

## 9. ENVIRONMENTAL STATUTES, EXECUTIVE ORDERS, AND GUIDANCE

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This section addresses Federal statutes, implementing regulations, and Executive Orders potentially applicable to the Missouri River Master Water Control Manual Review and Update (Study) Final Environmental Impact Statement (FEIS). The text provides a brief summary of the relevant aspects of the law or order. The conclusions on compliance are based on the impacts analyses presented in the FEIS and the appendices to the FEIS.

### 9.1 NATIONAL ENVIRONMENTAL POLICY ACT

This FEIS was prepared pursuant to regulations implementing the National Environmental Policy Act (NEPA) (42 USC 4321 *et seq*). NEPA requires Federal agencies to consider the environmental effects of their actions. It also requires that an EIS be included in every recommendation or report on proposals for legislation and other major Federal

actions significantly affecting the quality of the human environment. The EIS must provide detailed information regarding the proposed action and alternatives, the environmental impacts of the alternatives, potential mitigation measures, and any adverse environmental impacts that cannot be avoided if the proposal is implemented. Agencies are required to demonstrate that these factors have been considered by decision makers prior to undertaking actions.

The history of the Study and the NEPA process to date is found in Section 1.3 of this FEIS. This FEIS, which includes a Preferred Alternative (PA), was prepared pursuant to NEPA. A 30-day comment period will follow this FEIS to provide an opportunity for Tribal and public comment on the FEIS and PA. Following the comment period, the Corps will prepare a Record of Decision (ROD), Revise the Master Manual, and develop an Annual Operating Plan (AOP) that conforms with the revised Master Manual.

## 9.2 ENDANGERED AND THREATENED SPECIES AND CRITICAL HABITAT

The Endangered Species Act (ESA), (16 USC 1531-1544), amended 1988, establishes a National program for the conservation of threatened and endangered species of fish, wildlife, and plants and the habitat upon which they depend. Section 7(a) of the ESA requires Federal agencies to consult with the U.S. Fish and Wildlife Service (USFWS) to ensure that their actions are not likely to jeopardize the continued existence of endangered or threatened species or adversely modify or destroy their critical habitats.

Section 7(c) of the ESA and the Federal regulations on endangered species coordination (50 CFR § 402.12) require that Federal agencies prepare biological assessments of the potential effects of major actions on listed species and critical habitat. On December 16, 2003, the USFWS provided the Corps an amendment to its November 2000 Biological Opinion. The Corps has been and continues to consult with USFWS concerning listed species that could be affected by the actions addressed in this FEIS.

## 9.3 FISH AND WILDLIFE CONSERVATION

### 9.3.1 Fish and Wildlife Coordination Act

The Fish and Wildlife Coordination Act (FWCA) of 1958 (16 USC 661 *et seq.*) provides that whenever the waters of any stream or other body of water are proposed to be impounded, diverted, the channel deepened or otherwise controlled or modified, the Corps shall consult with the USFWS or the National Marine Fisheries Service, as appropriate, and the agency administering the wildlife resources of the states involved. The consultation shall consider conservation of wildlife resources with the view of preventing loss of and damages to such resources, as well as providing for development and improvement in connection with such water resources development.

Generally, compliance with NEPA requirements also meets the requirements of the FWCA. Prior to the preparation of the Preliminary Draft EIS in 1993, the Corps conducted FWCA activities with the USFWS. In addition, the USFWS has participated in this Study since its initial scoping. USFWS staff were actively involved in several work groups that developed models used to assess environmental impacts in the NEPA process and have participated in the Corps' Government-to-Government consultation with the Tribes and attended Tribal and public workshops and hearings. In addition, there has been extensive consultation with the USFWS under the ESA.

Existing wildlife and fisheries resources are addressed in Sections 3.7 and 3.8 of the FEIS. Impacts to fish and wildlife resources are addressed in Sections 7.5 through 7.17 and Section 8.4 of the FEIS. Through the Agency Coordination Team (ACT), the USFWS will be a critical participant in future adaptive management strategies for ESA-listed species related to annual operations.

Through the Corps' extensive and continued coordination with the USFWS throughout the NEPA process, the Corps has complied with the requirements of the FWCA.

### 9.3.2 Migratory Bird Conservation Act

The Migratory Bird Conservation Act (16 USC 715 *et seq.*) requires that lands, waters, or interests acquired or reserved for purposes established under

the Act be administered under regulations promulgated by the Secretary of the Interior. This Act involves conservation and protection of migratory birds, in accordance with treaties entered into between the United States and Mexico, Canada, Japan, and the former Union of Soviet Socialist Republics; to protect other wildlife, including threatened or endangered species; and to restore or develop adequate wildlife habitat. The migratory birds protected under this Act are specified in the respective treaties. In regulating these areas, the Secretary of the Interior is authorized to manage timber, range, agricultural crops, and other species of animals, and to enter into agreements with public and private entities. Migratory bird species are addressed in Section 3.7, Wildlife Resources, of the FEIS.

## 9.4 HERITAGE CONSERVATION

A number of Federal laws have been promulgated to protect the Nation's historical, cultural, and prehistoric resources.

### 9.4.1 National Historic Preservation Act

Section 106 of the National Historic Preservation Act (NHPA) (16 USC 470) requires that Federal agencies evaluate the effects of Federal undertakings on historical, archeological, and cultural resources and afford the Advisory Council on Historic Preservation (ACHP) opportunities to comment on the proposed undertaking. The first step in the process is to identify cultural resources included in (or eligible for inclusion in) the National Register of Historic Places that are located in or near the project area (called the "area of potential effect"). The second step is to identify the possible effects of proposed actions. The lead agency must examine whether feasible alternatives exist that would avoid such effects. If an effect cannot reasonably be avoided, measures must be taken to minimize or mitigate potential adverse effects.

Section 110 of the NHPA (16 USC 470) requires each Federal agency to establish a preservation program for the identification, evaluation, nomination, and protection of historic properties. The Corps has chosen to comply with this requirement by completing cultural resource management plans (CRMPs) for all lands owned and managed by the Corps. Separate plans are prepared for each reservoir along the Missouri River. The plans include the information required

by law, which includes historic property identification, evaluation, and nomination; determination of edibility to the National Register; full consideration to properties potentially affected, but outside of agency jurisdiction; and agency procedures for compliance with Section 106. These topics are addressed in five chapters and multiple appendices in each CRMP.

The Corps' awareness of its responsibilities to American Indian Tribes and the protection of cultural resources have evolved considerably during the past decade. This evolution is reflected in the 14-year Missouri River Master Manual Review and Update Study. Nine basin Tribes are participating in consultation with the Corps on the Missouri River Master Manual Review and Update. Many other Tribes have provided substantive comments throughout the process, which has aided the Corps in shaping the final Study. While there are several significant issues between the Tribes and the Corps, some are directly related to changes in the operation of the Missouri River Mainstem Reservoir System (Mainstem Reservoir System), and some are not. The impact of the operation of the Mainstem Reservoir System on cultural resources has been and continues to be paramount in the Corps' consultation with the Tribes.

The analysis of cultural resources in the Study has been based on the best available information and methodology to address cultural resources issues of this magnitude. More information continues to become available as the Tribes and Corps makes progress in jointly addressing cultural resources issues and this information is incorporated into the NEPA document. Such information and discussion with the Tribes will continue to be integral to the Corps' cultural resources program.

At the time the Study was initiated, there were no CRMPs for the lakes and projects on the Mainstem Reservoir System. The Corps has chosen to comply with the requirements in Section 110 of the NHPA by completing a CRMP for all lands owned and managed by the Corps. Separate plans are being prepared for each reservoir along the Missouri River. The Corps, in consultation with the Tribes, has now completed three CRMPs, has two out for consulting party review, and has one in preliminary draft form. The Lewis and Clark Lake (Gavins Point Dam) CRMP was completed in November 2001, the Lake Sharpe (Big Bend Dam) CRMP was completed in March 2002, and the Lake Francis Case (Fort Randall Dam) CRMP was

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completed in June 2003. The Lake Oahe (Oahe Dam) CRMP and Fort Peck Lake (Fort Peck Dam) CRMP were distributed in August 2003 for review by consulting parties, while the Lake Sakakawea (Garrison Dam) CRMP is currently a preliminary draft document. The Lake Oahe CRMP and Fort Peck CRMP are currently scheduled to be complete in February 2004, while the Lake Sakakawea (Garrison Dam) CRMP is scheduled to be completed by September 2004. In the course of developing these plans, the Corps and Tribes have reviewed existing sites and added sites as they have been identified. Tribal governments are currently under contract to assist the Corps with identification of traditional cultural sites.

The Corps continues to aggressively pursue additional funding for the implementation of the cultural resources program. While funding is still far below what is necessary, the Omaha District has committed \$3 million dollars for inventorying, testing, evaluation, assessment, and mitigation in FY 2003 and again in 2004. This is a five-fold increase from previous fiscal years. Funding cultural resources will continue to be a priority for the Corps in the future and the Corps is committed to working with Tribes on this issue.

Special emphasis has been given to the development of a Section 106 programmatic agreement for the operation and management of the Mainstem Reservoir System during the past year. A three-phase process is being used to produce a signed agreement. Phase I included two Cultural Resource Task Force meetings, three Intertribal Working Group meetings, and multiple presentations and visits to Tribal council meetings in order to gather early input into the development of the preliminary draft programmatic agreement. Phase II is official consultation with interested parties. Formal consultation meetings were held in July 2003, September 2003, and November 2003 to discuss the preliminary draft programmatic agreement, with a minimum of three additional meetings necessary to complete the draft programmatic agreement. Phase II will follow with the public review process, completion of a final programmatic agreement, and the signing of the agreement by the consulting parties. The Corps anticipates the programmatic agreement will be signed prior to completion of the Master Manual process.

The analysis of cultural resources in the FEIS for the Study is based on the impacts of wave erosion

on known cultural sites. The Corps recognizes in the FEIS that shoreline and bluff erosion and exposure of cultural sites during low-water periods are also factors that affect cultural resources. However, based on available information, a quantitative analysis of these types of impacts could not be developed.

The Corps is committed to expanding its efforts to gain Tribal input into the Corps' annual operations and adaptive management strategies directed toward ecosystem recovery. In addition, the Corps encourages basin Tribes to provide input to and actively participate in a Missouri River Recovery Implementation Program (MRRIP).

In consultation with the Tribes, the Omaha District GIS database should assist in determining which sites may be impacted by Mainstem Reservoir System annual operations so that decisions regarding protection of those sites can be made by the Corps in coordination with the affected Tribes. Further, the Corps is taking responsible measures to protect resources that may be impacted by changes in operation of the Mainstem Dams. For example, the Fort Peck Tribes have completed cultural resource surveys below Fort Peck Dam to determine which cultural resources could be impacted by specific flow modifications from Ft. Peck for endangered species. If sites would be impacted, the Corps in coordination with the Tribes would determine what steps are needed to protect the sites.

Summarizing, the Corps believes that it is in compliance with Section 110 and Section 106 of the NHPA and believes that the FEIS fulfills its responsibilities under NHPA. The Corps also recognizes, however, that as tools to identify and analyze cultural resources are improved, protection of cultural resources must be addressed in an adaptive management context with continued participation by basin Tribes.

## 9.4.2 Archeological Resources Protection Act

The Archeological Resources Protection Act (ARPA) (16 USC 470aa-4701i) provides for the protection of archeological sites located on public and American Indian lands; establishes permit requirements for the excavation or removal of cultural properties from public or American Indian lands; and establishes civil and criminal penalties for the unauthorized appropriation, alteration, exchange, or other handling of cultural properties.

Appropriate monitoring, surveillance methods, and awareness programs are integral components of cultural resources management programs. This issue will be addressed in the revised programmatic agreement(s) currently being developed by the Tribes, Federal and State agencies, and the Corps. The Corps currently does not have enforcement authorities under ARPA, but issues citations under the authority of 16 USC 460d as described in 36 CFR 312, et seq. The Corps is authorized to issue permits for archeological surveys and exploration on project lands. The Corps' responsibilities under ARPA will not be affected by the PA, but will be enhanced.

The Corps is currently working with the Bureau of Indian Affairs (BIA), State, Tribal, and local law enforcement personnel to implement the provisions in ARPA. The agreement is an informal working agreement, which the Corps is trying to formalize in FY 2004. This formal memorandum of agreement, which is part of the programmatic agreement, would document the current procedures that are being followed. It is anticipated that additional details would be included so that roles and responsibilities of all parties would be clear. It is expected that the memorandum of agreement will enhance the effectiveness of the current informal agreement. This agreement would cover all Corps owned and managed lands and would include Title VI lands. This would be a result of the Title VI legislation, which requires that the Corps maintain the responsibility for NHPA, ARPA, and NAGPRA implementation. The anticipated completion date for this agreement is September 2004.

### **9.4.3 Native American Graves Protection and Repatriation Act**

The Native American Graves Protection and Repatriation Act (NAGPRA) (25 USC § 3001 et. seq.) addresses the discovery, identification, treatment, and repatriation of Native American and Native Hawaiian human remains and cultural items (associated funerary objects, unassociated funerary objects, sacred objects, and objects of cultural patrimony). This Act also establishes fines and penalties for the sale, use, and transport of Native American cultural items. Consistent with procedures set forth in NAGPRA, the Corps will proactively work to preserve and protect cultural resources, and will establish NAGPRA protocols and procedures.

NAGPRA specifies the appropriate process to address the inadvertent discovery of Native American human remains, which includes stopping work and notification until such time as affiliation can be determined and disposition assessed. In addition, Omaha District is currently in the process of consulting on a programmatic agreement under NHPA, which addresses some of these concerns, in an attachment to the agreement. The attachment addresses the current North Dakota Intertribal Reinterment Committee (NDIRC) memorandum of agreement in place between the Corps and several North and South Dakota Tribes, and mentions the development of another memorandum of agreement between the Corps and those not currently involved in the NDIRC agreement.

The NDIRC memorandum of agreement contains a simplified NAGPRA procedure for discovery of inadvertent remains in that region. It documents specific procedures that will be followed should an inadvertent discovery be made. It also includes specific points of contact from the Tribes involved in the agreement, as well as some points of contact from Tribes not involved in the agreement. In addition, the Corps is looking to develop a memorandum of agreement with the Tribes in the southern part of South Dakota that will address simplified procedures on NAGPRA implementation. We believe that this agreement would be similar to the existing NDIRC memorandum of agreement. This new agreement would allow the Corps to work closely with southern Tribe(s) to resolve any NAGPRA concerns.

In an attempt to avoid inadvertent discoveries from happening again, the Corps has implemented and approved several projects to complete traditional cultural property surveys. These surveys attempt to identify sacred sites that exist in the Missouri River basin. If sacred sites are identified, then they can be taken into consideration prior to approval of any Federal undertaking.

### **9.4.4 American Indian Religious Freedom Act**

The American Indian Religious Freedom Act (AIRFA) of 1978 (42 USC § 1996) provides for the protection and preservation of American Indian rights of freedom of belief, expression, and exercise of traditional religions. Courts have interpreted AIRFA to mean that public officials must consider American Indian interests before undertaking

actions that might cause unnecessary interference with those traditional practices. The Corps recognizes its responsibilities with respect to AIRFA and will coordinate with the Tribes in carrying out the requirements of the Act.

## 9.4.5 Executive Order 13007 Indian Sacred Sites

Executive Order 13007 directs Federal agencies to accommodate access to, and ceremonial use of, American Indian sacred sites by American Indian religious practitioners. It states that agencies should avoid adversely affecting the physical integrity of such sites and should maintain the confidentiality of information pertaining to such locations. The Corps will utilize all reasonable means to accommodate American Indian Tribes by providing meaningful access to sacred sites in compliance with this Executive Order.

## 9.5 STATE, AREA-WIDE, AND LOCAL PLAN AND PROGRAM CONSISTENCY

The Council on Environmental Quality (CEQ) regulations for implementing NEPA (40 CFR § 1506.2) require agencies to consider the consistency of a proposed action with approved State and local plans and laws. State and local government agencies operate a variety of recreational, infrastructure, and related resources along the river system. Impacts to these resources that could result from the various alternatives are identified in Chapters 7 and 8 of this FEIS. In accordance with Executive Order 12372, this FEIS will be circulated to the appropriate State agencies for review and consultation requirements, as it has been at each stage in the Study.

## 9.6 ENVIRONMENTAL JUSTICE

Environmental justice refers to executing a policy of fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws. Increasing concern with environmental equity or justice evolved from a series of studies conducted in the late 1980s and early 1990s that suggested that certain types of government and corporate environmental decisions may adversely affect low-income and minority populations to a greater extent than the general population. This finding was particularly the case with locally

unpopular land uses, such as landfills and toxic waste sites. Guidelines addressing environmental justice include President Clinton's 1994 Executive Order 12898 and accompanying memorandum, the 1996 draft guidelines for addressing environmental justice under NEPA issued by the CEQ, and the 1997 interim guidelines issued by EPA.

EPA's Office of Environmental Justice defines environmental justice as:

*"The fair and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. Fair treatment means that no group of people, including racial, ethnic, or socioeconomic groups, should bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state, local, and tribal programs and policies"* (as printed on EPA website: <http://www.epa.gov/compliance/environmentaljustice/>).

Federally recognized American Indian Tribes are considered to be the low income and/or minority population that would potentially be affected by changes in the operation of the Mainstem Reservoir System. Impacts to affected American Indian Tribes resulting from the PA are summarized in Section 7.16 of the FEIS as well as in the Tribal Appendix (Appendix A) of the FEIS. The Corps has examined this issue very carefully, fully disclosed Tribal impacts in this NEPA process, and has concluded that there are no disproportionate impacts to American Indian Tribes or other low-income and/or minority populations.

## 9.7 FLOOD PLAIN MANAGEMENT

If a Federal agency program will affect a floodplain, the agency must consider alternatives to avoid adverse effects in the floodplain or to minimize potential harm. Executive Order 11988 requires Federal agencies to evaluate the potential effects of any actions they might take in a floodplain and to ensure that planning, programs and budget requests reflect consideration of flood hazards and flood plain management. The impacts of the PA on flood control capability are considered insignificant.

## 9.8 WETLANDS PROTECTION

Executive Order 11990 encourages Federal agencies to take actions to minimize the destruction, loss, or degradation of wetlands, and to preserve and enhance the natural and beneficial values of wetlands when undertaking Federal activities and programs. Any agency considering a proposal that might affect wetlands must evaluate factors affecting wetland quality and survival. These factors should include the proposal's effects on the public health, safety, and welfare due to modifications in water supply and water quality; maintenance of natural ecosystems and conservation of flora and fauna; and other recreational, scientific, and cultural uses. Impacts to wetland habitats are addressed in Section 7.5.1 and Section 8.4 of the FEIS. More stringent drought conservation measures included in the PA result in a slight decrease in wetland acreages.

## 9.9 FARMLAND PROTECTION

### 9.9.1 Farmland Protection Policy Act

The Farmland Protection Program Act (FPPA) provides funds to help purchase development rights to keep productive farmland in agricultural uses. Working through existing programs, the U.S. Department of Agriculture (USDA) joins with State, Tribal, or local governments to acquire conservation easements or other interests from landowners. The USDA provides up to 50 percent of the fair market easement value. Projects are subject to FPPA requirements if they may irreversibly convert farmland (directly or indirectly) to nonagricultural use, and are completed by a Federal agency or with assistance from a Federal agency. From this description, it is evident that the Corps PA is consistent with the FPPA, as it is a program that only applies when Federal projects may irreversibly convert farmland to nonagricultural use. The PA does not propose to convert, directly or indirectly, existing farmlands to nonagricultural uses.

### 9.9.2 CEQ Memorandum, August 11, 1990, on Analysis of Impacts on Prime or Unique Agricultural Lands

The CEQ Memorandum establishes criteria to identify and consider the adverse effects of Federal programs on the preservation of prime and unique

farmland; to consider alternative actions, as appropriate, that could lessen adverse effects; and to ensure Federal programs are consistent with all State and local programs for protection of farmland. The PA does not have a direct impact on prime or unique agricultural lands; direct impacts would be confined to the reservoirs. The PA could, however, diminish the productive capacity of prime or unique agricultural lands that are adversely affected by changes in flood control, interior drainage, or groundwater impacts as a result of the project.

## 9.10 RECREATION RESOURCES

### 9.10.1 Wild and Scenic Rivers Act

The Wild and Scenic Rivers Act (16 USC 1278 *et seq.*) designates qualifying free-flowing river segments as wild, scenic, or recreational. The Act establishes requirements applicable to water resource projects affecting wild, scenic, or recreational rivers within the National Wild and Scenic Rivers System, as well as rivers designated on the National Rivers Inventory. Under the Act, a Federal agency may not assist the construction of a water resources project that would have a direct and adverse effect on the free-flowing, scenic, and natural values of a Federally designated wild or scenic river. If the project would affect the free-flowing characteristics of a designated river or unreasonably diminish the scenic, recreational, and fish and wildlife values present in the area, such activities should be undertaken in a manner that would minimize adverse impacts and should be developed in consultation with the National Park Service (NPS). There are two reaches of the Missouri River that have been designated as National Recreational Rivers under the Wild and Scenic Rivers Act. One, the Fort Randall Reach, is 36 miles of river from Fort Randall Dam (River Mile 880) to the Lewis and Clark Lake delta (River Mile 844). The other is the Gavins Point Reach, a 58-mile stretch of river between Gavins Point Dam (River Mile 810) and Ponca (River Mile 752).

Sections 7.11 and 8.4 of the FEIS address recreation benefits under the PA. A minor and insignificant reduction in recreation benefits occurs under the PA for both designated river reaches when compared to the current Water Control Plan. The reduction in benefits results from reduced summer flows below Gavins Point Dam included in the PA to preclude jeopardy of the endangered interior least tern and threatened piping plover.

In consolidated Department of Interior comments received in response to the RDEIS, the NPS, who jointly manages the Recreational River segments with the Corps, recognized the Corps and NPS responsibilities relative to the National Recreational River reaches, and indicated their support for lower summer flows which more closely mimic the natural hydrograph of the Missouri River. Based on the minor and insignificant impacts to recreation, and in consideration of the comments of the NPS, the Corps has concluded that the PA does not affect the National Recreational River designations of these river reaches.

## 9.10.2 Water Resources Development Act

Congress generally authorizes water resources projects through biennial legislation, such as the Water Resources Development Act (WRDA) of 1990. Section 310(b) of WRDA 1990 requires public participation in changes to reservoir operation criteria. For the Study, this public participation has been accomplished through the NEPA process.

## 9.10.3 Federal Water Project Recreation Act

In planning any Federal navigation, flood control, reclamation, or water resource project, the Federal Water Project Recreation Act (16 USCA 4612 *et seq.*) requires that full consideration be given to the opportunities that the project affords for outdoor recreation and fish and wildlife enhancement. The Act requires planning with respect to the development of recreation potential. Projects must be constructed, maintained, and operated to provide recreational opportunities, consistent with the purposes of the project. Chapters 7 and 8 of the FEIS considers recreation opportunities associated with the PA.

## 9.10.4 Land and Water Conservation Fund Act

The Land and Water Conservation Fund Act (LWCFA) (16 USC 4601-11) assists in preserving, developing, and ensuring accessibility of outdoor recreation resources. The LWCFA establishes specific Federal funding for acquisition, development, and preservation of lands, water, or other interests authorized under the ESA and National Wildlife Refuge Areas Act. Funds appropriated under the Act are allocated to Federal

agencies or as grants to States and localities. Recreation facilities on the Missouri River, as evaluated in the FEIS, are not LWCFA-funded facilities.

## 9.11 NAVIGABLE WATERS

The Rivers and Harbors Appropriation Act of 1899 (33 USC 1344) prohibits constructing bridges, dams, dikes, or causeways over harbors or navigable waters of the United States in the absence of Congressional consent and approval of plans by the Chief of Engineers and Secretary of the Army (33 USC 401). The Act prohibits any obstruction or alteration of any navigable water of the United States (33 USC 403). The purpose of the Act was to place the navigable waters of the United States under the exclusive control of the United States to prevent any interference with their navigability, whether by bridges or other obstructions, except by express permission of the United States Government. It preserves the public right of navigation and prevents the interference with interstate and foreign commerce. The Missouri River is designated a navigable water under the Rivers and Harbor Act. Impacts to navigation are addressed in Sections 7.12 and 8.4 of the FEIS. Although Missouri River navigation is affected under the PA, navigation is maintained as an authorized project purpose.

## 9.12 POLLUTION CONTROL AT FEDERAL FACILITIES

In addition to their responsibilities under NEPA, Federal agencies are required to carry out the provisions of other Federal environmental laws concerning hazardous and toxic wastes. The alternatives discussed in this FEIS do not require any particular response with regard to these Federal pollution control laws such as the Comprehensive Environmental Response, Compensation and Liability Act, (CERCLA), 42 USC §§ 9601 *et seq.*, and the Resource Conservation and Recovery Act (RCRA) 42 USC §§ 6901 *et seq.*, which are more concerned with site-specific proposals and alternatives, rather than this Study of the Master Manual to identify a Water Control Plan for the Missouri River in this FEIS.

### 9.12.1 Federal Water Pollution Control Act (Clean Water Act)

The Federal Water Pollution Control Act (33 USC 1251 *et seq.*) is more commonly referred to as the



Clean Water Act (CWA). This Act is the primary legislative vehicle for Federal water pollution control programs and the basic structure for regulating discharges of pollutants into waters of the United States. The CWA was established to “restore and maintain the chemical, physical, and biological integrity of the nation's waters.” The CWA sets goals to eliminate discharges of pollutants into navigable waters, protect fish and wildlife, and prohibit the discharge of toxic pollutants in quantities that could adversely affect the environment. The Act has been amended numerous times and given a number of titles and codifications. Water quality impacts are addressed in Sections 7.4 and 8.4 of the FEIS, as well as in Appendix B to the FEIS, Summary of Clean Water Act Issues.

The CWA sets national goals and policies to eliminate discharge of water pollutants into navigable water, to regulate discharge of toxic pollutants, and to prohibit discharge of pollutants from point sources without permits. The CWA also authorizes the U.S. Environmental Protection Agency (EPA) to establish water quality criteria that are used by States to establish specific water quality standards.

The objective of the CWA is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. The CWA focuses on technology-based limitations on individual discharges from “point sources” into the navigable waters. The CWA provides that “the discharge of any pollutant by any person shall be unlawful,” unless in compliance with a variety of requirements. Important programs under the CWA are the National Pollutant Discharge Elimination System (NPDES); the program, administered by the Corps, regulating the discharge of dredged or fill material into the navigable waters; and state water quality standards.

Under the NPDES program, after notice and hearing, EPA issues permits to individual point sources to allow the discharge of pollutants in compliance with effluent and other standards. If it meets certain requirements, a State may obtain authority from EPA to administer its own NPDES permit program.

The CWA also provides for state promulgation of “water quality standards,” which must be approved by EPA. Water quality standards are adopted to protect waters that would not be protected by effluent limitations in NPDES permits, and often

become conditions of such permits. Water quality standards are not technology-based standards, but are based on the desired uses and condition of the particular water body involved. They are specific to a particular water body and consist of three principal elements: (a) “designated uses” for each water body, such as for public water supply, recreation, or fish propagation; (b) “criteria” specifying the amounts of various pollutants that may be present in water without impairing the designated use; and (c) an “antidegradation policy” to protect existing uses and high-quality waters.

The CWA contains a provision waiving sovereign immunity on behalf of the Federal government. In addition, it also contains a provision that indicates that the CWA will not affect or impair the authority of the Secretary of the Army to maintain navigation.

The Corps does not consider releases of water from its dams as point sources of discharge, and does everything practicable to meet State water quality standards. The FEIS identifies the beneficial uses and State water quality standard concerns by river reach. The Corps will work with the EPA and the States to address these impaired water bodies through the TMDL process.

### 9.12.2 Clean Air Act

The Clean Air Act (CAA) (42 USC 7401 *et seq.*), amended in 1977 and 1990, was established “to protect and enhance the quality of the Nation's air resources so as to promote public health and welfare and the productive capacity of its population.” CAA authorizes EPA to establish National Ambient Air Quality Standards (NAAQS) to protect public health and the environment. The CAA establishes emission standards for stationary sources, volatile organic compound emissions, hazardous air pollutants, and vehicles and other mobile sources. The CAA also requires the States to develop implementation plans applicable to particular industrial sources.

In an analysis conducted for the Corps by the Tennessee Valley Authority (TVA), the TVA examined quality of life issues resulting from modal shifts from barge transportation to truck and rail. Costs associated with quality of life effects were determined for traffic delays, accidents, emissions, and pavement wear as a result of more trucks on the highways. Total costs were determined to be about \$1 million per year for the next 5 years. An approximate breakdown of the

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costs is: delays, 34 percent; accidents, 51 percent; emissions, 13 percent; and pavement, 0.0004 percent. Because none of the required routes for those commodities that would have to be trucked were through major metropolitan areas with problems meeting established NAAQs (Kansas City and St. Louis), this factor was not evaluated by TVA.

## 9.13 TRIBAL

### 9.13.1 Description

Impacts to Tribal resources are summarized in Section 7.16 of the FEIS and in the Tribal Information Appendix (Appendix A) to the FEIS. Appendix A to this FEIS centralizes Tribal information and issues important to the 30 American Indian Tribes located within the Missouri River basin. This appendix addresses the following issues: Tribal Sovereignty, Treaties, Trust Responsibilities, Water Rights, Environmental Justice, Cultural Resources, Adaptive Management, PA Impacts to the Tribes, Corps' Tribal Policy Principles, Government-to-Government Consultation History, and process and correspondence received from the basin Tribes throughout the Study. These issues include compliance with Executive Order 12898, pertaining to Environmental Justice, Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, and Executive Order 13007, Indian Sacred Sites. The Corps has long recognized the sovereign status of American Indian Tribes. Principles outlined in the Constitution and treaties, as well as those established by Federal laws, regulations, and Executive Orders, continue to guide the Corps' National policy towards American Indian Nations.

The Corps operates within a Government-to-Government relationship with Federally recognized American Indian Tribes. This involves consulting, to the greatest extent practicable and permitted by law, with Tribal governments; assessing the impact of agency activities on Tribal trust resources, ensuring that Tribal interests are considered before the activities are undertaken; and removing procedural impediments to working directly with Tribal governments on activities that affect trust property or the Governmental rights of the Tribes.

The Corps recognizes that Tribal governments are sovereign entities, with rights to set their own priorities, develop and manage Tribal resources, and be involved in Federal decisions or activities

that have the potential to affect these rights. The Corps is working to enhance the relationship with Tribal Governments, meet trust obligations, protect trust resources, and obtain Tribal views of trust and treaty responsibilities or actions related to the Study, in accordance with provisions of treaties, laws, and Executive Orders as well as principles included in the Constitution of the United States.

## 9.14 FLOOD CONTROL ACT OF 1944

In the authorizing legislation for the Missouri River Mainstem Reservoir System, Congress authorized the construction of all but one of the mainstem projects by adopting the Pick-Sloan Plan in Section 9 of the Flood Control Act of 1944. This provision states:

*Sec. 9(a) The general comprehensive plans set forth in House Document 475 and Senate Document 191, Seventy-eighth Congress, second session as revised and coordinated by Senate Document 247, Seventy-eighth Congress, second session, are hereby approved and the initial stages of recommended are hereby authorized and shall be prosecuted by the War Department and the Department of the Interior as speedily as may be consistent with budgetary requirements.*

*(b) The general comprehensive plan for flood control and other purposes in the Missouri River Basin approved by the Act of June 28, 1938, as modified by subsequent Acts, is hereby expanded to include the works referred to in paragraph (a) be undertaken by the War Department and said expanded plan shall be prosecuted under the direction of the Secretary of War and Supervision of the Chief of Engineers.*

Section 9 adopted no management standards other than through the incorporation of House Document 475, "the Pick Plan" and Senate Document 191 "the Sloan Plan" as revised and coordinated by Senate Document 247 "the Reconciliation Report," which itself only identifies the broad purposes of the Missouri River Mainstem Reservoir System, among them being flood control, irrigation, navigation, power, fish and wildlife, and recreation. Neither plan defines any further standard of any kind for management of the recommended projects or for developing the multiple-use purposes of the system. The alternatives evaluated in the Study and the PA

are all within the broad discretionary delegation provided by Congress to the Corps in operating the Mainstem Reservoir System.

**9.15 EXECUTIVE ORDER #13211 ON ACTIONS CONCERNING REGULATIONS THAT SIGNIFICANTLY AFFECT ENERGY SUPPLY, DISTRIBUTION OR USE**

Executive Order 13211 applies to the promulgation of new Federal regulations and does not apply to the Study.

# 9 ENVIRONMENTAL STATUTES, EXECUTIVE ORDERS, AND GUIDANCE

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