

Congress of the United States
U.S. House of Representatives
Committee on Small Business
2361 Rayburn House Office Building
Washington, DC 20515-6515

To: Members, Committee on Small Business
From: Committee Staff
RE: Hearing, "Missouri River Management: Does It Meet the Needs of Small Business Stakeholders?"
Date: August 19, 2013

On August 21, 2013, at 10:00 a.m. CDT, the Committee on Small Business is scheduled to meet for a field hearing titled: "Missouri River Management: Does It Meet the Needs of Small Business Stakeholders?" The hearing will take place at St. Joseph City Hall, 1100 Frederick Avenue, Room 301, St. Joseph, Missouri 64501.

The Missouri River System¹ is a source of significant economic activity to states in the Missouri River Basin and the rest of the nation. According to the Missouri Department of Transportation, more than 4.7 million tons of cargo were transported along the Missouri River in 2010, a decline from approximately 6.7 tons in 2007.² In addition, the Missouri River System provides flood protection, irrigation, and water supply to small businesses and rural communities throughout the Missouri River Basin. Given the importance of the river basin for small businesses, the hearing will examine whether the United States Army Corps of Engineers (Corps) management of the Missouri River System ("System") is meeting the economic needs of small businesses. Further, the Committee will receive testimony regarding whether changes to federal statutes governing Missouri River System management practices are necessary to maximize the potential economic benefits of the river and its tributaries to small firms and rural communities.

¹ UNITED STATES ARMY CORPS OF ENGINEERS NORTHWEST DIVISION, MISSOURI RIVER MAINSTEM RESERVOIR SYSTEM: MASTER WATER CONTROL MANUAL (revised March 2006), available at <http://www.nwd-mr.usace.army.mil/rcc/reports/mmanual/MasterManual.pdf> [hereinafter "Master Manual"]. The Missouri River System consists of six individual reservoirs, each of which has its own Water Control Manual. The Master Manual serves as a guide to the integrated operation of the System. *Id.* at I-1. To achieve the maximum multipurpose benefits for which these reservoirs were constructed, the System must be operated as a hydraulically and electrically integrated system. *Id.* at I-4.

² MISSOURI DEPARTMENT OF TRANSPORTATION, EFFICIENT MOVEMENT OF GOODS 12c (January 2013), available at http://www.modot.org/about/documents/Tracker_PDF_Jan13/Chapter_12.pdf.

Management of the Missouri River System

Since the early years of the United States, the federal government has maintained an interest in the development of waterways resources, particularly those used for commercial navigation.³ In the 19th century, private and state interests generally initiated water projects with the federal government providing assistance through land grants, stock purchases, direct appropriations and the use of federal engineers to help survey and construct navigation projects.⁴ As the nation's borders and population expanded the demand for water resource uses beyond navigation grew. In turn, the federal government began taking on a larger role as a sponsor of water development projects with multiple uses.⁵

The Corps is the primary federal agency authorized under the Flood Control Act of 1944⁶ to manage the Missouri River System for the purposes of flood prevention, navigation, irrigation, water supply, power, protecting water quality, recreation and fish and wildlife protection.⁷ Collectively these activities are known as "authorized purposes" or multipurpose authorized activities."⁸

To carry out these multipurpose authorized activities, the Corps has developed a Master Water Control Manual (hereinafter "Corps Master Manual" or "Master Manual") which prescribes the policies and procedures to be followed by the Corps in carrying out its mission.⁹ Given the size of the system and the need to meet multipurpose use objectives, the Corps produces annual water management plans based on criteria outlined in the Master Manual regulating water flows at each of the systems reservoirs,¹⁰ which in turn determine how much water will be available for various authorized purposes for that year, such as navigation or irrigation.

While the Corps is obligated to manage the river for all authorized purposes, there are instances in which authorized uses will conflict among themselves. These disputes may involve the authorized use preferences of stakeholders in upriver states versus the preferences of downriver stakeholders and between commercial and non-commercial interests.

³ JOSEPH L. ARNOLD, THE EVOLUTION OF THE 1936 FLOOD CONTROL ACT iii (1988), available at http://publications.usace.army.mil/publications/eng-pamphlets/EP_870-1-29/EP_870-1-29.pdf. [hereinafter "Evolution of Flood Control"] During the early years of federal water resources development projects federal sponsorship was largely limited to those projects and activities that were deemed nationally significant. *Id.* at 4. Historically, this principal applied to navigation, which many believed had a constitutional basis under the Commerce Clause (Article I, § 8, Cl. 3 of the United States Constitution). *Id.* Other purposes, such as flood control and prevention, were not deemed nationally significant prior to passage of the Flood Control Act of 1936, though previous federal sponsorship of certain activities that provided flood control benefits were often justified by claims that they primarily improved interstate navigation. *Id.* at 5.

⁴ UNITED STATES ARMY CORPS OF ENGINEERS INSTITUTE FOR WATER RESOURCES, RESHAPING NATIONAL WATER POLITICS: THE EMERGENCE OF THE WATER RESOURCES DEVELOPMENT ACT OF 1986 at 3 (October 1991) available at http://publications.usace.army.mil/publications/misc/IWR_91_PS-1/IWR_91_PS-1.pdf.

⁵ *Id.* at 9.

⁶ 33 U.S.C. §§ 701-09b.

⁷ 33 U.S.C. § 701-1.

⁸ Master Manual, *supra* note 1 at IV-1.

⁹ *Id.* at I-1.

¹⁰ *Id.* at I-2.

In addition to the Flood Control Act of 1944, other federal statutes complicate Corps multipurpose planning and management. Primary among these are the National Environmental Policy Act (NEPA)¹¹ and the Endangered Species Act (ESA),¹² which requires all federal agencies, including the Corps, to preserve and protect the habitat of threatened and endangered species.¹³ These diverse statutory mandates require the Corps to balance multiple policy goals when managing the operation of the Missouri River System.

Given the dynamic demands and preferences of the Missouri River stakeholder communities, multipurpose activity disputes have grown in scope and intensity in recent years. These disputes can intensify during periods of irregular water flows in the river basin system and can result in substantial economic repercussions to small businesses.

Small Business Concerns with River Management

Multipurpose planning involves the diverse and sometimes disparate needs and preferences of various stakeholders that utilize the Missouri River Basin. Given its size, it would be impossible to discuss in a cogent manner all of the stakeholder concerns about management of the system. As a result, the memorandum will predominately focus on the concerns of stakeholders located below the Gavin's Point Dam and Reservoir, located near Yankton, South Dakota.

Flood Protection

Since 1936, flood prevention has been an authorized Corps activity. Beginning in the late 1960s and early 1970s, environmental concerns began to receive increased attention. This resulted in calls to lessen the potential negative environmental consequences of federal water resources infrastructure and management.¹⁴ However, managing the river for environmental concerns may conflict with flood prevention efforts.

For example, in 1990, the United States Fish and Wildlife Service ("FWS" or "Service") listed the Pallid Sturgeon as an endangered species.¹⁵ This designation was followed by a FWS 2003 Amended

¹¹42 U.S.C. §§ 4321-47. NEPA requires federal agencies to assess the implications of their activities on the physical environment. Major federal actions affecting the environment require the preparation of an environmental impact statement (EIS). *Id.* at §4332(C). In addition to the effects on the environment, agencies are required to assess potential economic and social outcomes of agency actions, 40 C.F.R. § 1508.8, which can help inform the development of alternatives that may mitigate adverse environmental impacts.

¹²16 U.S.C. §§ 1531-44.

¹³ *Id.* at §1536(a)(i).

¹⁴ Evolution of Flood Control, *supra* note 3 at Forward.

¹⁵ Endangered and Threatened Wildlife and Plants; Determination of Endangered Status for the Pallid Sturgeon, Final Rule, 55 Fed. Reg. 36,641 (Sept. 6, 1990). Under the ESA, the FWS issues a Biological Opinion (or BiOp) that states the Service's opinion on whether a particular federal activity threatens the continued existence of a threatened species. 50 C.F.R. § 402.02. The BiOPs often include site specific instructions to agencies, called reasonable and prudent alternatives (RPA) that an agency must implement to reduce incidental takings of species listed pursuant to the ESA. *Id.* In 2003, the FWS issued an Amended BiOp listing RPAs to reduce incidental takings of a number of threatened and endangered species in the Missouri River Basin. UNITED STATES FISH AND WILDLIFE SERVICE 2003 AMENDMENT TO THE 2000 BIOLOGICAL OPINION ON THE OPERATION OF THE MISSOURI RIVER MAIN STEM RESERVOIR SYSTEM, OPERATION AND MAINTENANCE OF THE MISSOURI RIVER BANK STABILIZATION AND NAVIGATION PROJECT AND OPERATION OF THE KANSAS RIVER RESERVOIR SYSTEM

Biological Opinion¹⁶ directing the Corps to release pulses of water down the lower Missouri River, referred to as a Spring Rise, to stimulate spawning by the Pallid Sturgeon. These Spring Pulses could conflict with flood prevention activities. In addition, many communities along the lower Missouri River blame environmental objectives for devastating floods that occurred in 2011.¹⁷

Navigation

Flood protection is not the only Corps mission that may conflict with environmental concerns. For example, Corps activities to protect the Pallid Sturgeon pose navigational challenges. Provisions in the FWS BiOP to protect the Pallid Sturgeon¹⁸ require the Corps to construct shallow water habitat to facilitate spawning grounds for the Pallid Sturgeon. The creation of these habitats may impede commercial navigation on the river.

Limitations on commercial navigation may hinder the ability of small businesses to ship their products to customers in the most cost effective manner. It also may reduce economic opportunities for small businesses that provide maritime shipment of goods.

Economic Effects on Rural Governments

One of the means the Corps has utilized to meet its environmental goals mandated by Congress is to acquire lands along the river for species habitat. These lands may be privately owned and may be used for commercial purposes, such as agriculture production.

However, lands acquired by the Corps for species habitat may no longer be utilized for commercial purposes. It goes without significant further analysis that removal of lands from agriculture productions will affect not only the farmer but those businesses, often small, that supply the farmer. In addition, local governments lose the ability to collect property tax revenues when lands are acquired by the Corps.¹⁹ This reduces the tax base of affected communities and may inhibit local government economic development goals.

(Dec. 16, 2003), available at <http://www.nwd-mr.usace.army.mil/mmanual/FinalBO2003.pdf>. [hereinafter "FWS BiOP"]. Under the ESA, the ability of the Corps to assess economic consequences of actions it takes to protect threatened or endangered species is significantly circumscribed.

¹⁶ *Id.* at 219-236.

¹⁷ Chet Brokaw, *Corps booed at meeting on Missouri River Flooding*, ASSOCIATED PRESS (August 19, 2011), available at <http://www.agweek.com/event/article/id/18941/>.

¹⁸ *Id.* at 237-38.

¹⁹ While local governments lose the ability to tax lands owned by the federal government, Congress could authorize the Corps to make payments in lieu of taxes to local governments, just like it does for many federal lands managed by the United States Forest Service.

Water Resources Development Act

A water resources development act is federal legislation that authorizes the construction of new water resources development projects.²⁰ Congress periodically enacts such statutes to address emerging water resource development needs.

Many of the projects encapsulated in such acts are related to commercial navigation in our nation's harbors and inland waterways. However, the legislation also may authorize other projects, such as those related to flood protection and environmental goals.

Congress last passed a water resources development act in 2007. It is now in the process of considering new water resource legislation. On May 15, 2013, the United States Senate passed its version of a WRDA reauthorization²¹ by a vote of 83-14.²² The House of Representatives is expected to begin consideration of an as yet unreleased draft of WRDA in September of this year.²³

Conclusion

The Corps multipurpose use management planning is a multifaceted process that requires the agency to attempt to find a balance between diverse multiuse objectives. Many of these objectives, such as flood prevention and maintaining the river for navigation or wildlife preservation, may conflict.

Congress should carefully consider and possibly seek changes to existing federal statutes that have complicated Corps management of the Missouri River System, and give special consideration to how existing federal requirements affect the management of the Missouri River System.

²⁰ A water resources development act authorizes investigation studies, to determine the appropriateness and feasibility of proposed water resources development projects, as well as the construction of site specific projects. However, funding for studies and federal contributions to site specific projects is subject to separate appropriations legislation.

²¹ Water Resources Development Act of 2013, S. 601, 113th Cong. (2013), available at <http://www.gpo.gov/fdsys/pkg/BILLS-113s601es/pdf/BILLS-113s601es.pdf>.

²² 159 Cong. Rec. S3454 (daily ed. May 15, 2013).

²³ Adam Snider, *Shuster to Outline WRDA Timeline Today*, POLITICO (August 2, 2013), available at <http://www.politico.com/morningtransportation/0813/morningtransportation11321.html>.