).